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People v. Bruggy. (No. 20,706.)

(*Supreme Court of California.* Feb. 23, 1892.)

HOMICIDE—SELF-DEFENSE—MANSLAUGHTER—DRUNKENNESS—INSTRUCTIONS.

1. Where defendant, on trial for murder, pleaded self-defense, the court, after defining "malice" and "manslaughter," properly charged that "to reduce a felonious homicide from the grade of murder to that of manslaughter on the ground of sudden quarrel or heat of passion the provocation must be of such a character as would be naturally calculated to excite and arouse the passions; and it must appear that the party acted under the smart of his sudden passion and resentment."

2. The court properly charged that "to justify the killing of another in self-defense it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary;" the words "it must appear" clearly referring to defendant, and not to the jury. PATERSON, J., dissenting.

3. The court properly charged that, if defendant killed deceased in repelling an attempt by deceased to murder or to do great bodily harm to defendant, the killing was justifiable; the charge not limiting defendant's right to kill to the two cases specified.

4. The court properly charged that if deceased, seeing defendant draw a pistol, ran away, and defendant followed and overtook deceased, "unarmed, and showing no disposition to kill and murder defendant, and that defendant

then and there, without believing himself in the danger of losing his own life at the hands" of deceased, killed deceased, no self-defense is shown. PATERSON, J., dissenting.

5. The court, after defining the two degrees of murder, charged that, in determining the degree, evidence of defendant's mental condition was a proper subject for the consideration of the jury, and continued: "The fact that defendant was drunk does not render the act less criminal, and in that sense it is not available as an excuse. But there is nothing in this case to exclude it as evidence on the question as to whether the act was deliberate and premeditated. It was murder, whether premeditated or not." The court then added that there was no presumption of law in favor of either of the two degrees of murder, the question being one of fact, to be determined by the jury. *Held* correct, as the jury would not, from the use of the word "murder," understand that the court considered defendant guilty of murder, or that it was their duty so to return a verdict. BEATTY, C. J., and DE HAVEN and PATERSON, JJ., dissenting.

In bank. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

George H. W. Bruggy was convicted of murder, and appeals. Affirmed.

J. C. Sims and *J. A. Barham*, for appellant. *Atty. Gen. Hart*, for the People.

GAROUTTE, J. The defendant was convicted of murder of the first degree, and is under sentence of death. He appeals from the judgment and order denying his motion for a new trial, and insists that the evidence is not sufficient to support the verdict. The jury had before them many eye-witnesses to the homicide, and also evidence showing all the surrounding circumstances. There was some evidence tending to prove the guilt of the defendant as charged, and for that reason, under well-settled principles, we would not be justified in setting aside the verdict. It is insisted that many of the instructions containing the law of the case, as given by the court to the jury, were erroneous, and prejudicial to the rights of the defendant. The instructions necessary to consider in the discussion of this question are as follows:

"(1) Malice may be express or implied. It is express when there is manifest a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"(2) Under the information in this case the defendant may, if the evidence warrant it, be convicted of manslaughter. This is defined by our statute to be the unlawful killing of a human being without malice, and is of two kinds: *First*, voluntary, upon a sudden quarrel, or heat of passion; *second*, involuntary, in the commission of an unlawful act, not amounting to felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

"(3) To reduce a felonious homicide from the grade of murder to that of manslaughter, upon the ground of sudden quarrel or heat of passion, the provocation must be of such a character as would be naturally calculated to excite and arouse the passions; and it must appear that the party acted under the smart of his sudden passion and resentment.

"(4) Upon the law of self-defense I instruct you as follows: To justify the killing of another in self-defense it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary. And it must appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further trouble before the fatal shot was fired. If the jury believe from the evidence that the defendant, George Bruggy, at the time he fired the fatal shot which killed the deceased, Dick Louison, (if he did fire such shot and kill him,) believed, and had good reason to believe, that his life was in imminent danger at the hands of said Dick Louison, then I charge you that defendant was justifiable in firing said shot, and you should acquit him.

"(5) If the jury believe from the evidence in this case that the defendant, Bruggy, killed the deceased by shooting him, and that the shooting was done by Bruggy in resenting an attack on the part of the deceased to murder him, Bruggy, or an attempt on the part of the deceased to do great bodily harm to him, Bruggy, then, in such a case, I instruct you the killing by Bruggy was justifiable, and you should find the defendant not guilty. The rule in such a case is this: What would a reasonable person—a person with ordinary caution, judgment, and observation—in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from his situation and his surroundings?

"(6) If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and in acting on such appearances. The defendant is not justified because he actually believed he was in imminent danger. When the danger is only apparent, and not actual and real, the question is, would a reasonable man, under all the circumstances, be justified in such belief? If so, the defendant would be justified. If this was the defendant's position, it was his right to repel the aggression, and fully protect himself from such apparent danger.

"(7) If you believe from the evidence that the defendant, while upon the sidewalk, drew his pistol, with a deliberate intent to kill and murder Dick Louison, and that Dick Louison saw the pistol, and, believing himself in danger of the defendant, ran away, and through the alley, and into the saloon, to avoid the defendant; and you further believe from the evidence that the defendant, with intent to willfully and deliberately kill and murder Louison, entered and passed through the saloon, with the pistol in his hand, for the purpose of overtaking or meeting him and killing him; and you further believe from the evidence that he did meet the deceased coming into the saloon, through one of the back doors of the saloon, unarmed, and showing no disposition to kill and murder the defendant, and that the defendant, then and there, without believing himself in danger of losing his own life at the hands of Dick Louison, fired the fatal shot, and killed said Louison,—then I instruct you the evidence shows no self-defense."

Appellant's counsel insist that instruction No. 3 is erroneous, "because, in effect, it tells the jury that, although the defendant acted under the heat of passion, it could not be manslaughter, unless the provocation was of such a character as would naturally excite and arouse the passions of an average man; for the question is not whether some other person would probably have been excited or thrown into a passion by similar circumstances, but whether the defendant acted upon a sudden quarrel, or heat of passion." The instruction is clearly and entirely correct, and the principle of law as announced by appellant has no support in authority. As to the latter portion of the instruction, that "it must appear that the party acted under the smart of his sudden passion and resentment," it is so evident that such must of necessity be the law that we refrain from a discussion of the matter. The provocation to reduce a killing in the heat of passion from murder to manslaughter must be of such a character as would be naturally calculated to "excite and arouse the passions." In the words of the law, it must be a considerable provocation. Persons are not allowed to work themselves into a heat of passion upon any trivial pretext whatever, and in that condition commit homicide, and then set up the plea of manslaughter. Under such circumstances, the crime would be murder, for the law says that "malice is implied when no considerable provocation appears." Prior to the adoption of the Codes, the statute of this state provided that, in order to constitute voluntary manslaughter, "there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irrestible passion in a reasonable person." Section 1427, Hit. Gen. Laws. While no similar provision is found in the Penal Code, yet it has never been even suggested that the law pertaining to the subject of manslaughter underwent any change upon the adoption of the Code. Such provision was probably omitted from the Code upon the ground that it was entirely unnecessary, and surplusage, being simply a reiteration of a principle of law settled and established by all text-writers upon the subject.

In East, P. C. p. 234, the author says: "It must not, however, be understood that any trivial provocation which in point of law amounts to an assault, or even a blow, will of course reduce the crime of the party killing to manslaughter. This I know has been supposed by some, but there is no authority for it in the law; for where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner of the continuance of it, or beyond all proportion to the offense, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty. It is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation." In the case of Nichols v. Com., 11 Bush, 586, the court said: "Heat of passion, in order to reduce a killing with a deadly weapon from murder to manslaughter, must have arisen from some provocation, which, out of a tender regard for the weakness of human nature, the law deems sufficient to arouse passions which the party for the moment is unable to control. But we know of no case in whch heat of passion, without regard to the cause producing it, has been held to reduce an unlawful killing with a deadly weapon from murder to manslaughter." In the case of People v. Freel, 48 Cal. 437, this court said: "But when the mortal blow is struck in the heat of passion, excited by a quarrel sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter." Nothing is more surely calculated to arouse the blood of some men to a heat of passion than grievous words of reproach, yet no words are sufficient provocation to reduce an offense from murder to manslaughter; and this principle is so well established in this state that discussion would be out of place. As to the general principle, see 1 Whart. Crim. Law, § 472; Rex v. Lynch, 5 Car. & P. 324; State v. Tooky, 2 Rice, Dig. 104.

Appellant's counsel, with argument and authority, attack that portion of instruction No. 4 which reads: "To justify the killing of another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary." Counsel places a construction upon this charge which is strained, not warranted by the language used, and undoubtedly never intended by the court who gave it. Counsel insist that the instruction should be interpreted as if it read: "To justify the killing of another in self-defense it must appear (to the jury) that the danger was so urgent, etc., that the killing was absolutely necessary." The proper construction to be placed upon it is: "To justify the killing of another in self-defense it must appear (to a defendant) that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary." This seems to be the natural construction; the personal pronoun "his" thus plainly referring to its antecedent, "defendant." By the other construction there is absolutely no antecedent in the clause to which the pronoun "his" could refer. The court was stating an abstract proposition of law pertaining to the right of self-defense, possibly too liberally for a defendant, as it omits the qualification that it must appear to him "as a reasonable man." Reading the proposition of law, as embodied in this instruction, from a text-book, it would be absurd to say that the verb "must appear" related to the jury, or to anybody other than the actor in the homicide, the party killing. To support their contention in this regard appellant's counsel rely upon the case of People v. Flahave, 58 Cal. 249, and undoubtedly that case is directly opposed to the views here expressed; but the opinion is not indorsed by a unanimous court, and stands alone in the Reports of this state, for the cases of People v. Gonzales, 71 Cal. 577, 12 Pac. Rep. 783, and People v. Dye, 75 Cal. 108, 16 Pac. Rep. 537, upon which counsel rely to give it support, entirely fail in that regard. Upon the contrary, the great weight of authority supports the validity of this instruction. This identical instruction was given by the court in People v. Nichol, 34 Cal. 217, and, referring to the instructions given to the jury in that case, the court said; "They are not even obnoxious to criticism." The same instruction was again given in People v. Iams, 57 Cal. 119. The court, after remarking that it had examined the charge to the jury with great care, said: "It is a long charge, completely covering all the points in the case, and is, in our opinion, entirely correct." It was again before the court in People v. Gray, 61 Cal. 164, and the case was reversed upon other grounds. And in People v. Morine, found in the same volume of Reports, (369,) the instruction was again given *verbatim*, and, referring to it, the court said: "It is claimed that the instruction given was disapproved by this court in the case of People v. Flahave, and it may be conceded for the purposes of this case that the position taken by the learned counsel for the defense is correct, but it does not follow therefrom that the judgment of the court should be reversed. If other instructions were given, which qualify and explain the objectionable instruction, the whole charge will be considered; and if, as a whole, it correctly presents the law applicable to the case, the judgment will not be reversed. In other words, it is not necessary that each instruction should fully state the law of the case, but an instruction may be helped out and explained by another on the same point; and in such case the court will look to all the instructions *in pari materia* for the purpose of determining whether the law has been correctly given to the jury;" and the court affirmed the judgment. In People v. Herbert, which is also found in 61 Cal. 546, the same instruction was again directly approved. It was also given and approved in People v. Raten, 63 Cal. 425; People v. Turcott, 65 Cal. 129, 3 Pac. Rep. 461; and People v. Guidice, 73 Cal. 228, 15 Pac. Rep. 44. In the latter case the opinion was written by Justice TEMPLE, and concurred in by the whole court. The learned justice said: "The instruction in regard to the right to act in self-defense was taken from the case of People v. Iams, 57 Cal. 115, and has been approved by this court. It correctly lays down the law on the subject;" and, in speaking of the instruction given by the court in the Flahave Case, said: "This instruction was not qualified by any statement of the right to act upon apparent danger. Here the right of the defendant to act upon appearances was fully and clearly stated." The same reasoning, applied to this case, takes it also out of the authority of the Flahave Case; for here, as in the Guidice Case, the right of the defendant to act upon appearances was fully and clearly stated to the jury by the court. The doctrine of apparent danger was repeatedly explained to the jury. It is stated in a subsequent portion of the instruction under discussion, and is reiterated in various forms in the three following instructions. It would seem that this instruction has been before the court many times in the past, and with but a single exception has been sustained; many times as an abstract proposition of law, and many times when read and considered in connection with other instructions. As we have already seen, it can only be correct as an abstract proposition when the appearances "are directed to the defendant;" and, if superior courts are still inclined to give this instruction, it would be clearer and more satisfactory if the words, "to the defendant as a reasonable man," were inserted after the verb "must appear." The jury, as men of ordinary intelligence, must have understood that the defendant was justifiable in killing the deceased when it appeared to him as a reasonable man that he was in danger of losing his life, or suffering great bodily injury. Indeed, taking all the instructions upon the question of self-defense *pari materia*, as was said in People v. Morine, supra, the jury could not have been misled upon the question.

Counsel insist that instruction No. 5 is erroneous, inasmuch as it confined the defendant's right to kill the deceased to a state of facts where the deceased was endeavoring to "murder Bruggy, or do him some great bodily harm;" and that it should have stated further that "an attempt to kill Bruggy by the deceased, either with or without malice aforethought," would have warranted the defendant in taking the life of the deceased. The instruction is entirely correct, and does not attempt to limit or confine the right of the defendant to kill the deceased only in the case of an attack to murder, or an attempt to do great bodily harm. If the defendant desired an instruction including other and additional conditions, he should have asked for it. People v. Franklin, 70 Cal. 642, 11 Pac. Rep. 797; People v. Northey, 77 Cal. 618, 19 Pac. Rep. 865, and 20 Pac. Rep. 129.

Counsel complain of instruction No. 7. It is based upon a hypothesis founded upon evidence in the case; and, if the facts existed as stated in the instruction, there is no question of self-defense involved, for the hypothesis stated makes a case of murder. If one person, with murder in his heart, and a deadly weapon in his hand, pursues and overtakes another, and then and there fires the fatal shot, he is guilty of murder, regardless of what the deceased may have been doing at the moment of the shooting, for murder was in his heart, and he acted upon that malice, and not upon any appearances created by the deceased. Again, if he had murder in his heart when he overtook the deceased, and then and there fired the fatal shot, no question of his declining a further struggle is involved in the issue. We think the instruction correct.

We see no error in the instruction given to the jury upon the question of drunkenness. As a principle of abstract law, the instruction is entirely correct. The court defined the two degrees of murder, and then instructed the jury as to the effect of the evidence of drunkenness upon the question of degree of the crime. In using the word "murder," the jury, as men of average intelligence, certainly did not understand that the court considered the defendant guilty of murder, or that it was their duty to so return their verdict. Necessarily is this the fact when we consider that previously the court had fully instructed the jury as to the definition of "manslaughter," and stated to them that under the information and the evidence the defendant could be convicted of such offense.

While some of these instructions might have been improved to their advantage in clearness, we see no error sufficient to justify a reversal of the judgment. The practical administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of the instructions of the court. The instructions are for the enlightenment of the jury as to the law of the case, and a jury never enters into such character of analysis in construing them. In this case the evidence discloses that the killing of the deceased was to some extent the result of a drunken brawl; and it would seem that a verdict by the jury of imprisonment for life would have satisfied the law, but that is not a question to be here considered. The law gives the power of fixing the punishment in such cases to the jury, and the only appeal from their decision as to that matter is to the executive. The judgment and order denying a new trial are affirmed.

We concur: **McFarland, J.**; **Harrison, J.**; **Sharpstein, J.**

De Haven, J. I dissent. In my opinion, the court erred in giving the following instruction: "If the murder was deliberate and premeditated, it was murder of the first degree; otherwise, it was murder of the second degree. And in determining the degree, any evidence tending to show the mental *status* of the defendant is a proper subject for the consideration of the jury. The fact that defendant was drunk does not render the act less criminal, and in that sense it is not available as an excuse. But there is nothing in this case to exclude it as evidence upon the question as to whether the act was deliberate and premeditated. It was murder, whether premeditated or not. And, as between the two degrees of the offense, there is no presumption or intendment of law in favor of the first. Presumptively every killing is murder. But, so far as the degree is concerned, no presumption arises from the mere fact of the killing, considered separately and apart from the circumstances under which the killing occurred. The question is one of fact, to be determined by the jury from the evidence in the case, and is not a matter of legal conclusion." This instruction was given in connection with others relating to the purpose for which the evidence of defendant's drunkenness was received, and doubtless the court in its charge intended to state the familiar rule which is found in section 22 of the Penal Code, to the effect that the jury might consider such evidence for the purpose of determining whether the defendant was capable, at the time of the homicide, of acting with that peculiar deliberation which is necessary in order to make an unlawful killing murder of the first degree; that is, whether his mental condition was such that he could and did form in his mind a design deliberately and premeditatedly to take the life of deceased. But it must be conceded, I think, that the language chosen was not sufficiently guarded. The use of the word "murder" throughout the instruction, and particularly in the sentence, "it was murder, whether premeditated or not," must have been understood by the jury as intended to apply to the particular case before them, and indirectly as an expression of what the judge believed the evidence to establish. Instructions should not, directly or indirectly, assume or suggest that a defendant is guilty of any degree of crime. People v. Lanagan, 81 Cal. 144, 22 Pac. Rep. 482. And when a defendant claims that the act of killing was done in self-defense, the act should not be spoken of by the judge as a murder.

I concur: **Beatty, C. J.**

Paterson, J., (*dissenting*.) In my opinion, the seventh instruction was clearly erroneous. If the defendant declined any further struggle immediately prior to the firing of the shot, although he was the assailant, he was justified in shooting the deceased, if he believed upon reasonable ground that he was in danger of receiving great bodily injury. Pen. Code, § 197, subd. 3. The instruction ignores the fact that the defendant may have declined any further struggle, and tells the jury, in effect, that the defendant was not justified in shooting the deceased if he was the assailant, unless he believed that he was in danger of losing his own life. I think that the learned judge of the court below erred also in giving the fourth instruction, and the instruction upon the question of drunkenness. This court granted a rehearing in this case because in the opinion of the majority the petition for a rehearing presented a new point, as to which there were grave doubts. It is practically admitted in the opinion of the majority affirming the judgment of the court below that the case upon the evidence is a close one. If, therefore, the instructions are contradictory or confusing, the court should be willing to grant the defendant another trial. There are cases in which the appellate court can say that, although the instructions are somewhat contradictory, yet, taken as a whole, upon all the evidence in the case, it is clear that no prejudice resulted to the defendant; but in this case the evidence is of such a character, it seems to me, that the infliction of the death penalty, at least, was unjust, and, unless the instructions are clear and fair in all respects, a new trial should be granted. The evidence shows without conflict that the deceased and the defendant were personal friends, and there is nothing to show that they had ever before had any difficulty. Both were drinking heavily, evidently, and were in a maudlin state. The defendant took offense at something the deceased said or did, and persistently annoyed him, and provoked deserved chastisement. The deceased was a much larger and a more powerful man than the defendant. The defendant had a fractured arm. The deceased threw the defendant violently upon the floor three times before the final struggle. After throwing the defendant down the third time, and slapping his face, the deceased took out a pocket-knife, and, holding it in his hand, said to Bruggy, "This is the way we fight in Germany." There seems to be a conflict as to whether Bruggy had exhibited any weapon before the deceased took out his knife. When the deceased saw the defendant's pistol he ran around the saloon, through the alley, and into the back room of the saloon. The parties met right at the back of the saloon, and the deceased immediately grabbed the defendant by the arms, and pushed him back several feet to the billiard table, and was pushing him over against it, when the fatal shot was fired. What occurred beyond what has been stated, or what, if anything, was said by either party after they met at the rear door of the saloon, and before the shot was fired, does not appear in the evidence. If the defendant did decline further struggle, he certainly was justified in shooting the deceased, if he believed that he was in danger of receiving great bodily harm. The court cannot say, as matter of law, that he did not decline further combat. That was a question peculiarly the province of the jury to determine, and the law should have been given to the jury upon such an assumption.

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93 Cal. 194

DAWSON v. SCHLOSS *et al.* (No. 14,085.)

(*Supreme Court of California.* Feb. 4, 1892.)

JUDGMENT AGAINST TWO DEFENDANTS—NEW TRIAL AS TO ONE—MALICIOUS PROSECUTION—EVIDENCE —INSTRUCTIONS—APPEAL.

1. Where two defendants are sued jointly for malicious prosecution, and judgment is rendered against them, but one defendant obtains a new trial, a judgment for a less amount may be rendered against him, while the former judgment remains in force against the other.

2. In an action for a malicious prosecution, defendant cannot contend on appeal that the evidence does not justify the verdict that defendant prosecuted plaintiff maliciously, and without probable cause, unless these points are specified in the statement on motion for a new trial.

3. Where plaintiff, for the purpose of refreshing the memory of a witness, is permitted to read to him a portion of his testimony on the former trial, and to ask him if he so testified, but the witness does not answer, and the portion read is afterwards stricken out, if error to permit the reading, it is not reversible, when the testimony read contains nothing which defendant does not admit.

4. In an action for malicious prosecution for perjury, where it appears that the attorney for defendant advised him that there was "probable cause" for believing that plaintiff had perjured himself in a certain suit, defendant's attorney cannot testify as to what plaintiff's attorney said in such suit without showing that plaintiff was present or assented.

5. In an action for malicious prosecution for perjury, where it appears that in a former suit plaintiff verified an answer alleging that he had paid the rent for certain property, and where there is evidence tending to prove that he had good reason to believe, and did believe, that the rent had been paid by him, and that defendant so understood it at the time he commenced the prosecution, it is not error for the court to refuse to charge that, if the rent had not been paid at the time the answer was sworn to, there was probable cause that plaintiff had committed perjury.

6. In an action for malicious prosecution, the erroneous sentence in an instruction to the jury that "if you find, in this case, that malice existed on defendant's part, then the plaintiff would be entitled to recover," is not ground for reversal, where three times before and once after this sentence the court charged that before plaintiff could recover he must prove that the prosecution was both malicious and without probable cause; and especially where the record shows that the instruction was at defendant's request.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by George Dawson against Sigmund B. Schloss and Phillip Hinkle. On the first trial plaintiff recovered a judgment against both defendants for $5,000. A new trial was granted to Schloss, and a verdict and judgment for $3,000 was rendered against him; from which judgment, and from an order denying his motion for a new trial, he appeals. Affirmed.

Olney, Chickering & Thomas, for appellant. *H. H. Lowenthal*, for respondent.

VANCLIEF, C. Action for malicious prosecution on a charge of perjury in verifying an answer in an action by Schloss and others against Dawson and others. On the first trial plaintiff recovered a judgment against both defendants for the sum of $5,000 and costs. A new trial was granted to Schloss alone. The new trial resulted in a verdict and judgment against Schloss for $3,000, and Schloss alone appeals from this judgment against him, and from an order denying his motion for a new trial. Both trials were by jury, and the judgment against Hinkle remains in force, but wholly unsatisfied.

1. It is contended by counsel for appellant that no judgment should have been rendered against Schloss on the new trial so long as the original judgment of $5,000 existed against Hinkle; that "while separate suits may be brought against each of joint tort-feasors, yet it is well settled that if the defendants are sued jointly, as here, there can be but one verdict and judgment." Such is not the prevailing rule in the United States. Says Judge Cooley at page 159 of his book on Torts, (2d Ed.:) "The rule laid down by that eminent jurist, KENT, in Livingston v. Bishop, 1 Johns. 290, and which has since been generally followed in this country,

in that the party injured may bring separate suits against the wrong-doers, and proceed to judgment in each, and that no bar arises to any of them until satisfaction is received." See cases cited in note. The same author, on page 160, says: "It is to be observed, in respect to the point above considered, where the bar accrues in favor of some of the wrong-doers by reason of what has been received from or done in respect to one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent." This passage is quoted with implied approval by Mr. Justice McKinstry, in Urton v. Price, 57 Cal. 270. See, also, Tompkins v. Railroad Co., 66 Cal. 164, 4 Pac. Rep. 1165. There is nothing in the California cases cited by counsel for appellant opposed to the above quotations from Judge Cooley. There is no pretense that any part of the judgment against Hinkle has been paid or satisfied, or even that execution has been taken out upon that judgment.

2. In their brief, counsel for appellant make and specify the point that the evidence does not justify the verdict that defendant prosecuted plaintiff maliciously, or without probable cause. Counsel for respondent object to the consideration of this point, for the alleged reason that it is not specified in the statement on motion for new trial; and in my opinion this objection should be sustained. The truth of several propositions of fact are essential to constitute a cause of action for malicious prosecution, which must be alleged in the complaint, and which are alleged in this complaint. Among them are the two propositions that the proscution was malicious, and that it was without probable cause. There is no specification in the statement on motion for new trial that either of these is not justified by the evidence. Under the head of "Specifications of particulars in which the evidence is insufficient to justify the verdict," counsel undertake to allege what "the evidence shows,"—which is unnecessary and out of place in the specifications required by section 659 of the Code of Civil Procdure,—yet do not allege even "that the evidence shows" either of the two propositions to be untrue. Indeed, neither of these propositions is stated or referred to in the so-called "specifications." It is further alleged: "There is no evidence to support the verdict as against the defendant Schloss." But this is not a specification of any particular one of the several facts involved in and affirmed by the verdict. If this is sufficient, it would be sufficient, in any case tried without a jury, to allege merely that there is no evidence to support the findings of fact, even though there may be 20 distinct findings of fact. Edelbuttel v. Durrell, 55 Cal. 277. Of course, the specification is not required to be made in any particular form of words, but, in some form, should distinguish each particular proposition of fact excepted to from all others found by the court, or involved in a general verdict of a jury. Hence it has been held that a statement that there is no evidence to support a particular finding of fact is a sufficient specification of the particular finding alleged not to be justified by the evidence, (Knott v. Peden, 84 Cal. 300, 24 Pac. Rep. 160;) and such a specification of a particular fact involved in a general verdict would probably be held sufficient. The principal object of requiring these specifications in statements on motions for new trial, and in bills of exceptions, is to abbreviate the statement of evidence by restricting it to such as is relevant and material to prove or disprove the specified fact. By the specifications required, the opposing party and the judge are notified of the exact points of contest, and thereby enabled to determine what evidence should be brought into the statement, and what should be excluded therefrom. Without such specifications the judge could not perform the duty enjoined upon him "to strike out of it [the statement or bill of exceptions] all redundant and useless matter, and to make the statement truly represent the case," (Code Civil Proc. §§ 650, 659;) nor would the opposing party have any means of distinguishing what portions of the evidence would be redundant from that which tends to prove the issue on his part; and the consequence would generally be that all the evidence would be brought into the statement or bill of exceptions, though nine-tenths of it were irrelevant and useless. So important were the required specifications in a statement on motion for new trial regarded by the legislature that it enacted, "If n such specifications be made, the statement shall be disregarded on the hearing of the motion," (Code Civil Proc. § 659;) and this penalty has been enforced by this court in so many cases that there seems to be no excuse for failure to comply with the Code rule, especially as a compliance with the rule is not difficult in any case; it being much easier to state, in a few lines, each distinct proposition of fact not justified by the evidence, than, as is often done, to cover pages with a restatement of evidence, and of counsels' arguments and inferences therefrom, as to what the evidence shows, and thus obscuring, if not entirely concealing, the specific points to be contested upon the hearing of the motion or on appeal. But should it be conceded that the specifications are sufficient, I think the statement on motion for a new trial contains evidence tending to prove both malice and want of probable cause; and although such evidence, as it appears in the record, may seem to be overbalanced by rebutting evidence, it is nevertheless sufficient, under the well-settled rule of this court, to justify the verdict of the jury.

3. Appellant contends that he was advised by counsel that there was probable cause for believing respondent guilty of perjury; that he in good faith acted upon such advice; and, therefore, that he is not responsible, even though there may have been no probable cause. In order to avail himself of this defense, it devolved upon the defendant to prove that, before receiving the advice, he had fairly and fully communicated to his counsel, or at least

that his counsel knew, all the facts within defendant's knowledge tending to prove or to disprove probable cause for the prosecution; and also that at the time of commencing the prosecution the defendant believed the plaintiff to be guilty as charged. Harkrader v. Moore, 44 Cal. 144. Did the defendant make the required communication to his own counsel? And did he believe the plaintiff guilty at the time he made his affidavit to that effect? These questions having been properly submitted to the jury with proper instructions by the court, the verdict necessarily implies that the jury answered one of them, at least, in the negative; and, since there is no specification that the evidence did not justify the verdict in any particular, the verdict is conclusive of all facts necessarily implied in it. Besides, I think there was evidence tending to prove that the defendant did not fully state to his counsel the facts within his knowledge tending to exculpate the plaintiff from the charge of perjury. To make this fairly appear, however, would require a tedious statement of the evidence, which, in view of the defective specifications of particulars in which the evidence is insufficient, is deemed unnecessary.

4. Plaintiff called as a witness the defendant Hinkle, whose memory seemed bad, and for the purpose of refreshing his memory was permitted, against the objection of defendant, to read to the witness a portion of his testimony on the former trial, and to ask him if he so testified. The witness did not answer this question, and what was so read as his former testimony was afterwards stricken out by the court. Again, plaintiff's counsel asked the witness if he did not give a certain answer to a certain question on the former trial, to which witness answered, "I cannot recollect the words." Under the circumstances it does not appear that the action of the court amounted to an abuse of discretion; but, if it did, the defendant was not injured by it. The portion of Hinkle's former testimony which was read, contained nothing prejudicial to defendant which defendant did not admit in his own testimony, viz., that in a certain conversation he (defendant) "spoke of arresting Dawson for perjury." When the witness answered that he did not recollect what was his answer to a certain question on the former trial, his answer at the former trial was not read; and the only possible ground of objection to this last question is that it was in the nature of cross-examination of plaintiff's own witness, but this ground of objection was not stated.

5. It was claimed on the trial that Mr. Olney's advice to defendant as to "probable cause" was grounded in part upon knowledge derived from others than defendant; and Mr. Olney, as a witness for defendant, was asked to state what Mr. McGowan, as Dawson's attorney, had said while representing Dawson on the trial of the case in which Dawson was charged with perjury in his answer, without showing that Dawson was present, or in any way assented to what McGowan said. After testifying that he was present in court on that occasion, Mr. Olney testified as follows: "Mr. Reddy. Question. Were you informed in any way by Mr. McGowan or any other person, on the part of Dawson, at any time, as to what the defendant (Dawson) meant by the plea of payment in that answer?" An objection to this question was sustained by the court. "Q. Were you informed of what the plaintiff meant by his plea of payment in that answer? Answer. I cannot answer that question exactly by 'Yes' or 'No.' If you will fix the time and place, I can state what I remember. Q. After the answer was filed, were you informed? A. Well, I can say 'Yes,' if you will allow me to modify my answer, because it is a little too sweeping. The Court. You can explain it. A. (continued.) With that understanding, I say 'Yes,' but I desire to explain it. I will have to state what I said in court, and what Mr. McGowan, respresenting Mr. Dawson, said. The Court. That is what I have ruled out. Witness. That is all I know about it,—what took place in the court-room at the time of the trial before Judge REARDEN on the 1st day of June; and it was said by Mr. McGowan, who was there representing Mr. Dawson. It came up in regard to this answer; and it was a statement in regard to the answer. The Court. Then the objection is sustained." I think the objection was properly sustained.

6. It is insisted that certain instructions asked by defendant's counsel, (numbered 2, 12, 13, and 15,) and refused by the court, should have been given. The whole substance of Nos. 2, 12, 15, and so much of No. 13 as is correct, was substantially given in other instructions. Number 13 is erroneous, in that the court is asked to charge that if the jury believed "that a demand for rent and possession of the premises in question was made upon Dawson on the 25th day of February, 1885, and that the rent had not been paid at the time the answer in said suit was sworn to and filed, there was 'probable cause,'" etc. From these facts it would not necessarily follow that Dawson's verified answer that the rent had been paid by him was willfully false, nor that Schloss had reasonable grounds for so believing. The instructions, as asked, entirely ignore the evidence on the part of the plaintiff tending to prove that he had good reasons to believe, and did believe, that the rent had been paid by him, and that Schloss so understood at the time he commenced the prosecution of plaintiff for perjury.

7. It is also insisted that in three particulars the instructions given are erroneous. The court introduced its instructions to the jury in the following language: "Gentlemen of the jury, at the request of the defendant in this case I give you the following instructions." Then follow all the instructions shown to have been given. With one exception these instructions are quite as favorable to defendant as he was entitled to ask. At folio 318 the following erroneous sentence is found in the instructions given: "If you find in this case that malice existed upon his (defendant's) part, then the plaintiff would be entitled to re-

cover." Three times before and once after this sentence the court correctly and distinctly instructed the jury that before the plaintiff could recover he must prove that the prosecution was both malicious and without probable cause. The introduction of the erroneous sentence, whether by the court or by defendant's attorney, was probably accidental, as it is inconsistent with four other instructions given. The record, in the language of the court, shows that the erroneous instruction was given at the request of the defendant; and nothing to the contrary being suggested, except the improbability that defendant's counsel excepted to instructions asked by themselves, and as it is not impossible that counsel for defendant excepted to instructions requested by themselves, (People v. Lopez, 59 Cal. 362; Harrison v. Spring Val. H. G. Co., 65 Cal. 376, 4 Pac. Rep. 381,) the record must be taken as decisive of the question. The consequence is that appellant's exceptions to the instructions given should be disregarded. I think the judgment and order should be affirmed.

We concur: **Fitzgerald, C.**; **Foote, C.**

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 421

Smith v. McDermott. (No. 12,844.)

(*Supreme Court of California.* Feb. 19, 1892.)

Bond for Costs—Action for Slander—Sufficiency—Validity of Act.

1. Under St. 1871-72, p. 533, requiring plaintiff in an action for slander to file an undertaking with sureties who shall annex to such undertaking an affidavit that they are residents "within the county," and whose qualifications "shall be as required in their affidavits," such sureties must be residents within the county in which the action is brought.

2. Such act having been passed by the same legislature that adopted the four Codes, including the Code of Civil Procedure, but subsequent to such adoption, it was not repealed by any provision in said Code inconsistent with the act.

3. If such act were inconsistent with any provision of any of the Codes, the act must prevail, under Pol. Code, § 4479, giving precedence over the Codes to all acts passed at the same session that adopted the Codes.

4. Such act is not a special law, and as such inconsistent with Const. art. 4, § 25, subd. 3, and art. 22, § 1, providing that the legislature shall not pass special laws regulating the practice in courts of justice.

5. If such act were a special law, it, having been passed prior to the adoption of the constitution, would not be affected thereby.

Commissioners' decision. In bank. Appeal from superior court, San Mateo county; E. F. Head, Judge.

Action by Mary Smith against Hugh McDermott. Judgment for defendant. Plaintiff appeals. Affirmed.

Henry E. Highton, for appellant. *Edward F. Fitzpatrick* and *George N. Buck*, (*Henry W. Walker*, of counsel,) for respondent.

Belcher, C. This is an action to recover damages for slander. The complaint was filed in the superior court of San Mateo county on the 28th day of March, 1887. The summons was issued on the 18th of February, 1888, and on that day the plaintiff filed a written undertaking, in the sum of $500, to meet the requirements of the "Act concerning actions for libel and slander," passed March 23, 1872, (St. 1871-72, p. 533.) The undertaking was executed in the city and county of San Francisco, and in the affidavit annexed thereto each of the sureties stated that he was "a resident and freeholder within the state of California." As a matter of fact each of the sureties was a resident of the city and county of San Francisco. On the 29th of February, 1888, "and within the time allowed by law," the defendant gave notice to the plaintiff that he excepted to the sureties, and each of them, and that he required them to appear before the judge of the superior court of San Mateo county, at a specified time and place, to justify as such sureties, as prescribed by section 3 of the act of 1872. At the time and place named the two sureties appeared before the said judge, and were examined as to their sufficiency by counsel on both sides, and were approved, as shown by an order of the court entered on its minutes. Afterwards, on March 31, 1888, the defendant served on the plaintiff notice that he would move the court to dismiss the action, on the ground that an undertaking, as required by the act of 1872, had not been filed. This motion came on for hearing in April, and was argued before the court, and submitted upon briefs filed by the respective parties. After considering the matter, the court granted the motion on the ground that, "since the commencement of said action, no sufficient undertaking has ever been filed herein." An order dismissing the action was thereupon entered, and from this order, which was duly excepted to, the plaintiff prosecutes this appeal.

The act of 1872 provides as follows: "Section 1. In an action for libel or slander the clerk shall, before issuing the summons therein, require a written undertaking on the part of the plaintiff in the sum of five hundred (500) dollars, with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that, if the action be dismissed, or the defendant recover judgment, that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, or on an appeal, not exceeding the sum specified in the undertaking. An action brought without filing the undertaking required shall be dismissed. Sec. 2. Each of the sureties on the undertaking mentioned in the first section shall annex to the same an affidavit that he is a resident and householder or freeholder within the county, and is worth double the amount," etc. "Sec. 3. * * * The qualifications of the sureties shall be as required in their affidavits." These sections are parts of one act, and must be read and construed together. When so read it clearly appears that the sureties, to be "competent and sufficient," must have the qualifications required in their affidavits. One of the qualifications required to be stated in the affidavits is that the surety is a resident "within the county." This evidently means within the county in which the action is brought. Here the sureties were not residents of the county of San Mateo, and therefore they were not, in this regard, competent and sufficient. But the affidavits are to be annexed to, and are parts of, the undertaking, and the statute expressly declares that if the undertaking required is not filed the action shall be dismissed. The appellant contends that this act was repealed by the Code of Civil Procedure, which declares that it "establishes the law of this state respecting the subjects to which it relates," (section 4,) and that, "in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated," (section 18.) It is urged that the Code provides for but one form of civil action, prescribes how a civil action is to be commenced, how and when the summons is to be issued and served, and that, when the service is complete, "the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings;" that these provisions apply to all civil actions; and that there is no provision, expressly or by implication, continuing in force the act in question. The ready and obvious answer to this argument is that the four Codes were passed on the 11th day of March, 1872, while the act claimed to have been repealed thereby was subsequently passed at the same session. A subsequent act is not repealed by a prior one. Besides, section 4479 of the Political Code provides: "If the provisions of any law passed at the present session of the legislature contravene or are inconsistent with the provisions of either of the four Codes, the provisions of such law must prevail."

The appellant also contends that the act was a special law, and inconsistent with the provisions of our present constitution, and that it ceased to exist upon the adoption thereof. The portions of the constitution relied upon as affecting this result are section 25, subd. 3, art. 4, and section 1, art. 22. They are as follows: "The legislature shall not pass local or special laws in any of the following enumerated cases; that is to say, * * * regulating the practice of courts of justice." "The provisions of all laws which are inconsistent with this constitution shall cease upon the adoption thereof." We do not think this contention can be sustained. In our opinion the act is not a local or special law within the meaning of the constitution. It applies to the whole state, and to every person within the state who may wish to commence an action for libel or slander. A special law is one relating to a selected class, as well as to a particular object. This act does not relate to a selected class, but extends to and binds all within the jurisdiction of the law-making power. If, however, the act could be considered a special law, still the result claimed would not follow. It has been held by this court that the provision of the constitution that the legislature shall not pass local or special laws in certain cases applies to future and not to past legislation, and therefore does not operate to repeal acts passed before the constitution went into effect. Ex parte Burke, 59 Cal. 6; School-Dist. v. Shoecraft, 88 Cal. 372, 26 Pac. Rep. 211.

The appellant further claims that the order of dismissal should be reversed upon the authority of Dixon v. Allen, 69 Cal. 527, 11 Pac. Rep. 179, and Stinson v. Carpenter, 78 Cal. 571, 21 Pac. Rep. 304. In the first of these cases no undertaking was filed at the time of the commencement of the action. Afterwards the plaintiff filed an amended complaint, to which the defendant demurred, and, the demurrer being overruled, answered. The case was then, by agreement of the parties, set for trial on a day named. Before that day arrived the defendant moved the court to dismiss the action, on the ground that no bonds for costs had been filed. The court refused to dismiss the action, and gave the plaintiff leave to then file the statutory undertaking; and one in due form was executed and filed. This was held, on appeal, not to be error, the court saying: "The statute (Acts 1871, p. 533, § 1) does not deprive the superior court of jurisdiction in case the undertaking is not filed. The object of the statute is accomplished if, when the objection is made, the undertaking is executed, and the defendant thus secured the costs and charges which may be awarded to him." In the second case no undertaking was filed by the plaintiff before the issuance of the summons, but four days later one in due form was filed. About two months after that, when a jury was in attendance for the trial of the case, the defendant objected for the first time that an undertaking had not been filed in time, and moved to dismiss the action because the undertaking was not filed for several days after filing the complaint, and issuance and service of summons. The trial court granted the motion, and, on appeal, this was held to be error, on the authority of Dixon v. Allen, supra. The obvious difference between those cases and this is that in each of them an undertaking "in due form," that is, meeting all the requirements of the statute, was filed, while here no such undertaking has ever been filed or offered to be filed. When the motion to dismiss was made, and the plaintiff's attention was directly called to the matter, she might have asked, and doubtless would have obtained, leave to file an undertaking in due form, as required by the statute. This, however, she failed to do, preferring, as it would seem, to rely on the defective undertaking already on file, and to take the chances of its being held sufficient. Under the circumstances shown, we think the court below was right in dismissing the action, and we therefore advise that the order and judgment appealed from be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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93 Cal. 459

In re BURTON'S ESTATE. (No. 14,450.)

(*Supreme Court of California.* Feb. 20, 1892.)

DISTRIBUTION OF ESTATES—RIGHTS OF PURCHASER OF INTEREST.

Under Code Civil Proc. § 1664, which provides that, in all estates now being administered, any person claiming to be heir to the deceased, or entitled to distribution, in whole or in part, of such estate, may file a petition praying the court to "declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made," etc., one who has, by purchase, succeeded to the rights of the heirs to land before distribution may maintain her petition in the superior court for the determination of the title, and for distribution. Theller v. Such, 57 Cal. 447; Bath v. Valdez, 70 Cal. 350, 11 Pac. Rep. 724; Barnard v. Wilson, 74 Cal. 512, 16 Pac. Rep. 307; Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. Rep. 1081,—distinguished.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

Petition by Maggie Leach, executrix of the will of Wallace Leach, deceased, praying for the determination of the rights of all persons to the estate of Henry S. Burton, deceased, and for distribution. Maria A. Burton as widow, and others as heirs, of Burton, answered. Petitioner had decree, and certain defendants appeal. Affirmed.

Works, Gibson & Titus and *Luce & McDonald*, for appellants. *Wellborn, Parker & Stevens, Haines & Ward*, and *James S. Callen*, for respondents.

VANCLIEF, C. This is a proceeding initiated by the petition of Maggie Leach, as executrix and sole devisee of the will of Wallace Leach, deceased, under section 1664 of the Code of Civil Procedure, praying the court to ascertain and declare the rights of all persons to the estate of Henry S. Burton, deceased, and to determine to whom distribution thereof should be made. In due course of the proceeding, the petitioner filed her complaint, alleging that she had succeeded to the title of the heirs of Henry S. Burton in and to a tract of land containing 8,925 acres, situate in the county of San Diego, known as "Rancho Jamul," subject to administration and to the homestead of the widow of the deceased, and praying that it may be so determined, and that distribution of the estate be made to her. The heirs of Henry S. Burton, deceased, who appeared, and by answer denied the alleged right of petitioner, were Maria A. Burton, the widow of deceased; Nellie de Pedrorena and Henry H. Burton, the children of deceased; and Elizabeth Lull Cochrane and Richard Swann Lull, the grandchildren of deceased. The court found that five-sixths of the Rancho Jamul had descended to Maria A. Burton, Nellie de Pedrorena, and Henry H. Burton, as heirs of Henry S. Burton, deceased, and that, through the foreclosure of a mortgage executed by these heirs, the plaintiff, Maggie Leach, as executrix of the will of Wallace Leach, deceased, and as sole devisee, has succeeded to and is the owner of all their rights, as such heirs, in and to the Rancho Jamul; and decreed that, upon final distribution, five-sixths of said rancho, less the homestead, be distributed to her, and that the remaining one-sixth be distributed to the two grandchildren above named. From this decree Maria A. Burton, Henry H. Burton, and Nellie de Pedrorena bring this appeal upon the judgment roll, and without any bill of exceptions.

1. It is contended by counsel for appellants that section 1664 of the Code of Civil Procedure does not authorize the superior court to ascertain and declare the rights or interests of others than the heirs of an intestate and the devisees and legatees by will; and that one who has purchased the interest of an heir or devisee in the property of an estate, pending the administration, has no right, under that section of the Code, to have the interest thus purchased, ascertained, declared, or directly distributed to him by the superior court, "while sitting as a court of probate"—*First*, because no such legislative intent is expressed in that section; and, *second*, because, if such intent is expressed, the section is unconstitutional in that respect.

First. I think it cannot reasonably be questioned that it was the intention of the legislature, by section 1664 of the Code of Civil Procedure, to provide a mode of proceeding by which all persons who claim ownership of or an interest in the property of an estate of a testator or an intestate, whether directly, as heirs and devisees, or indirectly, through the heirs or devisees, may have their respective rights and interests in and to such property conclusively ascertained, determined, and declared, so far, at least, as the parties before the court are concerned, before distribution is decreed, to the end that the final distribution of the property may be made directly to the persons respectively entitled thereto; and the language of the section seems to express this intention so clearly that there is no room for construction. But the provisions of the section are carefully limited to the ascertainment and determination of rights and interests claimed in privity with the estates, and are not applicable to rights or titles claimed adversely to such estates. The case most relied upon as being opposed to the views above expressed is that of Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. Rep. 1081. But that case was not a proceeding under section 1664 of the Code of Civil Procedure; nor did it involve any question as to the construction or constitutionality of that section; nor is there any allusion to that section in the opinion. The only point decided in that case is that an ordinary decree of distribution to an heir is not conclusive of title in the heir as against a prior grantee of such heir. The reasons for this, as I understand the opinion, are that in the ordinary mode of distribution the grantee of the heir is not a party to the proceeding, and there is no issue as to his title presented for determination. This being so, of course the court would have no jurisdiction to try or determine anything as to the title of the grantee. The opinion indicates, however, that the cases in this state are not entirely harmonious on this point; and hence the apparent need of such a mode of procedure as that provided by section 1664 of the Code of Civil Procedure, whereby the grantees of heirs and devisees may have their rights determined, and distribution ordered directly to them, instead of being compelled to pursue the heirs or devisees by another suit in substantially the same court, after the latter, by decree of distribution, have been invested with *prima facie* title.

Second. It is further contended that, conceding that section 1664 of the Code of Civil Procedure clearly expresses the intention of the legislature to authorize the court to ascertain and determine the rights of alleged assignees of the heirs, as a part of the proceedings in the settlements of estates of deceased persons, to that extent, the legislature attempted to confer upon superior courts a jurisdiction not authorized by the constitution; since the constitution has conferred upon "superior courts, while sitting as courts of probate," jurisdiction of only probate matters. The point made is that while the superior court was engaged in the proceeding to settle and distribute the estate of H. S. Burton, deceased, it had no jurisdiction of the subject-matter of ascertaining and determining the rights of the alleged assignees of the heirs, although it had jurisdiction to ascertain and determine the respective rights of the heirs among themselves. It is not questioned that the court had jurisdiction of the persons of all parties interested, nor that the proceeding was conducted in strict accordance with section 1664 of the Code of Civil Procedure. No distinct "court of probate" has been created or recognized by the present constitution of this state. The constitution has created superior courts, and has given them original jurisdiction of the subjects-matter of various classes of actions and special proceedings, more or less distinct from each other; among which are "all actions at law which involve the title or possession of real property," and "all such special cases and proceedings as are not otherwise provided for," and "all matters of probate." Article 6, § 5. The proceeding provided by section 1664 of the Code of Civil Procedure is a special proceeding, (Smith v. Westerfield, 88 Cal. 374, 26 Pac. Rep. 206,) and is embraced within the scope of "matters of probate," as clearly so as is the proceeding for the sale of real property to pay debts of an estate. The objects of probate proceedings are to administer, settle, and distribute the estates of deceased persons. They are commenced by petition for letters of administration or for the probate of wills, and they are closed by a decree distributing "the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto," (Code Civil Proc. § 1665,) and an order discharging the executor or administrator, but who cannot be discharged from his trust until he has delivered up, under the order of the court, (order of distribution,) all property of the estate to the parties entitled, (section 1697.) It will not be denied that the decree of distribution, and the order discharging the executor or administrator, are within the scope of "matters of probate," in the sense of the constitution; from which it necessarily follows that the court must have the incidental power, in some mode, to ascertain and determine who are entitled, as distributees, to the residue of the estate, even though such determination should involve a question as to title or possession of real property; and I see no objection, on constitutional grounds, to the mode provided by section 1664 of the Code of Civil Procedure. The superior court, while sitting in matters of probate, is the same as it is while sitting in cases in equity, in cases at law, or in special proceedings; and, when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment in such case. This is an incidental power pertaining "to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them." Smith v. Westerfield, supra. It is true, however, that in special proceedings the court must exercise its jurisdiction, substantially at least, in the mode prescribed by the statute authorizing the proceeding; but in this case it is not questioned that the court did so. The statute (section 1664) expressly authorizes and requires the court to determine "the heirship to the deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein," which is not claimed adversely to the estate. This certainly includes the "ownership" of grantees of the heirs, and all those who are "claimants" through the heirs. All such are required to be cited to appear and to plead "the facts constituting their claim of heirship, ownership, or interest in said estate;" and it further provides that evidence shall be received in support of all issues made by the pleadings. The proceeding thus authorized, expressly and necessarily involves questions to the title to the property of the estate, whether real or personal. How is the court to exercise the jurisdiction given without trying and determining such questions? The cases of Theller v. Such, 57 Cal. 447; Bath v. Valdez, 70 Cal. 350, 11 Pac. Rep. 724; and Barnard v. Wilson, 74 Cal. 512, 16 Pac. Rep. 307,—are irrelevant to any point in this case, since in each of them the claim to be determined was adverse to the estate of the deceased. For such a case, as before remarked, section 1664 of the Code of Civil Procedure does not provide.

The findings of fact support the decree. The points made by appellants, in addition to those above considered, have not a sufficient foundation in the record, even if the reports of former cases in this court between the same parties may be considered. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

93 Cal. 518

PEOPLE v. AHERN. (No. 20,862.)

(*Supreme Court of California*. March 3, 1892.)

CRIMINAL LAW—INSTRUCTIONS.

Where the defendant, on a trial for robbery, desired to have the jury instructed as to the definition of "reasonable doubt," it was his duty to have asked for such instruction.

In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

Prosecution against Michael Ahern for robbery. From the judgment on conviction, and an order denying him a new trial, he appeals. Affirmed.

J. D. Sullivan, for appellant. *Atty. Gen. Hart*, for the People.

PER CURIAM. Defendant was convicted of the crime of robbery, and appeals from the judgment and order denying his motion for a new trial.

The evidence is sufficient to support the verdict, and we find no merit in the assignment of errors of law. If the defendant desired to have the jury instructed as to the definition of "reasonable doubt," it was his duty to have asked for such instruction. People v. Christensen, 85 Cal. 571, 24 Pac. Rep. 888. Let the judgment and order be affirmed.

PEOPLE v. AHERN *et al.* (No. 20,446.)

(*Supreme Court of California*. March 3, 1892.)

In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

Prosecution against Michael Ahern and others for robbery. From the judgment on conviction, and an order denying them a new trial, defendants appeal. Affirmed.

J. D. Sullivan, for appellants. *Atty. Gen. Hart*, for the People.

PER CURIAM. On the authority of People v. Ahern, ubi supra, (No. 20,862,) filed March 3, 1892, the judgment and order are affirmed.

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93 Cal. 513

JAMES v. McCANN, Judge. (No. 14,821.)

(*Supreme Court of California*. March 1, 1892.)

REPORTER'S FEES—BILL OF EXCEPTIONS—REFUSAL TO SETTLE—WRIT OF MANDATE.

1. Code Civil Proc. § 274, which provides that the reporter's fees for taking notes in civil cases shall be paid by the party in whose favor judgment is rendered, and shall be taxed as costs against the party against whom judgment is rendered, does not authorize the trial judge to refuse to settle the bill of exceptions until appellant has paid to the reporter certain fees ordered during the trial, and a writ of mandate will issue to compel the judge to settle such bill.

2. Conceding that the amendment of 1885, which provides that each party, before judgment or verdict is entered, shall pay a *per diem* of $2.50 to the clerk of the court, to be by him paid into the county treasury, is constitutional, it does not authorize the judge, after entry of judgment, to refuse to settle the bill of exceptions until appellant has paid to the reporter certain fees ordered during the trial.

In bank.

Original petition for writ of mandate by Sarah M. James against E. J. McCann, judge of superior court, to compel defendant to settle a bill of exceptions. Granted.

Horace N. Philbrook, for plaintiff. *J. H. Skirm* and *Z. N. Goldsby*, for respondent.

MCFARLAND, J. This is a petition for a writ of mandate to compel the defendant to settle a certain bill of exceptions, and it was submitted upon a demurrer to the complaint or petition. The plaintiff, (or petitioner,) Sarah M. James, and one Leonora A. James, were hostile contestants in the court of the defendant (or respondent) for letters of administration on the estate of William E. Jones, deceased. That contest, after a full trial, was decided by the court in favor of said Leonora, and judgment was entered accordingly. The petitioner herein (Sarah) then duly filed her notice of and undertaking on appeal; and afterwards, and within the proper time, appeared and served on said Leonora a draft of a bill of exceptions. The said Leonora duly prepared and served on petitioner certain amendments to said draft; and the draft and amendments were duly presented to said respondent, who designated the 27th day of October, 1891, at 10 o'clock A. M., as the time when he would settle said bill. At that time the parties appeared, and the settlement was begun and proceeded with until the 29th day of said month, at which time a large part of said bill had been settled. But on said last-named day the attorney of said Leonora moved that all further proceedings in the settlement of said bill be stayed until certain fees of the short-hand reporter of the court should be paid; and the judge, (respondent herein,) against the objection and exception of petitioner, ordered "that all proceedings herein be stayed until the above amount, to-wit, $45 and $55, making a total amount of $100, be paid by Sarah M. James to said reporter." And since then the respondent has refused to settle said bill of exceptions because said Sarah has not paid said reporter's fees, and declares that he will not settle said bill, or any bill of exceptions in said cause, unless said Sarah shall first pay said fees. It appears that during the trial of said contest for administration between said Sarah and Leonora the court on one occasion made an order "that each party in this action pay the reporter $45 for short-hand reporting;" and that at a later period in the trial it made another order "that Sarah M. James and Leonora A. James each pay the reporter $55 for reporting herein;" and it is for the failure of said Sarah to pay the amounts stated in said two orders that the respondent refuses to settle the bill. It is alleged in the petition, and therefore must be taken as true, that said short-hand reporting referred to in said orders meant the taking of short-hand notes of the testimony and proceedings as the trial progressed, and not the transcription of said notes into long-hand. The ground upon which the respondent rests his refusal to settle the bill of exceptions is not tenable. In some respects the statutory law about the payment of reporters' fees is in an uncertain and unsettled condition. Prior to March 23, 1885, the law upon that subject was contained in section 274 of the Code of Civil Procedure. See Newmark's Code, 1883. On March 23, 1885, the legislature passed a bill by which they undertook to amend section 274 by re-enacting it, so as to provide that the judges should fix monthly salaries for reporters; that the salaries should be paid out of the county treasuries; and that certain fees to be paid by litigants for reporting should be paid into the county treasuries. That attempted amendment, however, was held in Smith v. Strother, 68 Cal. 194, 8 Pac. Rep. 852, to be unconstitutional, so far, at least, as it attempted to confer upon courts the power to fix salaries; and, as the other parts of the amendment are based upon the theory that the salaries were to be so fixed, and are interwoven with the system sought to be established, it is probable that the whole amendment fails. In that event, the section as it stood before is still the law; and if such construction be correct, then the provision is that "the reporter's fees for taking notes in civil cases shall be paid by the party in whose favor judgment is rendered, and shall be taxed up by the clerk of the court as costs against the party against whom judgment is rendered." If, on the other hand, there is anything left of said attempted amendment of March, 1885, then the provision is that "each party shall pay a *per diem* of two dollars and fifty cents before judgment or verdict therein is entered," said *per diem* "to be paid to the clerk of the court, and by him paid into the treasury of the county." And neither provision warrants the action taken in the case at bar. Whether or not a court might, during the progress of a trial, compel the parties to make a deposit of money, or in some other way secure in advance the payment of the reporter for taking notes of the proceedings, or might refuse to order the reporter to do such work without such security, or might by some other means force the parties to secure him before the work should be done, are questions which do not arise in this case. Here the reporter did his work voluntarily, and without demanding security. The trial in which he took the notes terminated, and judgment was entered. After that the view most favorable to the reporter's right that could be taken is that the petitioner is his debtor; and, in order to enforce the payment of that debt, the respondent has not the power to refuse to settle petitioner's bill of exceptions, and thus practically destroy her right of appeal. (Respondent moved to strike out certain parts of the petition, but, as the case was submitted on demurrer, the motion is of no importance, and is denied.) Let a peremptory writ of mandate issue as prayed for.

We concur: Harrison, J.; De Haven, J.; Garoutte, J.; Paterson, J.; Sharpstein, J.

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93 Cal. 497

Barnhart v. Fulkerth *et al.* (No. 14,603.)

(*Supreme Court of California.* Feb. 24, 1892.)

Attachment—Claims by Third Persons—Evidence—Estoppel by Admissions.

1. Plaintiff claimed certain wheat in his possession which was attached by defendant as sheriff, and sold on an execution of M. against one D. Plaintiff, in reply to a question by M.'s attorney just before the attachment issued, said that the wheat belonged to D., and he (plaintiff) had a lien on it. Defendant claimed that plaintiff was estopped by such declaration from denying that the wheat belonged to D., and at the trial asked M.'s attorney whether, in instructing the sheriff to levy, he relied solely upon the declaration of plaintiff and the belief that that declaration was true. *Held*, that the question was competent.

2. Plaintiff, having testified that he had received other security for the money owing by D., was asked, on cross-examination, if such security was not of greater value than the money due from D. *Held*, that the question was material.

Department 2. Appeal from superior court, San Joaquin county; William O. Minor, Judge.

Action by H. Barnhart against Fulkerth & Perley. Judgment for defendants. From an order denying a new trial, plaintiff appeals. Affirmed.

P. J. Hazen, for appellant. *W. E. Turner* and *Chas. J. Heggerty*, for respondents.

McFarland, J. This is an appeal by plaintiff from an order denying him a new trial. He had also taken an appeal from the judgment, and on that appeal (No. 13,682) the judgment was by this court affirmed. 27 Pac. Rep. 71. There had also been an earlier judgment in the trial court in favor of plaintiff; and upon appeal by defendants from that judgment, and from an order denying a new trial, it was reversed, and a new trial ordered. 73 Cal. 526, 15 Pac. Rep. 89. Upon those two appeals the main questions in the case were decided against the contention of plaintiff. In the last appeal from the judgment (No. 13,682) it was definitely determined as the law of the case that the findings supported the judgment. The only questions arising upon this present appeal, from the order denying a new trial, appertain to the sufficiency of the evidence to justify the findings, and rulings of the court as to the admissibility of evidence. The evidence as to the main issues of fact is voluminous, and somewhat conflicting; and it would be a useless labor to review it here in detail. It is sufficient to say that there is no reason for disturbing the findings of fact made by the trial court upon the ground that they are not warranted by the evidence. There are only two alleged errors on rulings upon the admission of evidence which are relied upon, one relating to the testimony of Howel, and the other to the testimony of Barnhart. The action was to recover certain wheat in a warehouse claimed by plaintiff, but attached and sold by defendant Fulkerth, sheriff, as the property of one Davis, upon a writ issued in a certain action brought by Mathews and wife against said Davis. Davis owed the plaintiff (Barnhart) $2,500, and had pledged the wheat to the latter to secure that sum of money; and when the sheriff attached the wheat he tendered the plaintiff the amount of his debt and lien. The witness Howel was the attorney of the Mathews, and was also acting as the agent for the sheriff; and immediately before the attachment was levied he visited the plaintiff, Barnhart, and asked him about the ownership of the wheat. Barnhart told him that the wheat belonged to Davis, and that he (Barnhart) had a lien on it for $2,500 and interest. Afterwards it was claimed by Barnhart that the wheat, at the time of the attachment, really belonged to one Vancel, who lived in an eastern state, and to whom Davis had deeded a life-interest in the land upon which the wheat had been raised. Defendants contended, among other things, that under these circumstances, wherever the strict legal title to the wheat may have been, Barnhart was estopped from denying that it belonged to Davis. Now, the questions asked Howel to which appellant objected were these: "Upon what did you base your action in instructing the sheriff to levy?" and "Did you rely solely and entirely upon the declarations of Barnhart, and the belief that that declaration was true from Barnhart's own declaration?" The objection was that the questions were "irrelevant, incompetent, and immaterial," and we think that it was properly overruled. One of the necessary elements of estoppel is that the party setting it up must have been actually induced to do a certain act by the conduct or directions of the party sought to be estopped; and under our system, where all persons (practically) may testify, a witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action. Even in a criminal case a defendant may testify as to the intent with which he entered a building or killed a human being, although, of course, a jury is not bound to believe the witness either in a criminal or a civil action. But such testimony is competent and relevant, and is not immaterial.

The other rulings excepted to relate to certain questions asked by respondents in cross-examination of the plaintiff. Plaintiff, having testified that he had received other security (land) for the money owing by Davis, was asked if such additional security was not "in value twice or three times as much as the money that you loaned him," and the only objection that it was "immaterial." We think the question was, at least, material; and, moreover, as the answer was negative, it could have done no harm. There were three other questions asked plaintiff, which were objected to upon the sole ground that they were "not cross-examination." We are disposed to think that the court was right in holding that they were legitimate cross-examination of the plaintiff; but as the answers were all negative, or that the witness had "no recollection" of the matter asked about, the appellant could not have been prejudiced by the questions, particularly as the case was tried by the judge without a jury. These views make it unnecessary to determine respondents' motion to dismiss the appeal. The order denying a new trial is affirmed.

We concur: SHARPSTEIN, J.; GAROUTTE, J.

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93 Cal. 34

WICKERSHAM v. BRITTAN. (No. 14,506.)

(*Supreme Court of California.* Jan. 18, 1892.)

JURISDICTION OF SUPERIOR COURTS—ELECTIONS BY CORPORATIONS.

1. By the constitution of 1879, district courts theretofore existing were superseded by the superior courts. Const. art. 22, § 11, declares that "all laws relative to the present judicial system shall be applicable to the judicial system created by this constitution." *Held*, that the superior courts were vested with the jurisdiction of the district courts to inquire into any election held "by any corporate body," pursuant to the provisions of Civil Code, §§ 312, 315.

2. The fact that an act, passed after the adoption of the new constitution for the purpose of adapting the phraseology of the several Codes to the nomenclature of the courts, omitted such change in any particular section of the Code, did not prevent the superior court from exercising any jurisdiction conferred on it by the constitution. Fraser v. Alexander, 16 Pac. Rep. 757, 75 Cal. 147, explained.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Action by I. G. Wickersham against N. J. Brittan to determine the right of defendant to be a director in the Bank of San Luis Obispo. Defendant's demurrer was sustained, and plaintiff appeals. Affirmed. For former opinion, see 28 Pac. Rep. 792.

Henley & Swift, Lippitt & Lippitt, Wilcoxson & Bouldwin, and *Crittenden Thornton,* (*F. H. Merzbach,* of counsel,) for appellant. *James L. Crittenden* and *Graves & Graves,* for respondent.

PER CURIAM. The opinion heretofore rendered in this cause is modified by adding thereto the following:

The superior court had jurisdiction to entertain this proceeding. Sections 312 and 315 of the Civil Code, as amended in 1878, conferred such jurisdiction upon the district court of the district in which the election was held. Upon the adoption of the constitution of 1879, the district courts theretofore existing were superseded by the superior courts, and the superior court was given original jurisdiction "of all such special cases and proceedings as are not otherwise provided for." Article 22, § 11, of the constitution, also provided that "all laws relative to the present judicial system of the state shall be applicable to the judicial system created by this constitution until changed by legislation." The effect of this section was, by a single comprehensive provision, to preserve and adopt for the courts created by the new constitution the statutory procedure that was then existing with reference to the courts which were by that instrument abolished, and to authorize that procedure in all rights of action that were to be determined under the new constitution. For the purpose of adapting the phraseology of the several Codes to the new nomenclature of the courts provided by the constitution, the legislature in 1880 amended the greater portion of the sections in which were the names of the old courts, by substituting therefor the names of the new courts. But its omission to make such change in any particular section did not have the effect to prevent the superior court from exercising the jurisdiction over any right of action which had been conferred upon it by the constitution. During the interim between January 1, 1880, and the date of any such amendment, the superior court could rightly entertain and hear all proceedings and actions instituted therein under the jurisdiction conferred upon it by the constitution. The jurisdiction thus conferred was not such a provision of the constitution as required legislation to enforce it, (article 22, § 1;) and the laws for the exercise of such jurisdiction were not "inconsistent" with the constitution, and did not cease upon its adoption, but, by the provision of section 11 of article 22, were expressly preserved in force until changed by legislation. In Fraser v. Alexander, 75 Cal. 147, 16 Pac. Rep. 757, it was held that the act of March 30, 1874, under which the proceedings were instituted, had been superseded by the provisions of the county government act of 1883; and what was said in the opinion respecting the effect of section 1 of article 22 of the constitution was *obiter dictum*, inasmuch as, upon holding that the provisions of that act had been thus superseded and "changed by legislation," there was no opportunity for the court to consider or determine the effect of the constitutional provision upon the statute existing at the date of its adoption.

(3 Cal. Unrep. 478) ————

Hinckley v. Stebbins *et al.* (No. 13,746.)

(*Supreme Court of California.* Feb. 2, 1892.)

DECREE OF DISTRIBUTION—CONSTRUCTION—ATTORNEY'S FEES—WHO CHARGEABLE.

1. Where a decree of the probate court distributed to certain trustees the legal title to an undivided one-third of certain property, "that is to say, * * * one-third of the aggregated value of all the six items hereinafter specified," and contained a statement of such items, together with the amounts thereof, the values of the various items were thereby fixed.

2. Where a testator leaves a portion of his estate to a charity, and the charity engages in litigation involving the construction of the will, its attorney's fees will not be chargeable against the whole estate, but only against the portion devised to it.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action by Mary C. Hinckley against Horatio Stebbins and others, trustees. From the final decree of the court, dividing certain trust funds, plaintiff appeals. Reversed.

William Barber, for appellant. *C. K. Bonestell*, for respondents.

FOOTE, C. This suit was brought by the plaintiff, as residuary legatee under the will of William C. Hinckley, deceased, against the defendants, for the purpose of securing an accounting, procuring the sale of certain property, the payment of certain unpaid legacies out of the proceeds of that sale, and to obtain a division of the balance left in their hands between the residuary legatee and some of these defendants, as trustees of a certain charity. There had been a contest as to the construction of this will, and what proportion of the estate was to be distributed to the parties here, and this court, in 58 Cal. 517, adjudicated the matters there involved, and ordered a probate court decree of distribution to be made, modifying a previous one made on the 10th of March, 1879, which decree, modified as directed by the appellate court, was made and entered on the 22d of May, 1882. This last decree has never been appealed from, and is in full force and effect. It is prayed in the complaint that the California Theater property, which had been by that decree distributed to certain of the defendants here, in trust for certain purposes, should be sold, and that from the proceeds of that sale, and any money remaining in the hands of these trustees derived from rents and profits of the theater property, should be paid certain 12 specific legacies, of $3,000 each. The answer of the legatees agrees to this prayer, and so does the answer of the trustees. Upon this state of affairs an interlocutory decree was entered, following this agreement. After that, upon findings of fact and conclusions of law filed by the trial court, a final decree was made and entered, dividing the remaining trust funds between the trustees for the charity and the residuary legatee, plaintiff and appellant here. It is claimed in her behalf that certain findings of fact made by the trial judge are not supported by the evidence, and that the conclusions of law attached do not follow the findings.

The most important matter, therefore, which is first to be considered and determined, is what the amended probate court decree does declare as to certain matters. The appellant contends that the third finding of fact, made by the trial court, is not sustained by the language of the amended probate court decree of distribution. It is said that the decree does not affix any value to the distributable assets at the date of its entry, and that the finding assumes that it does fix such value, and therefore that such finding is erroneous. The finding is as follows: "The value of the distributable assets of the estate at the date of the amended decree, May 22, 1882, estimating the value of the theater property at $120,000, at which sum it had been appraised in the probate court on the 5th day of June, 1876, was $150,492, less the amount of the unpaid mortgage of $37,500, referred to in the decree,—the remainder being $112,992, of which one-third is $37,664." The decree referred to reads thus: "To the trustees and their successors hereinabove named is hereby distributed the legal title to an undivided interest in the California Theater property, equal to one-third (⅓) of the distributable estate of said testator, that is to say, equal to one-third of the aggregated value of all the six items, hereinafter specified as the distributable assets of said estate. * * * The distributable assets of the estate of said testator, one-third of which is subject to the charitable uses, are as follows, viz.: (1) Cash heretofore paid to legatees amounting to $8,912.02. (2) Cash distributed to trustees, $6,420.90. (3) The house and lot on Bush street, appraised, $11,500. (4) The personal property in said house, appraised at $3,659.50, being all the personal property mentioned in the inventory, excepting mining stock, and the $60 in money. (5) 150 shares of stock in the Scorpion Silver Mining Company. (6) The California Theater property, inventoried and appraised on the 5th day of June, 1876, as of the value of $120,000, and which said theater property is subject to the said mortgage held by said Frank H. Woods." This mortgage was in the sum of $37,500. From the original probate court decree and the amended decree, from which the quotation is taken, it is easily perceived that, by direction of the supreme court in the case heretofore alluded to, the probate court was proceeding to carry out the views of the appellate tribunal in fixing the share or proportion of the California Theater property which would go to the trustees for the charity; and, inasmuch as the theater property was all that was left of the estate in their hands, in order to determine what that proportion was, it was deemed necessary to enumerate certain distributable assets that had passed from the hands of the trustees to those entitled thereto, and of which the charity had no benefit, and the theater property. In this enumeration the theater property was stated to have been appraised at $120,000, and it was also stated that it was subject to a mortgage of $37,500. The decree does fix the values of various items of distributable property, and whether the values so fixed are upon a right basis or not, as the probate court fixed the value of that property at its appraised value, which is contrary to both the statute and the decision of the supreme court, which the lower tribunal was then carrying out, (Code Civil Proc. §§ 1445, 1451; Estate of Hinckley, 58 Cal. 517,) it must stand if it is a decree of distribution at all, as it is not appealed from, and is in full force and effect. This part of the decree was for the purpose of determining what the distributable assets then were out of which the trust was to be awarded an interest in the theater property, equal to one-third of the distributable assets, whatever they might be. This amended decree did undertake to vest in the trustees for the charity a definite fractional interest that was fixed as to value in the theater property. It did nothing more than to follow the supreme court in its directions, and distributed to the charity an interest in the theater property which was all that then remained in the hands of the trustees, under the will of Hinckley, of the estate, equivalent to one-third of the whole of the then known items of the distributable assets of the estate as of that date, which was then positively known or declared in the decree. And a specific value was given of that share of the whole distributable assets. By making an arithmetical calculation, based on the language of the decree, it appears that the whole value placed on the distributable assets was $150,492, less the mortgage of $37,500, all debts and liabilities and costs of administration having then been paid, and the net result is that the distributable assets was then the amount of $112,992. Of that, according to the decree which seems to have followed the decision of the appellate court, (58 Cal. 516,) the trust was entitled to $37,664; and, since there was no distributable assets to pay it out of except the theater property, there was given to the charity a legal interest in the theater property equal to one-third of the whole of the distributable assets ascertained by the decree. The charity from thenceforth owned 37,664-120,000 of the theater property, subject to the payment of its share of the mortgage; for, after distribution, the interest of the charity was not subject to any future costs or liabilities which might be incurred by the trustees, not growing out of the incumbrance or mortgage.

The income of the theater property was charged by the final decree with the payment of the 12 $3,000 legacies, and what was left of that the charity was entitled to 37,664-120,000 thereof. How, then, is the present accounting to be stated between the parties thereto? It appears that the theater property afterwards, by consent of all parties, was sold for $126,000. 37,664-120,000 of this sum, less the amount paid out for the mortgage debt and interest, belonged to the charity. Amount received from increase of the property was $115,416.67. From this sum the legacies were to be paid before any division between the parties hereto. That sum is $36,921.85, according to finding 6. The item of taxes on mortgage, if payable by the estate at all, was payable out of the interest of each party, on the basis of his proportional interest; and it does not seem to be questioned that it was payable out of the interest of some one, a party here, and not the mortgagee. The Scorpion stock assessment paid was, of course, chargeable against the share of the residuary legatee. From the finding we should judge that the $500 fee paid Mr. Baldwin for litigation about the mortgage was payable out of the interest of both parties, in proportion to their share in the theater property. The balance expended by the trustees seems to have been, according to the record, $60,628.50, which the trial court charged wholly against the gross income, $115,416.67. It does not appear what this sum of $60,628.50 was paid out for, except $100, mentioned in findings 6 and 7, and $5,850, (erroneously added up as $5,000,) mentioned in finding 7; so it will be presumed that all of that sum, except $5,950, is chargeable, as allowed, to the entire gross receipts. But we cannot perceive how any party to this proceeding except the charity is chargeable with this last sum. The money was not for costs of administration or debts, but for counsel fees to those employed by the trustees of the charity to litigate their side of the controversy, and to get all that was possible from the residuary legatee for the benefit of the charity. The charity was the real party in interest, and should pay its own attorneys' fees. It will thus be seen that finding 5, where it assumes the balance on hand for division to be $95,157.10, and the 2d, 3d, 4th, and 5th conclusions of law are erroneous. The judgment should therefore be reversed, and we so advise.

I concur: FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

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93 Cal. 241

PEOPLE v. HOLLADAY *et al.* (No. 13,676.)

(*Supreme Court of California.* Feb. 4, 1892.)

ADVERSE POSSESSION—LAND DEDICATED TO PUBLIC USE—RES JUDICATA—ACTION ON BEHALF OF STATE.

1. Act Cong. July 1, 1864, (13 U. S. St. at Large, p. 332,) grants to the municipality of San Francisco all the rights and title of the United States in a certain public square known as "Lafayette Park," within the city limits as fixed by act of the legislature of 1851, "for the uses specified in the ordinance of said city, ratified by an act of the legislature" approved March 11, 1858. The ordinance referred to was passed in 1855, and provided for the location of Lafayette park. Defendant was in actual possession of the land in question, January 1, 1855, and so continued till after March 11, 1858. *Held*, that the land having been dedicated to the public by the act of the legislature of 1858, which dedication was confirmed by the act of congress of 1864, making it operative on the legal title in the government as well as on such title as the city held prior thereto, the defendant never acquired any title by possession.

2. The city and county of San Francisco being a municipal corporation, endowed with full power and jurisdiction over the public parks within its territory, a suit prosecuted by such city, wherein it claims legal title to land as part of a public park and as trustee of the people of the state, is a bar to any subsequent action by the people of the state for the same land.

3. In such case, in a suit against the city by the person in possession to quiet the title to land claimed by such city as part of a public park, a judgment in favor of the plaintiff is a bar to an action for the recovery of such land by the people.

4. Where a former suit was brought against defendant by plaintiff herein, involving the same land in question, and issue joined therein prior to the passage of the act of congress of July 1, 1864, and judgment rendered in favor of defendant, such judgment does not constitute a bar to this action, commenced after the passage of said act of congress. 9 Pac. Rep. 655, affirmed.

5. The findings of the court below, that the plaintiff has acquired no different title to the land since the commencement of the former suit, does not change the rule that such former judgment is not a bar, for the reason that such findings were set aside by the order of the court granting a new trial, and for the further reason that it was a conclusion of law drawn from the facts presented on the former appeal.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action by the people against Holladay and others. From an order setting aside judgment for defendants, and granting plaintiff's motion for a new trial, defendants appeal. Affirmed.

S. W. & E. B. Holladay, Mastic, Belcher & Mastic, John R. Jarboe, and *Lloyd & Wood,* for appellants. *Atty. Gen. Hart, William Matthews,* and *Craig & Meredith,* for respondent.

DE HAVEN, J. This is an action brought by the attorney general in behalf of the people of the state, upon the relation of one Bryant. It is alleged in the complaint that the land therein described was lawfully dedicated to public use as a public square, on March 11, 1858, by the name of "Lafayette Park," and that defendants have erected buildings and fences thereon, thereby obstructing the public in the use of the same as a square; and judgment is asked to the effect that such buildings and fences constitute a nuisance, and that defendants be enjoined from maintaining or continuing the same, or from otherwise obstructing the people of the state in the free use of said land for the purpose for which it was dedicated. In their answer the defendants deny that the land described in the complaint was ever dedicated to public use as a square, and also allege that on November 16, 1863, the plaintiff herein, upon the relation of one Bohen, commenced an action against S. W. Holladay, one of the defendants herein, and through whom the other defendants claim; that in said action the same identical matters alleged in this complaint were in issue, and judgment therein was finally rendered against this plaintiff, and in favor of defendant Holladay. It is also particularly averred, as a separate defense, that in said action one of the material issues was whether the land here in controversy was ever dedicated to the public as a square, and that this issue was in said action found and adjudged against plaintiff. The answer further alleges, as a separate defense, that on December 17, 1864, the said defendant S. W. Holladay commenced an action against the city and county of San Francisco to quiet his title as against all adverse claims of said city and county to the land in controversy, and that judgment was therein given to the effect that said Holladay was the owner of an undivided nineteen-twentieths of said land, and his title thereto was quieted as against the said city and county; and in this connection it is further alleged that one of the material issues tried in that action, and determined adversely to the present claims of the plaintiff herein, was whether the land in controversy had ever been dedicated to the public use as a square, and whether said city and county held the legal title thereto in trust for the people of the state. The action was tried by the court without a jury, and findings filed to the effect that the matters alleged in the answer of defendants were true, and judgment was thereafter entered for the defendants. Subsequently the court granted plaintiff's motion for a new trial, and from this order the defendants appeal.

The land in controversy is within the corporate limits of the city of San Francisco, as defined by the act of the legislature of this state of April 15, 1851, (St. 1851, p. 157;) and all the right and title of the United States thereto were by section 5 of the act of congress of July 1, 1864, to expedite the settlement of titles to lands in the state of California, (13 U S. St. at Large, p. 332,) "relinquished and granted to the said city, and its successors, for the uses and purposes specified in the ordinance[1] of said city, ratified by an act of the legislature of the said state approved on the 11th of March, eighteen hundred and fifty-eight." It is a conceded fact in the case that this land forms a part of the tract designated as "Lafayette Park" upon the map, showing the location of streets and public squares in the city of San Francisco, which map was approved by one of the ordinances of said city, ratified and confirmed by the act of the legislature of this state, approved March 11, 1858, (St. 1858, p. 52,) referred to in the act of congress of July 1, 1864. It further appears from the evidence that the defendants and their successors in interest were in the actual possession of the land on January 1, 1855, and so continued until after March 11, 1858.

1. It has been repeatedly held by this court that this act of the legislature, in ratifying and confirming the ordinance referred to, operated as a selection and dedication to public use of the tracts marked as public squares on the map approved by that ordinance, and that the act of congress of July 1, 1864, had the effect to confirm such dedication, and make it operative upon the legal title, as well as upon such title as the city held prior thereto. Hoadley v. San Francisco, 50 Cal. 265; Sawyer v. San Francisco, Id. 370; Hoadley v. San Francisco, 70 Cal. 320, 12 Pac. Rep. 125. This being so, it follows that the land in controversy was in fact dedicated to the public as alleged in the complaint, and, as a consequence, defendants never acquired any title thereto by virtue of the possession of themselves or predecessors, and the act of the legislature of this state of March 11, 1858, or the ordinances thereby ratified. The plaintiff is therefore entitled to maintain this action, unless estopped by one or the other of the judgments relied upon by defendants as a bar.

2. It was held by this court, upon the former appeal in this case, that the judgment rendered in favor of defendant Holladay, in the action brought by the people of the state upon relation of Bohen, is not a bar to the present one. In discussing this question the court said: "The title which passed to the city and county of San Francisco by the act of congress of July 1, 1864, was unaffected by the judgment pleaded in bar thereof—*First*, because it was acquired long after issue in the action in which that judgment was rendered was joined and the case submitted for decision, and was not in issue therein, (Bank v. Hodgdon, 64 Cal. 95, 27 Pac. Rep. 938; Valentine v. Mahoney, 37 Cal. 396;) and, *secondly*, because the attorney general of the state had no power to submit to the determination of any tribunal the title of the government of the United States." People v. Holladay, 68 Cal. 439, 9 Pac. Rep. 655. This record does not disclose any new or additional facts in relation to the judgment the effect of which was thus passed upon, and the decision thus quoted must therefore be deemed the law of the case so far as concerns the particular point therein decided. The findings of the court below, that the people of the state have acquired no new or different title to the land in controversy since the commencement of the former action, relied upon as a bar, is not sufficient to take the question now under consideration out of the operation of the law as decided on the former appeal—*First*, because the finding itself was set aside by the order granting a new trial; and, *secondly*, because it was only a conclusion of law which that court drew from the same facts which were before this court on the former appeal. Nor can the appellants avoid the force of that decision by the special and particular manner in which they have alleged that respondent is estopped to retry in this action the question of dedication which was in issue and passed upon in the former action. The fact of dedication is essential to support respondent's cause of action, and that it is not estopped by that judgment from showing such fact is not only the necessary and logical effect of the decision upon the former appeal, but was so stated by the court in the following language: "To hold that the plaintiffs are concluded, by the judgment pleaded in bar, from showing that there was a dedication to which the title conveyed by the act of 1864 related, and which it perfected, would be in effect to hold the title conveyed by the act of 1864 concluded by the former judgment, which, for the reasons already given, is not the case." As already stated, this decision constitutes the law of this case, and we hold in accordance with it that the former judgment in the action brought against defendant Holladay, by the present plaintiff, upon the relation of Bohen, does not constitute a bar to this action, or conclude the question of dedication involved here.

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[1] The ordinance referred to was passed in 1855, and provided for laying out public squares on pueblo lands.

3. This brings us to consider the effect of the judgment in the case of Holladay v. The City and County of San Francisco. That was an action to quiet title, and it appears from the evidence that the question therein litigated was whether the land in controversy had ever been dedicated to the public use claimed by the people in this action. It is contended by the respondent that such matter was not in issue in that case, the answer of the defendants simply denying all the allegations of the complaint in that action. But this court held in the late case of San Francisco v. Holladay, in relation to this particular judgment, that this question was involved therein, and that such judgment was a bar to any further assertion by the city and county of San Francisco that it held the legal title in trust for the people. The court there said: "It is claimed by the appellant that the record in that case is not binding upon the city or the people, for the reason that at the date of the institution of the suit all the title that the city had was the bare right to the possession of this land in trust for the people of the state. But the particular matter litigated in that case was whether the city held the fee in trust for the people or at all, and it was adjudged therein that the city had no right, title, or interest in the land. The judgment in that case was not appealed from, and is final, so far as the city is concerned. It quieted the title of the plaintiff as against any and all claims of the defendant herein." San Francisco v. Holladay, 76 Cal. 18, 17 Pac. Rep. 942. The pleadings in that case being sufficient to put in issue the question of dedication involved herein, what is the effect of such judgment upon the rights of the present plaintiff? Are the people of the state thereby estopped from asserting that the defendant in that action, the city and county of San Francisco, did hold and now holds the legal title to the land in controversy, in trust for the use of the people of the state as a public square?

The city and county of San Francisco is a municipal corporation created by the legislature of the state, and has conferred upon it by the state full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued; and this necessarily includes the authority to maintain and defend all actions relating to its right to exercise control over and subject to the public use such squares or land claimed by it to have been dedicated for such purposes, and in any action brought by it for the purpose of vindicating and protecting the public rights in such squares, or land claimed as such, the state would be bound by the result, because in such action the city and county would in fact represent the people of the state by virtue of its authority to maintain such actions for the purpose of preserving the public rights of which it is the trustee. A municipal corporation is for many purposes but a department of the state, organized for the more convenient administration of certain powers belonging to the state, (Sinton v. Ashbury, 41 Cal. 530; Barnes v. District of Columbia, 91 U. S. 544; Board v. Martin, 28 Pac. Rep. 799;) and such corporations, in their management and control over streets and squares within their limits, and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the state. Accordingly, it has been held that the city has the same right to maintain an action to prevent the unlawful obstruction of a street as would the people of the state. Thus, in the case of Railway Co. v. Chicago, 96 Ill. 628, it is said: "The state has a like control over highways, streets, and public grounds as is exercised by the crown of England, and may have like remedies against persons unlawfully obstructing the same. A portion of the political power of the state is committed to the municipalities. The general assembly of this state has vested in cities, villages, and towns the right to control the use of highways, streets, and public grounds, within their respective limits, and they are invested with the authority of the crown and of the state, in this respect, to file bills to prevent and remove obstructions from the streets, highways, and public grounds under their control." So, also, in Trustees v. Cowen, 4 Paige, 510, it was held that the municipality so far represents the equitable rights of its inhabitants that it is authorized to maintain action to abate a public nuisance upon a public square; and to the same effect is the case of City of Demopolis v. Webb, (Ala.) 6 South. Rep. 408. There are other cases which seem to base the right of municipal corporations to maintain such actions upon the narrower ground that they suffer special and peculiar injury in the obstruction of streets and squares different from that sustained by the general public, but we are satisfied with the broader rule announced in the above-cited cases. We entertain no doubt that the city and county of San Francisco has the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares, or land claimed as such, within its limits, and that in such action it is authorized to put in issue the alleged rights of the people to such easement, and that the state itself is bound by the result of such litigation, if the same is not collusive. The rule that the citizen shall not be twice vexed for the same cause of action is binding upon the state as upon other litigants. And we see no reason why these same rights might not also be tried and determined in an appropriate action in which the municipality might be a defendant; as, for instance, ejectment, where it has ousted the claimant from the possession; or by injunction, where it threatened to remove his buildings or trees or a portion of the soil from the land claimed by it as a public square, and the public would be bound by the result of any such litigation, if conducted in good faith on the part of the city. And that an action by the adverse claimant against the city to quiet his title, where the city claims to hold the legal title in trust for the use of the people, as a public square, is an appropriate action to determine such claim, is the effect of the decisions of this court in San Francisco v.

Holladay, supra, and San Francisco v. Itsell, 80 Cal. 57, 22 Pac. Rep. 74. In San Francisco v. Holladay, supra, the action was ejectment by the city and county of San Francisco, for the purpose of recovering the land in controversy in this action; the plaintiff claiming that it held the legal title to the land in trust for the people of the state, and that the same had been dedicated to the use of the public, and that the defendants were intruders thereon. The action was therefore substantially one for the use and benefit of the people of the state, and, as the plaintiff therein was authorized by law to bring the action for the purpose of preserving the alleged rights of the people, it could only be defeated by showing that the people of the state were not entitled to maintain such action, and the court, in holding that the right of the city and county of San Francisco to recover possession of the land in controversy for the use of the general public was barred by the judgment in Holladay v. San Francisco, in effect decided that the rights of the people of the state were also barred by that judgment.

There is nothing decided in the case of Branham v. Mayor, etc., of San Jose, 24 Cal. 585, in conflict with the conclusion we have reached on this point. All that was there decided was that a decree foreclosing a mortgage, and the execution by a sheriff's deed under the decree, transferred to the purchaser the interest which the mortgage created and vested in the mortgagee, and nothing more. In that case the city of San Jose executed a mortgage upon certain lands, which mortgage was void because of want of power in the city to execute the same or alienate the land, and it was held that its subsequent foreclosure, in an action to which the city was a party, gave to the mortgage no additional validity, and that the city was not estopped by the decree of foreclosure from asserting the invalidity of the title attempted to be conveyed by the sheriff's deed thereunder. This was only the assertion of a very familiar rule, as to the estate or title upon which a decree of foreclosure operates, but, manifestly, can have no relation to the question we have been considering, which is whether the state, by authorizing the city and county of San Francisco to sue and defend actions, for the purpose of preserving and protecting the rights of the general public in land claimed to have been dedicated as a public square, is bound equally with the municipality by the result of such litigation.

4. The judgment in Holladay v. San Francisco was undoubtedly erroneous under the law as declared by this court subsequently in the cases of Sawyer v. San Francisco, 50 Cal. 370, and Hoadley v. San Francisco, 70 Cal. 324, 12 Pac. Rep. 125; but its force as an adjudication of the rights of the parties thereto, and those in privity with them, is not affected thereby. Case v. Beauregard, 101 U. S. 688. To say that the bar of an estoppel by judgment can be removed by showing that it ought not to have been rendered would be, in effect, to declare that no fact is to be deemed as finally set at rest by judgment, and that litigation upon the same matter may be interminable. But by the judgment in Holladay v. San Francisco it was determined that the defendants here own an undivided nineteen-twentieths of the land in controversy, and the finding of the court below that all the land in controversy is the private property of the defendants, free and clear from any and all dedication whatever, (and we construe the first conclusion of law as a finding of fact,) was not justified by that judgment or by the other evidence in the case, and because of this error in the findings the court did not err in granting plaintiff's motion for a new trial. Although the effect of the judgment in Holladay v. San Francisco is a bar to the right of the plaintiff to the relief demanded in this action, it is still entitled to a correct finding as to the extent of the interest owned by defendants in the land in controversy. Upon the evidence disclosed in this record the finding as to this fact should have been in accordance with the judgment in Holladay v. San Francisco. Order affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.

HARRISON, J., being disqualified, did not participate in the foregoing opinion.

(93 Cal. 490)

PEOPLE v. SMITH. (No. 14,072.)[1]

(*Supreme Court of California.* Feb. 23, 1892.)

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action by the people, on the relation of R. D. Chandler, against Smith to abate a nuisance. Judgment for plaintiff. Defendant appeals. Reversed.

E. D. Wheeler and *R. Guy McClellan*, (*S. W. & E. B. Holladay*, of counsel,) for appellant. *Atty. Gen. Hart* and *Philip G. Galpin*, for respondent.

GAROUTTE, J. This is an action by the people, on the relation of R. D. Chandler, to abate a nuisance. It is alleged in the complaint that the land upon which the building stands is part of a public street in the city of San Francisco known as "Oregon Street;" that defendant placed the structure in said street on or about July 1, 1885, and ever since has unlawfully kept and maintained the same. The defendant denied that the land on which the building stands ever became a public street by dedication or otherwise; averred that he was the owner in fee of the premises described, and entitled to the use and enjoyment of the same; and for a further answer alleged that for more than 17 years immediately prior to August 18, 1877, he had been in the actual, open, peaceable, and exclusive possession of the property; that on said last-named day the city and county of San Francisco, falsely pretending that the premises were included within the limits of the public street called "Oregon Street," wrongfully entered upon the premises, and ousted him therefrom; that thereafter he commenced an action against said city and county to recover the possession of the premises; that in the answer filed therein the defendant claimed that the premises in controversy had been dedicated to public use as a street; that on May 14, 1880, a judgment was entered in said action in favor of the plaintiff herein, and against the city and county, for the possession of the land; that the court adjudged therein that neither the state of California nor the city and county of San Francisco dedicated the premises to public use; that an appeal was taken from the order of the court refusing to grant a new trial, but said appeal was dismissed on May 22, 1885, and the judgment thereupon became final; that on June 14, 1885, this defendant was placed in possession of the premises by the sheriff, and has ever since remained in possession, and erected a valuable building thereon. For further answer, the defendant alleged that he was in actual, open, exclusive, and notorious possession of the premises, claiming in good faith to own the same for many years before any action was taken by the city and county of San Francisco, or the state of California, in the matter of laying out, opening, or dedicating the land in controversy as a public street. At the trial, among other matters, the defendant introduced in evidence the judgment roll in the action of A. B. Smith v. The City and County of San Francisco, commenced September 12, 1877, and the writ of restitution under which the defendant was placed in possession, as alleged in his answer. As one of its findings of fact, the court found that the allegations of the defendant's answer, as to the matters therein set forth with reference to the action brought by Smith (the defendant here) against the city and county of San Francisco, were true, but held that the people of the state were not a party to said action, and that consequently the judgment therein rendered was no bar to this action, and thereupon ordered judgment for plaintiff. This identical question was involved in the recent case of People v. Holladay, 29 Pac. Rep. 54, (No. 13,676, filed February 4, 1892,) and there decided contrary to the views held by the trial court in this case. The judgment being a complete bar to the cause of action, it becomes unnecessary to examine other assignments relied upon. Upon the authority of People v. Holladay, supra, the judgment and order are reversed, and the cause remanded, with directions to enter judgment for the defendant.

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[1] Order modified on rehearing. 29 Pac. Rep. 247.

We concur: BEATTY, C. J.; DE HAVEN, J.; MCFARLAND J.; SHARPSTEIN, J.

HARRISON, J., being disqualified, did not participate in the foregoing opinion.

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93 Cal. 395

ROLLINS v. WRIGHT. (No. 13,787.)

(*Supreme Court of California*. Feb. 16, 1892.)

TAX-DEEDS—NOTICE OF APPLICATION—EVIDENCE—QUIETING TITLE.

1. In an action to quiet title to lands claimed by plaintiff under tax collector's deeds, where the evidence shows that the tax collector presented the certificates of the sales to the county recorder for filing, and that the recorder received them, but did not mark them "Filed" because no fees were paid him, the certificates must be deemed to have been filed, as such filing is a public duty, for which no fees are provided.

2. Pol. Code, § 3785, as amended in March 1885, so as to require notice of an application for a tax-deed, does not apply where the right to a tax-deed had become absolute before the passage of the amendment.

3. In an action to quiet title to land claimed by plaintiff under a tax collector's deed, plaintiff need not show title in the person to whom the land was assessed before the tax-sale, as under Pol. Code, § 3786, the deed is *prima facie* evidence of the validity of the assessment.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by William Rollins against John A. Wright to quiet title. From a judgment for plaintiff, and from an order refusing a new trial, defendant appeals. Affirmed.

John A. Wright and *Arthur Rodgers*, for appellant. *William Leviston*, for respondent.

TEMPLE, C. Appeal from judgment and order refusing new trial. This action is to quiet title to lots in San Francisco. Plaintiff claims under tax collector's deeds, and all the questions in the case are as to the validity of such deeds. There are four tax-deeds,—three based on sales made in 1882 for the assessments made in 1881, for the fiscal year ending June 30, 1882, to A. F. Hinchman; the fourth on a sale made in 1880, for an assessment for the fiscal year ending June 30, 1880. The deeds were read in evidence, against defendant's objections, which were as follows, so far as urged on this appeal: *First.* The certificates of sale were not filed in the office of the county recorder. *Second.* No notice of the application for the deeds, under section 3785 of the Political Code, was given. *Third.* The assessment and sale were not for any fiscal year. *Fourth.* No title or claim of title was shown in A. F. Hinchman, to whom the property was assessed. And it is further claimed here, although such points were not made in the court below, (1) that defendant is a purchaser for value without notice; and (2) the sale was under a local statute which violated section 25, art. 4, of the constitution, and is therefore void. The respondent contends that the tax-deeds are conclusive upon all these points. Section 3786 of the Political Code provides that the deed shall recite, and that the recitals shall be primary (*prima facie*) evidence of their truth, eight enumerated facts: (1) The assessment; (2) equalization; (3) tax-levy; (4) non-payment of tax; (5) the property was regularly sold; (6) has not been redeemed; (7) grantor was proper officer to execute deed; and (8) when sold to pay tax on personalty, that owner of the property was liable for the tax. The next section makes the deed "conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed." The first of the above sections has the effect, as to matters required to be recited in the deed, to shift the burden of proof, but leaves the owner of the property free to establish by proof that such facts do not exist. As to other matters the deed is made conclusive. We see no valid objection to these provisions. If the property owner held property which was liable to taxation, which had been properly assessed, for a tax duly levied, which had not been paid, but allowed to become delinquent, and the property had been sold as required by law and not redeemed, there is no hardship in providing that he shall not take advantage of mere irregularities, which did not affect his substantial rights, to avoid the effect of his delinquency. The matters which he is expressly authorized to dispute enable him to raise every point essential to a just defense. Justice does not require that he should be entitled to interpose pure technicalities. These stringent provisions were made to enable the state to collect its revenues, and property owners owe the duty to the government to pay taxes when due, and are not deprived of any substantial rights when they are limited in their defense to such matters as show that they do not justly owe the tax. We cannot do better than to adopt the language of the supreme court of the United States in De Treville v. Smalls, 98 U. S. 525, upon a similar point: "Besides, all possible attack upon the *prima facies* of the certificate was limited by the express provisions of the act, which enacted, as before stated, that it should only be affected as evidence of the regularity and validity of sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed. This left to the owner of lands subject to the tax every substantial right. It was his duty to pay the tax when it was due. His land was charged with it by the act of congress, not by the commissioners; and the proceeding ending in a sale was simply a mode of compelling the discharge of his duty. All his substantial rights were assured to him by the permission to show that he owed no tax, that his land was not taxable, that he had paid what was due, or that he had redeemed his land after sale. He was thus permitted to assert everything of substance,—everything except mere irregularities. We do not feel at liberty to disregard the plain intention of the acts of congress. We are not unmindful of the numerous decisions of state courts which have construed away the plain meaning of statutes providing for the collection of taxes, disregarding the spirit and often the letter of the enactments, until of late years the astuteness of judicial refinement had rendered almost inoperative all legislative provisions for the sale of land for taxes. The consequence was that bidders at tax-sales, if obtained at all, were mere speculators. The chances were greatly against their obtaining a title. The least error in the conduct of the sale, or in the proceedings preliminary thereto, was held to vitiate it, though the tax was clearly due and unpaid. Mr. Blackwell, in his treatise on Tax Titles, says (page 71) 'that, out of a thousand cases in court, [of tax-sales,] not twenty have been sustained.' To meet this tendency of judicial refinement very many states have of late adopted very rigid legislation. The acts of congress we are considering must have had it in view. Hence the stringent provisions they contain. They declare, in effect, that the certificate of the commissioners' sale shall be evidence of compliance with the preliminary requisites of the sale, and that this evidence shall be rebutted only by proof of one or the other of three specified things. There is no possible excuse for not enforcing such statutes according to their letter and spirit."

If this position be correct, the appellant is not in a position to make his first objection,—that the certificates were not filed by the recorder; but waiving for the time this point, and looking into the evidence, it shows that they must be held to have been properly filed, so far as that fact can affect the rights of the purchaser. It was the duty of the tax collector to present them to the recorder for filing. This he did. The recorder received them, but did not mark them "Filed," because no fees were paid him. It was a public duty for which no fees are provided. They must be deemed to have been filed. Page v. Rogers, 31 Cal. 307; section 1170, Civil Code; Donald v. Beals, 57 Cal. 399; Tregambo v. Comanche M. Co., Id. 506.

The second point—that no notice was given of the application for the deed, under section 3785 of the Political Code—the defendant is, perhaps, not precluded from making. Whether he is or not need not be decided in this case, for we think no such notice was necessary. Section 3785 was amended, so as to require notice, in March, 1885. Before that no notice was required. Long prior to this amendment the purchaser's right to a deed had become absolute. When the law was amended, the owner had no right to redeem, and the legislature could not deprive the purchaser of his absolute right. Oullahan v. Sweeny, 79 Cal. 537, 21 Pac. Rep. 960, does not hold to the contrary. On the other hand, the intimations are in favor of these views. There the time for redemption had not expired when the amendment took effect, and the court held that it did not have the effect to extend the time for redemption, and said: "It may be assumed, for the purposes of this case, that the legislature cannot make an absolute extension of the time." Even if the legislature could do that, it would fall far short of the necessities of this case. Here under the provisions of the statute the time for redemption had fully expired before the amendment, and, if it applies, its effect may be to compel one fully entitled to a deed conveying property worth many thousand dollars to accept in lieu of it a small sum. The cases upon this subject are collected by Cooley in his work on Constitutional Limitations, p. 353. They are not all in accord, but none of them go to the extent requisite to sustain the contention of appellant. The learned author says that "to extend the time for redemption is to alter the substance of the contract, as much as would be the extension of the time for payment of a promissory note." *A fortiori* would a law give a right to redeem, when, by the law under which the purchase was made, the right to the deed has become absolute.

Third, it is claimed that the assessment was not made for any fiscal year. That point seems to be the result of pure carelessness. Section 5, art. 20, of the constitution provides that "the fiscal year shall commence on the first day of July." Of course it would end with the 30th of June.

The fourth point is that no title was shown in Hinchman. No such showing was required. The deed establishes the assessment *prima facie.* If it were essential to the validity of the assessment that Hinchman should have been the owner, it was incumbent on the defense to negative the fact which had been established by *prima facie* proof. The defendant was not an innocent purchaser without notice. Reeve v. Kennedy, 43 Cal. 644. As we have seen, the certificates must be deemed to have been filed. If other parties have suffered from the failure of the recorder to do his duty, their remedy must be against him. The point that the sale was under a local law which contravened section 25, art. 4, of the constitution seems also to be an inadvertence. The law was passed before the constitution was adopted, and not amended until after the tax-sales were made. We think the judgment and order should be affirmed.

We concur: Belcher, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinon the judgment and order are affirmed.

(93 Cal. 401)

Fairchild v. Wall, Street Superintendent.
(No. 13,684.)

(*Supreme Court of California.* Feb. 16, 1892.)

Mandamus—To Street Superintendent—Awarding Contract—City Improvements.

The Oakland city charter provides that, within 10 days after the first posting and publication of an award by the city council for street work, the owners of three-fourths of the abutting lots where the work is to be done, or of the lots which are liable to be assessed for the work, or their agents, may elect to take the work, under a written contract, at the price at which the same has been awarded; and that the superintendent of streets shall, in his official capacity, make all written contracts, receive all bonds, and do all other acts that pertain to the street department. *Held*, that the superintendent of streets has final discretion in respect to the sufficiency, in number and amount, of the persons to whom the charter gives the right to do the work, and that, after he has entered into a contract with such persons, he cannot be compelled by *mandamus* to enter into a contract with one to whom the city council has awarded the work.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; E. M. Gibson, Judge.

Application of J. A. Fairchild for a writ of mandate to J. S. Wall, superintendent of streets of the city of Oakland, to enter into a contract for street work with plaintiff. From a judgment dismissing an alternative writ of mandate plaintiff appeals. Affirmed.

C. T. H. Palmer, (*J. C. Martin* and *Olney, Chickering & Thomas*, of counsel,) for appellant. *James A. Johnson* and *Parker & Eells*, for respondent.

Foote, C. This action is to obtain a writ of *mandamus* to compel the defendant to enter into a contract for street work with the plaintiff, to whom, it is claimed, a contract for street work had been awarded by the city council of the city of Oakland, to which tribunal such authority is delegated by the charter of that city. A demurrer was filed to the affidavit upon which an alternative writ of mandate was issued, which reads thus: "Now comes J. S. Wall, superintendent, etc., defendant, and makes return to the alternative *mandamus*, and demurs to the affidavit upon which the same was issued herein, upon the grounds that the same does not state facts sufficient to constitute a cause of action, or to entitle the petitioner to the relief asked for, or to any relief." The demurrer was sustained, and, the plaintiff declining to amend the affidavit, judgment of dismissal of the alternative writ of mandate, and that the order to show cause be discharged, and that the plaintiff take nothing, etc., and for costs in favor of the defendant, was duly given and made, from which this appeal is taken.

It appears from the affidavit in *mandamus* that the plaintiff claims to have been awarded a certain street contract by the Oakland city council, and that the superintendent of streets, whose duty it is to enter into such contracts by and on behalf of the city, refuses to do his duty in the premises. It is also stated in the affidavit that the reason assigned by the superintendent why he will not do so is "solely because he, in his official capacity as street superintendent, had already received from other persons, purporting to be the owners of three-fourths or more of the frontage of lots and lands liable to be assessed for said work, the said sum of $67.30, advanced by them to him for payment of said incidental expenses, and had already executed with said persons, as owners, a contract for said work, in which he had fixed the periods of time for beginning and completing the work, and had received from them a bond for said work; and therefore would not perform said acts a second time, except under mandate of a court." The part of the sections of the charter of the city of Oakland under which the authority on the part of the superintendent of streets exists to enter into a contract with owners of frontages of lots and lands upon a street where work is to be done, even after the city council has awarded a contract such as is claimed by the plaintiff to have been awarded to him by that body, reads thus: "The owners of three-fourths of the frontage of lots and lands upon the street whereon said work is to be done, or of the lots and lands which are liable to be assessed for said work, or their agents, and who shall make oath that they are such owners or agents, shall not be required to present sealed proposals or bids, but may, within ten days after the first posting and publication of said notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded." St. 1889, p. 162. "Sec. 6. The superintendent of streets is hereby authorized, in his official capacity, to make all written contracts and receive all bonds authorized by this act, and to do any other act, either express or implied, that pertains to the street department under this act," etc. St. 1885, p. 151. The affidavit for the *mandamus* does not, as we read it, declare that the affidavits mentioned in section 5 of the act of 1889, as amended, (page 162 of those acts,) were not made, nor does it declare anything material, positively, except that three-fourths of the owners, etc., "did not elect to take such work, and enter into a written contract to do the whole work at the prices at which the same had been awarded, or to file with the street superintendent any bond therefor, as required by law in case of such election." The main idea prevalent in the affidavit, and in the argument of the appellant, seems to be that the street superintendent did not contract with three-fourths of the owners of the frontage of lots and lands on the street where the work was to be done, and that such owners did not elect to do the work; that, as a matter of fact, they did not, in numbers and amount of ownership, as the statute requires, elect to do the work, or enter into a legal contract therefor with the superintendent of streets. Therefore the appellant claims the right, in this proceeding, to show this fact, and thereby to control the action of the street superintendent by *mandamus*, and force him to enter into a contract, and accept the bond of the plaintiff as the awardee of the contract from the city council.

The position of the defendant seems to be that he has already ascertained the fact that the requisite number of proper owners have elected to do the work, and that he has done his duty under the law, and entered into a contract with them, and cannot legally do as desired by the plaintiff. The rule with reference to the enforcement of the remedy sought here seems to have been announced in the case of Wood v. Strother, 76 Cal. 545, 18 Pac. Rep. 766: "If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on *mandamus*, or any other way." The matter to be determined in that case was whether the auditor of the city and county of San Francisco had the right to determine a purely legal question, as a finality; and it was held therein that he did not have such power. 76 Cal. 555, 18 Pac. Rep. 767. In the present instance we do not perceive that the street superintendent had anything to do except to be satisfied that, as a fact, the owners, or their agents, of three-fourths of the frontage on the street where work was to be done elected to do the work ordered on the street on which they fronted; and the section of the statute which gives them this right, before the awardee has any right at all to do the work, has, as we have seen, this provision: "And who shall make oath that they are such owners or agents," who shall elect to do the work. We can see no useful purpose for this clause, unless it be to enable the street superintendent to determine, as a fact, that the persons applying to elect to do the work are the persons who are entitled, under the law, to do it. It would appear that such a requirement is useless, unless it at least is intended to afford the means of ascertaining this fact; and, as an officer is presumed to do his duty, we do not see any sound reason why such a thing may not be confided to his discretion, as a finality. The street superintendent has nothing to do with the awardee of the contract until the "owners or agents" have failed to elect to do the work. All that he can do, in the first instance, is to enter into a contract with those whom the law gives the right to elect to do the street work, and before doing this he is to satisfy himself, from the affidavits required, that they are the owners or agents, sufficient in number or amount to authorize them to do the work. The discretion vested in him is confessed by the affidavit for *mandamus* to have been exercised, and we see no reason why he should be compelled by that writ to act a second time, and contrary to his former action. We think the demurrer was properly sustained, and advise that the judgment be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

93 Cal. 427

PEOPLE v. MCNULTY. (No. 20,659.)

(*Supreme Court of California.* Feb. 19, 1892.)

CRIMINAL LAW—SENTENCE—INCREASING PUNISHMENT—CONSTITUTIONAL LAW.

1. Pol. Code, § 329, providing that "the repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment, information, or punishment is expressly declared in the repealing act," is a general saving clause; and under it a person who has been convicted of an offense must be punished under the law as it existed at the time of the commission of the offense, though the clause of the act prescribing the punishment has since been repealed by an amendment which increases the punishment.

2. Act March 31, 1891, increasing the punishment for murder in the first degree, is constitutional when construed with Pol. Code, § 329, as it is thereby rendered inapplicable to past offenses, and prospective only in its operation.

HARRISON and DE HAVEN, JJ., dissenting.

28 Pac. Rep. 816, modified.

On rehearing. For former reports, see 26 Pac. Rep. 597, and 28 Pac. Rep. 816.

MCFARLAND, J. The appellant was convicted of murder in the first degree, and sentenced to suffer the penalty of death; and from the judgment and an order denying a new trial he appealed to this court. This court examined and considered all the points made on the appeal, determined that no error had been committed at the trial, and ordered the judgment affirmed. 26 Pac. Rep. 597. Afterwards, however, and before the *remittitur* went down, upon the suggestion of a difficulty caused by amendments of the law concerning the death penalty which had been enacted by the legislature after the conviction of the appellant, the judgment of affirmance was set aside, and an argument ordered as to the effect of said amendments. The amendments, if constitutional, repealed the former law upon the subject, and contained no express saving clause by which past offenses might be punished under the law as it stood at the time of their commission. But under the authority of the recent decision of the supreme court of the United States in Medley, Petitioner, 134 U. S. 160, 10 Sup. Ct. Rep. 384, the change made by said amendments in the punishment was so material as to render it as against appellant *ex post facto*, and void under the constitution of the United States; and as the amendments, if constitutional, repealed the former law, there seemed to be no means left by which the appellant could be punished. The main question, therefore, before the court on the first argument was whether the amendments were not unconstitutional *in toto*, and thus inoperative as a repeal of the former law; and a majority of the court reached the conclusion, upon the views then presented, that it was so unconstitutional, and therefore left the law as it stood before the attempted repeal. The question, however, was of such importance that a majority of the court ordered a rehearing and a reargument. The opinions of both the majority and minority of the court, on the first hearing of the question, were based upon the assumption that the amendment under review stood entirely without a saving clause, either in the amendment itself or in the general statutory law. Since the rehearing was granted, our attention has been called, for the first time, to section 329 of the Political Code, as constituting a saving clause fully covering the said amendments; and, if it does constitute such a saving clause, then the question presents an entirely different aspect. In that event the legislature could not be held as either intending the new law to apply to past offenses, or as intending to allow past offenders to escape; but, construing the new law as passed with the knowledge and in the light of the permanent saving clause existing in the general body of the law, it is clearly constitutional as to future crimes, while it leaves past offenses to be punished under the law as it was when the offenses were committed. It is quite clear that a general saving clause, if it be clothed in apt language to express the purpose, is as efficient as a special clause expressly inserted in a particular statute. This proposition is too plain to need the support of authorities; but there are authorities directly to the point. People v. Quinn, 18 Cal. 121; U. S. v. Barr, 4 Sawy. 254; Jordan v. State, 38 Ga. 585; Volmer v. State, 34 Ark. 487; Acree v. Com., 13 Bush, 353; State v. Shaffer, 21 Iowa, 486; State v. Ross, 49 Mo. 416. In the statutory law of a number of the states there is a general saving clause intended to prevent the miscarriage of justice in cases where the legislature should repeal or substantially change a penal statute, and neglect to put a special saving clause into the new enactment. Congress has enacted such a general saving clause, which is found in section 13 of the Revised Statutes; and when applying it, in U. S. v. Barr, supra, the United States district court explains the purpose and effect of such a provision as follows: "This section 13 is a salutary provision, and if it, or something like it, had always been incorporated in the statutes of the states and the United States, it would have prevented many a lame and impotent conclusion in criminal cases, in which the defendant escaped punishment because the legislature, in the hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses and liabilities already committed or incurred from the effect of express or implied repeals." The said section 13, and the saving clauses in the legislation of the various states which have enacted them, are all somewhat different from each other, and from section 329 of our Political Code; but they all have the same general purpose, viz., to prevent the mischief mentioned by the United States district court as above quoted, and the language employed in each of them should be construed in the light of that purpose. Some examples of saving clauses in other states are as follows: In Georgia the language employed is: "All crimes and offenses committed shall be prosecuted and punished under the laws in force at the time of the commission of such crime or offense, notwithstanding the repeal of such laws before such trial takes place." In Arkansas the language is: "When any criminal or penal statute shall be repealed, all offenses committed or forfeitures incurred under it while it was in force shall be punished or enforced as if it were in force, notwithstanding such repeal, unless otherwise expressly provided in the repealing statute." And in Iowa the language is: "The repeal of a statute does not revive a statute previously repealed; nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed." These examples are sufficient to show the main purpose in view, and the variety of language used to express it.

Section 329 of our Political Code is as follows: "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment, information, or punishment is expressly declared in the repealing act." Now, the impression which a first reading of this section naturally leaves upon the mind of the reader is that it is substantially the same as the saving clauses in other states to which we have alluded; and closer inspection of the language used, and full consideration of the objections made to it by appellant, only make that first impression stronger and surer. The stress of appellant's argument is upon the words "law creating a criminal offense;" and the contention is that a law repealing the punishment of an offense is not to be brought within the meaning of a law repealing a law "creating" an offense. (We do not deem it necessary to here quote in full the old and the new law upon which the question under discussion arises. It is sufficient to say that, when appellant committed the crime of which he was convicted, certain sections of the Penal Code provided for the death penalty; and that afterwards, on March 31, 1891, the legislature passed an act by which it amended and re-enacted those sections, and in the sections thus re-enacted provided for what is admitted to be a different and more severe punishment. The sections of the Penal Code which define murder were not changed. The most important sections of the Penal Code thus changed are sections 1217, 1227, and 1229, and the act changing them is to be found commencing on page 272 of the Statutes of 1891. The act contained no expression of intent to bar an indictment or information for a past offense, or the punishment thereof.) The contention of appellant rests upon the position that the description or definition of acts necessary to constitute a crime creates the crime, and that, unless the definition in a law creating a crime is repealed, there is no repeal of such law, within the meaning of the Political Code. But that position cannot be maintained. A description of acts necessary to constitute a crime does not make the commission of such acts a crime. Punishment is as necessary to constitute a crime as definition. Without either there is no crime, and the repeal of either leaves no crime. What constitutes a crime is definitely stated in section 15 of the Penal Code as follows: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: *First*, death; *second*, imprisonment; *third*, fine; *fourth*, removal from office; or, *fifth*, disqualification to hold and enjoy any office of honor, trust, or profit in this state." And so we think that a close analysis of section 329 removes all the refined distinctions by which its apparent general purpose is sought to be thwarted. The case of State v. Shaffer, supra, is very much like the case at bar. In that case section 4324 of the Criminal Law of Iowa had been amended after the commission of the crime charged against the defendant so as to merely change the punishment, and it was contended that the amendment took away the jurisdiction of the court in which he was tried. But the court, after citing section 29, which contained the general saving clause, (heretofore quoted in this opinion,) says: "The amendment to section 4324 is to be construed in connection with this section, and with such section it is equivalent to adding to such amendment, 'provided that such amendment shall not affect any penalty incurred under the section aforesaid.' This subdivision of section 29 of the revision was not presented by counsel, and hence not passed upon by the court, in the case of State v. Burdick, 9 Iowa, 402." In People v. Tisdale, 57 Cal. 104, there is some discussion of section 329 of the Political Code; but at the time of the commission of the crime there charged the defendant could have been proceeded against by indictment only, and not by information, and at the time of the decision section 329 did not contain the word "information." But the defendants were prosecuted by information under a subsequent law, and the court held that section 329 could not be applied because there was no power to inject into it the word "information;" saying: "We do not think that the respondents in this case could be held to answer for the offense with which they are charged, 'unless on presentment of a grand jury.'" This is all that was decided, and it does not touch the point involved in the case at bar. It seems clear enough that the section, at least as it then stood, could not be applied to the attempted prosecution by information of a crime which at the time of its commission could be prosecuted only by indictment; but the extent which the court discusses the question there involved shows that it must have considered section 329 as of wide-reaching influence. There are no other decisions in this state to which our attention has been called that throw further light upon the question.

It is quite clear that the act of March 31, 1891, repealed all contained in the sections amended that is not contained in the said sections as re-enacted, and thus repealed the former punishment. Indeed, counsel for appellant not only admit this proposition, but they declare it as the very basis of their contention that there is now no law by which their client can be punished. They say in their brief: "That these amendments absolutely and completely wiped out the old sections of the Penal Code there can be no question." And this is clearly so. The language of the act, as to each section, is that the section "is hereby amended so as to read as follows," and, of course, everything not put into the section as re-enacted vanished. The effect of such a re-enactment is well stated in the opinion of the court in State v. Ingersoll, 17 Wis. 634. It was there contended that a certain section 5 of chapter 35 of the Revised Statutes had not been repealed; but the court say: "We are satisfied, however, that this is a mistake, and that that section had been repealed by chapter 147, above referred to; for that chapter provides that 'section 5, chapter 35, of the Revised Statutes, entitled "Of Excise," is hereby amended so as to read as follows,' etc. Now, the conclusion is irresistible that any provision of section 5 not found in this chapter is repealed. This must be so, since the legislature says expressly that that section shall thereafter read and be to the effect following; then going on to enact a complete substitute for the former provision. In what clearer manner could the legislature indicate its intention to supersede, change, and repeal section 5 than by the one adopted? It is amended so as to read and be to the effect therein prescribed, and quite different from what it was as it formerly existed. An examination of our statutes will show that this method of superseding and changing the existing law is frequently resorted to, and it certainly leaves no room to doubt as to what the legislature intended. The legislature in effect says that such a provision of law shall be read and construed to be as therein declared, and shall have no other meaning or effect given to it. See case of State v. Andrews, 20 Tex. 230. Section 5, therefore, being superseded, changed, and repealed by chapter 147, was not in force when the trial was had in this case, and furnished no authority to the court to give judgment upon it. It can no more be said to exist for the purpose of regulating the punishment applicable to the offense here complained of than one committed since the law of 1862 went into operation." See, also, on this point, U. S. v. Barr, 4 Sawy. 254. And of course the materiality of the difference between the punishment as prescribed by the old sections, and the punishment prescribed by them as re-enacted, is admitted by appellant; for upon that materiality depends his whole contention that the reenactments are, as to him, *ex post facto*. Our conclusion is that under section 329 of the Political Code the appellant is to be punished under the law as it existed at the time of the commission of the crime of which he was convicted; and that, under this view, the said act of March 31, 1891, is constitutional, because not intended to apply to past offenses, but to be prospective only in its operation. The judgment and order appealed from are affirmed, and the superior court is directed to take further proceedings in accordance with this opinion.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; GAROUTTE, J.

We dissent: HARRISON, J.; DE HAVEN, J.

(93 Cal. 445)

PEOPLE v. SMITH. (No. 20,851.)

(*Supreme Court of California*. Feb. 20, 1892.)

HOMICIDE—OPINION EVIDENCE.

In a prosecution for murder, it appeared that defendant was himself shot during the difficulty which resulted in the homicide; and as defendant claimed to have acted in self-defense, and did not shoot until he himself was wounded, the position of defendant's arm at the time he was shot became a material question. *Held* that, as it was for the jury to determine the relative positions of the parties from the position of the wound and the course of the bullet, the admission of the opinion of an expert as to defendant's position was error. MCFARLAND and GAROUTTE, JJ., dissenting, on the ground that the error was harmless.

In bank. Appeal from superior court, Fresno county; S. A. HOLMES, Judge.

J. D. Smith was convicted of manslaughter, and appeals. Reversed.

S. J. Hinds, Frank H. Short, and *F. P. Taylor*, for appellant. *Atty. Gen. Hart*, (*W. W. Foote*, of counsel,) for the People.

DE HAVEN, J. The defendant was charged with the crime of murder, and was convicted of manslaughter. The defendant was himself shot by the deceased during the difficulty which resulted in the homicide, and it was a contested question upon the trial as to whether the defendant or the deceased fired first; the contention of the defendant being that he acted in self-defense, and did not shoot until after he himself was wounded; and in the determination of this question it became material to ascertain the position in which the defendant was at the time when he was shot. Upon the trial, Dr. Hayden, a physician and surgeon, was called as a witness on behalf of the people, and was asked: "Will you state, if you can, from your examination of this man's arm and your familiarity with gunshot wounds, if you are familiar with them, in what position, in your judgment, this man's arm was at the time that wound was received?" The question was objected to by defendant as incompetent, which objection was overruled, and the witness, in giving his opinion, stated that the defendant when shot was in one of two positions: *First*, standing with his side towards the discharged weapon, with the forearm flexed almost to a right angle to the upper arm, and the arm and elbow curved in front of and well towards the right side of the trunk, the trunk being inclined to the right of a perpendicular; or, *second*, "the arm may have been only partially flexed in the upper arm, and hanging at the side, the wounded party having his back towards the party firing the shot." But the general tenor of his testimony was to the effect that it was his opinion rather that the wound was received while the defendant was in this latter position. The court erred in the admission of this evidence. The subject-matter of the inquiry was not one in relation to which the opinion of an expert can be properly received. The position of the wound being given, and the course taken by the bullet known, the jury was fully as competent to determine the relative positions of the parties to the difficulty as was the witness. Kennedy v. People, 39 N. Y. 245; Cooper v. State, 23 Tex. 331; People v. Westlake, 62 Cal. 303. Nor can we agree with the attorney general and associate counsel for the people that the admission of this incompetent evidence was a harmless error, and therefore without prejudice to the appellant. It went to sustain the theory of the people in relation to the pivotal point in the case, and at the same time to discredit the testimony of the defendant. The defendant testified, in effect, that he did not draw his weapon, or fire, until after he had been shot by the deceased; that after firing the first time he continued to face the deceased, at the same time backing to and against the door, and while thus backing he shot at the deceased again. On the other hand, the theory of the prosecution seems to have been that the defendant fired the first shot, and then turned and ran, and while running towards the door was shot by the deceased; and, in this connection, Brown, a witness for the people, who was present and engaged in the difficulty, and was himself knocked down by the defendant, testified: "I don't know who drew his pistol first. I know that during the shooting Mr. Smith started to run, and ran fast. Question. Did he turn his back, or back out? Answer. Turned his back." If the testimony of this witness is true, then the deceased must have received his mortal wound before the defendant turned his back upon him and started to run away; and if the defendant was shot, as Dr. Hayden seemed to think more probable, while his arm was hanging down by his side, and his back turned towards the deceased, the inference would be that he was shot while running away, in the manner described by the witness Brown, and that the testimony of the defendant that he did not fire his weapon until after he was himself shot was therefore untrue. In this state of the case, we do not think it can be said with any certainty that this incompetent evidence did not have any influence upon the minds of the jurors in reaching a verdict; and for the error in admitting it the judgment must be reversed. Judgment and order reversed.

We concur: BEATTY, C. J.; HARRISON, J.; SHARPSTEIN, J.

MCFARLAND, J. I dissent. Dr. Hayden was examined as a witness in chief for the prosecution, not in rebuttal; so that whether or not that part of his testimony objected to was of any importance could not be determined before the evidence of the defendant was introduced. At the time of the homicide, defendant received a pistol wound, inflicted by the deceased; and Dr. Hayden was first properly asked about that wound,—what part of the body it was in, its size, the points of entry and exit, etc. He testified that it was on the inner side of the left forearm, a little below the elbow. Then the prosecution, with the approval of the court, and against defendant's objection, made an excursion into the doubtful domain of expert testimony. The transcript relates what occurred, as follows: "Question. Will you state, if you can, from your examination of this man's arm and your familiarity with gunshot wounds, if you are familiar with them, in what position, in your judgment, this man's arm was at the time that wound was received? Mr. Hinds. We object to that on the ground that it is incompetent. Court. Let him answer the question. Mr. Hinds. We except. Answer. It would be one of two positions, provided he was on his feet. If he was on his back or on the ground, it might be another position. If he was on his feet, I should say some such position as that, or this, way; either one. It could not be this way, because the ball would have entered his body some place, and it would have to be well over this way in order to miss the shoulder. Q. It was either the way you describe, or turning around with the arm down? A. With the arm down this way. I rather think this way, because the ball seemed to pass from rather that side towards the center. Q. Well, now, suppose that you are there and I am here, and I am going away, either running or walking fast, would you say that the ball could have entered? Mr. Hinds. The same objection goes to all these questions. Mr. Foote. Would it enter there, and come out that way, entering the same position relatively? Mr. Hinds. Same objection, ruling, and exception. Mr. Foote. Is that the fact? A. Yes, sir; very similar; very much that position. Q. What arm was it? A. The left arm." At the end of this testimony is appended a note as follows: "Note. The above witness, Dr. Hayden, in giving his testimony, illustrated the two positions testified to by him, viz.: *First*. With the forearm flexed almost to a right angle to the upper arm, and the elbow carried in front of and well towards the right side of the trunk, the trunk being inclined on its perpendicular axis to the right also, so the ball on its exit would not enter the trunk or the right upper extremity; that is, the wounded man should stand with his side towards the discharged weapon. *Second*. Or the arm may have been only partially flexed in upper arm, and hanging at the side; the wounded party having his back towards the party firing the shot." I do not deem it necessary to determine definitely whether or not this ruling of the court was, in the abstract, erroneous, because it is apparent that the appellant was not injured or prejudiced by it. As before stated, the defendant was himself wounded at the time of the homicide. The deceased fired at defendant either before or after the shot by which defendant killed the deceased. The theory of defendant, and his subsequent testimony when on the witness stand, was that the deceased fired first, and that defendant then killed him in self-defense. Now, if, when defendant testified, it had appeared that his testimony was in conflict with the former testimony of Dr. Hayden,—that is, if the deceased could not have fired first, and hit defendant in a position in which Dr. Hayden thought he must have been,—then appellant might have been prejudiced by the testimony of Dr. Hayden, which is claimed to have been erroneously admitted. But there was no such conflict. Appellant's theory and testimony were entirely consistent with the said testimony of Dr. Hayden. If appellant had contended or testified that he was facing deceased when the latter fired, some importance might have attached to Hayden's testimony. But there was no such testimony. The appellant, when on the witness stand, first described the difficulty between the deceased and himself over a game of cards, and some blows between them, and after speaking of a man, naming Brown, who was present, said as follows: "As I came out I expected to find him in front of me, but I didn't. I turned around as I came out, and kind of looked to see where he was. He was at my left." Further on he says: "I shoved Brown back that way, and, as I looked around again, Williams had his gun down on me, —throwed his gun down on me,—and shot. Just before he shot, as he was about to shoot, I turned and jumped sideways, and started to get my gun out, and he shot." And again he says: "I felt the shot strike my arm,—felt my arm kind of drop,—and I was getting my gun out at the same time. I got my gun out just as quick as I could, and turned, and shot at him." Now, there is nothing in these statements—and there was no different testimony—that is not entirely consistent with the testimony of Dr. Hayden. There was nothing in Hayden's testimony which could have prevented the jury from believing the story of the appellant, or which could have influenced them in any manner, when weighing appellant's testimony. I am satisfied, therefore, that the testimony objected to could have had no influence upon the conclusion of the jury.

GAROUTTE, J. I dissent. While the authorities cited by Mr. Justice DE HAVEN beyond question determine that the testimony of Dr. Hayden was incompetent, still I am unable to see how the defendant was prejudiced thereby. The theory of the prosecution at the trial was that the defendant had his back turned towards the deceased at the time he received the wound in the arm. The theory of the defense was that the defendant was standing with his side to the deceased, and his left arm raised to a certain angle at the time he received the wound. The doctor, as an expert, testified that the defendant could have been in either one of those two positions at the time he received the wound; consequently, I do not perceive how the defendant was prejudiced by the admission of the testimony.

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93 Cal. 465

City and County of San Francisco v. Pennie. (No. 12,923.)

(*Supreme Court of California.* Feb. 22, 1892.)

Assessment Book — Contents — Sufficiency of Entry — Record — Administrator — Liability for Taxes.

1. Pol. Code, § 3650, provides that "the assessor must prepare an assessment book, with appropriate headings, * * * in which must be listed all property within the county, and in which must be specified, in separate columns, under the appropriate head," among other things, "all personal property, showing the number, kind, amount, and quality; but a failure to enumerate in detail such personal property does not invalidate the assessment." *Held*, that the word "enumerate" applied to each of the specifications previously named, and that the legislature intended that no assessment should be invalidated because the number, kind, amount, or quality of the personal property was not specified.

2. An entry in an assessment book as follows: "C., administrator of the estate of S., deceased, per. prop., as per inventory on file in the superior court, dep't No. 9,"—with the valuation of the property, and the amount of taxes thereon, is a sufficiently definite description of the property assessed; Pol. Code, § 3642, providing that the undistributed property of decedents may be assessed to administrators, etc., and section 3639 providing that, "where a person is assessed * * * as an administrator, his representative designation must be added to his name.

3. In a suit to enforce the collection of such taxes, the court found that there was no inventory on file in the superior court on the first Monday of March of the year such assessment was made, but did not find that it was not on file on a subsequent day, nor was this alleged by the answer. *Held*, that the record did not show that the inventory was not on file when the assessment was made, as, under Pol. Code, § 3628, providing that an "assessor must, between the first Mondays of March and July in each year, ascertain * * * all property in his county subject to taxation, * * * and must assess such property to the person by whom it was owned or claimed, or in whose possession or control it was, at 12 m. of the first Monday of March next preceding," the assessor had until the first Monday in July to make the assessment.

4. The liability of an administrator for the taxes on his decedent's estate is official, and not personal, and, on his discharge, such liability is assumed by his successor.

In bank. Appeal from superior court, city and county of San Francisco: T. K. Wilson, Judge.

Action by the city and county of San Francisco against Pennie, administrator. Judgment for defendant. Plaintiff appeals. Reversed.

W. A. S. Nicholson, (*W. H. Bodfish*, of counsel,) for appellant. *Garber, Boalt & Bishop*, (*W. H. Cook* and *Mr. Wheeler*, of counsel,) for respondent.

Harrison, J. Action to recover the amount of certain taxes on personal property of the estate of Cynthia Hoff Shillaber, deceased, for the fiscal year ending June 30, 1886, originally commenced against Carroll Cook, as executor of the last will and testament of said deceased, and, the present defendant having succeeded Cook in the administration of said estate, continued in his name. The complaint alleges that the defendant is indebted to the plaintiff in certain amounts, specifying them, for taxes, "which said taxes were duly assessed and levied upon personal property in the possession or under the control of said defendant, as special administrator aforesaid, heretofore mentioned herein, to-wit, personal property, as per inventory on file in superior court, department No. 9,—personal property, $100,000, for the fiscal year ending June 30, 1886,—all of which said property was in the possession of or under the control of said Carroll Cook, as such special administrator of said estate, at 12 o'clock m. on the first Monday in March, 1885." The complaint was not demurred to, but in his answer the defendant denies any indebtedness for taxes, and denies that any taxes had been at all levied or assessed upon personal property in the possession or under the control of said special administrator for the fiscal year ending June 30, 1886, and alleges affirmatively "that there was an attempt made by plaintiff to assess the personal property belonging to said estate for taxes for the fiscal year ending June 30, 1886, and that said attempted assessment was in the words and figures as follows, to-wit: 'Personal property, as per inventory on file in superior court, department No. 9,—personal property, $100,000,'—as set forth in the complaint on file herein;" and denies that there was any inventory on file in said superior court, in the matter of said estate, on the first Monday in March, 1885. At the trial counsel for the plaintiff read from the complaint the foregoing averment of the assessment, which was admitted by the defendant to be a correct copy of the assessment, and it was also admitted by the defendant that the amount claimed to be due was correct. It was also admitted that, on the first Monday of March, 1885, there was no inventory of the estate on file in the superior court. No other evidence was introduced at the trial. The court found in accordance with the foregoing averments and admissions, and made its conclusion of law that, from said facts, the assessment was invalid, and plaintiff not entitled to recover anything thereon. Judgment accordingly was rendered for the defendant, from which, and from an order denying a new trial, the plaintiff has appealed.

The objection presented by the respondent to the constitutionality of the act of April 23, 1880, does not arise in the case. The sufficiency of the complaint was not objected to by demurrer, and it is too late after trial and decision for a defendant to make objections to a complaint that should have been specially raised by demurrer. While the entire absence of an averment which is essential to a cause of action is at any time available to the defendant, yet the defective allegation of a cause of action is cured by the verdict. Hence it is unnecessary to consider the power of the legislature to prescribe a special form of complaint for this class of actions. Neither does the sufficiency of the proof of authenticity of the assessment arise. The averment of the fact was not only not denied in the answer, but the defendant set out, in terms, the exact form in which the assessment had been made, and at the trial it was admitted that the averment in the complaint was a correct copy of the assessment. The only question which was contested at the trial, and the only one which it is necessary to consider on this appeal, is whether the description of the property assessed, viz., "Personal property, as per inventory on file in the superior court, department No. 9,—personal property, $100,000,"—is a sufficient compliance with he trequirements of the statute to form the basis of an assessment for the taxes sued for. Section 3650 of the Political Code provides: "The assessor must prepare an assessment book, with appropriate headings alphabetically arranged, * * * in which must be listed all property within the county, and in which must be specified in separate columns, under the appropriate head: * * * (4) All personal property, showing the number, kind, amount, and quality; but a failure to enumerate in detail such personal property does not invalidate the assessment. * * * (10) The cash value of all personal property exclusive of money." We are asked by the respondent to hold that the word "enumerate," found in the latter clause of subdivision 4, means merely to "number," and to construe that subdivision so that it will read: "All personal property, showing the number, kind, amount, and quality; but a failure to number in detail such personal property does not invalidate the assessment." It would be giving too narrow a construction to the word "enumerate" in this section to hold that it means simply "number." The word "number" had been already named as one of the specifications of the property to be shown in the assessment; and if it had been the intention of the legislature that this was the only specification which might be omitted without invalidating the assessment, we think it would have been so stated in explicit terms. The word "enumerate" is very frequently used with the meaning of "designate," or "specifically mention." Lexicographers give as definitions of the word, "to mention in detail," or "reckon up singly;" "to tell;" "to recount;" "to relate." It must be held that this word applies to each of the specifications previously named in the clause, and that the legislature intended that the assessment should not be invalidated if neither the number, kind, amount, or quality of the personal property should be specifically mentioned. This construction is supported by the provisions of section 3885 of the Political Code, which provides that "no assessment or act relating to assessment or collection of taxes is illegal on account of informality." This section was under construction by this court in San Francisco v. Flood, 64 Cal. 504, 2 Pac. Rep. 264, in which the only description of the property assessed was "mining stock." That term did not show either the number, amount, or quality,—only its kind,—but the court held that it was sufficient. The court must have determined that it was not essential to enumerate the property in detail, *i. e.*, to specify with precision its amount, quality, or number. This construction of the statute in sustaining the assessment is also supported by the authority of People v. Sneath, 28 Cal. 612. It is true that the statute under which the assessment in that case was made did not contain the provisions that are contained in section 3650 of the Political Code; but, if we give to that section of the Political Code the construction above mentioned, and which appears to have been given to it in San Francisco v. Flood, it gives to the section a reading similar to that of the statute under which the assessment in People v. Sneath was made. It is not necessary that the assessment should contain a specific and exact description of the property assessed, as would be necessary in an action to recover the same property. The object of requiring any description of the property is that the tax-payer may know for what property he is assessed; and whatever is sufficient to identify that property with reasonable certainty is a sufficient compliance with the statute. As was said in San Francisco v. Flood, supra: "If the description of the property assessed in the assessment is certain enough to inform the tax-payer for what he is to be taxed, it is sufficiently certain." The description in that case was "mining stock;" but, in view of the fact that there are many species of mining stock, it can hardly be said that that term gave any greater description of the property assessed than the one in the case under consideration. People v. Insurance Co., 29 Cal. 549; People v. McCreery, 34 Cal. 441; Monroe v. Town of New Canaan, 43 Conn. 309; Lewis v. Town of Eastford, 44 Conn. 477; Town of Hartford v. Champion, 54 Conn. 436, 7 Atl. Rep. 721. In the case last cited the description of the property in the assessment was, "All taxable property not specifically mentioned, $25,000," and the assessment was upheld.

For the purpose of determining whether this description was sufficient to identify the property, and to give sufficient information to the tax-payer of the property for which he was assessed, the court was at liberty to examine the surroundings connected with the assessment. Mrs. Shillaber died February 18, 1885, and the original defendant was appointed special administrator for her estate February 25, 1885. The assessment is of the property belonging to her estate on the first Monday of March of that year. Section 3642 of the Political Code provides that "the undistributed property of deceased persons may be assessed to the heirs, guardians, executors, or administrators;" and section 3639 provides that, "when a person is assessed as * * * administrator, his representative designation must be added to his name, and the assessment entered on a separate line from his individual assessment." The assessment in the present case was made to Carroll Cook, as the administrator of Mrs. Shillaber's estate. Whether he was special administrator or general administrator was immaterial. It was an assessment to him of only the property of the decedent whose estate he represented, and not of any of his individual property. This fact of itself eliminated all uncertainty as to whose property was intended by the assessment. The "description of the personal" property assessed to him as her representative was also made still more definite by adding the words, "As per inventory on file in the superior court, department No. 9." Assuming that there was an inventory of the personal property of the estate of Mrs. Shillaber on file in the superior court, department No. 9, at the time the assessment was made, the administrator would thus be fully informed of the property for which the estate was to be taxed. That inventory must have been prepared by himself, and its contents were, consequently, within his knowledge. It is not essential that the assessment book shall in itself contain a complete description of the personal property to be assessed. It is sufficient if it clearly refer to any public record or document in which the details of the description may be found. The usual manner in which mortgages are assessed is by a reference to the volume and page in which they are recorded in the office of the county recorder. The record does not disclose whether the administrator furnished this description to the assessor, or whether it was prepared by the assessor himself. It would appear from the plaintiff's specifications of error that the administrator did not give it, and that it was made by the assessor. The assignments of error are, however, merely the statements of the party, and not a portion of the record of the proceedings before the court, and we cannot look to them for the facts in the case. The sufficiency of the description, however, would not be affected by either of these conditions. If a description was absolutely uncertain, or if it were such that it did not give any information of the property assessed, it could not be sustained merely upon the ground that the assessor has made as good a one as he was able; while, on the other hand, if the description was merely defective in detail, but sufficiently explicit as not to mislead the tax-payer, he ought not to be heard to complain. As was also said in San Francisco v. Flood, supra: "If the description was taken from a list furnished by the defendant, or some one on his behalf, and by his authority, he ought not to be heard to complain of the insufficiency of the description. If made by the assessor without the aid of such list, the assessor has given a description as certain as could be reasonably required of him, and, under such circumstances, the defendant's objection to the assessment should not be regarded."

It is further contended by the respondent that there was no inventory of the estate of Mrs. Shillaber on file in the superior court, and that, consequently, the reference to it in the assessment was false, and must be disregarded in determining the sufficiency of the description. It does not, however, appear from the record that there was no inventory of her estate on file at the time the assessment was made. It is found by the court, in accordance with the averment in the answer, that "there was no inventory of the personal or real property of said estate of Cynthia Hoff Shillaber on file in the superior court of San Francisco, or any county, or city and county, on said day of March, 1885." The assessment, however, does not purport to state that it is of property of which there was an inventory on file on the first Monday of March. It was not essential to its sufficiency that the inventory should have been on file on that day. The assessor is not required to make his assessment on that day. Section 3628 of the Political Code provides that "the assessor must, between the first Mondays of March and July in each year, ascertain * * * all property in his county subject to taxation, * * * and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at 12 o'clock M. of the first Monday of March next preceding;" and section 3652 of the same Code provides that he must complete his assessment book on or before the first Monday in July in each year. In the city and county of San Francisco the assessor must complete the assessment of personal property on or before the first Monday of June in each year. St. 1874, p. 477. The value of the property is to be affixed as of the first Monday of March, but a subsequent ascertainment by the assessor that such property was, on that day, under the control of the individual assessed, is within the provisions of the statute, and in the present case it is not disputed that such was the fact. The complaint alleges that all the property "was in the possession of or under the control of said Carroll Cook, as such special administrator of said estate, at 12 o'clock M. on the first Monday in March, 1885." The answer does not deny this allegation, but merely denies that "Cook, as such special administrator, had under his control or in his possession at 12 o'clock M., or at any other hour, on the first Monday in March, 1885, personal property of the value of $100,000." This was merely a denial of the value of the property, but it was not competent for the court to investigate its value in this proceeding. That had been determined by the assessor when he fixed the value to it in the assessment book; and if the defendant did not make any application to the board of equalization for a reduction of that valuation, he was bound thereby, and could not question its correctness in an action brought against him to recover the tax. It may be assumed, in this case, that the assessor made the assessment at any time after the first Monday of March, and before the first Monday of June; and we are not at liberty to assume that, at the time it was made, there was not on file in the superior court an inventory of the personal property belonging to the estate of Mrs. Shillaber. It is neither alleged in the answer, nor found by the court, that the inventory was not on file at some time prior to the first Monday of June; and the denial in the answer "that there was any inventory on file in said superior court, or any court, in the matter of said estate, at 12 o'clock M. on the first Monday in March, 1885, or at any hour on said date," is equivalent to an admission that it was on file at any subsequent day. The finding of the court "that said tax was assessed as of the date of 12 M. on the first Monday of March, 1885," was not within any issue presented to it for trial, and may be disregarded. It may be observed, however, that it is the property which is by law assessed, and not the tax. The tax is levied upon the property after the assessment has been made. Even if we consider that the court intended by this to find that the property was assessed as of the date of the first Monday of March, 1885, it is not a finding of the date when the assessment was actually made. If, however, by these words is meant that the value placed upon the property was that which it bore on the first Monday of March, it is only a finding of what the law would have implied, and was not a fact in the case. The statement in the findings that there was an "attempted" assessment for personal property taxes may be disregarded. The fact which was found by the court is that there was made and entered on the assessment book of the city and county of San Francisco the following words and figures, to-wit: "Cook, Carroll, administrator of the estate of Cynthia Hoff Shillaber, deceased, per. prop., as per inventory on file, superior court, dep't 9," with the valuation of said property and the amount of taxes thereon. This was a finding of a sufficient assessment; and upon the finding that such an assessment had been made, with the admission of the defendant that the amount of the taxes levied thereon was correct, the court should have rendered judgment for the plaintiff.

The objection that the action should have been brought against Cook as special administrator, and not as executor, is untenable. The cause of action is for taxes due from the estate of Mrs. Shillaber, (Pol. Code, § 3642,) and is properly brought against the custodian of that estate. No order or decree for the distribution of the property can be made until they have been paid. Pol. Code § 3752. The liability of the administrator therefore is official, and not personal, and, upon his resignation or discharge, such liability is assumed by his successor in the same manner as is any other obligation of the estate. We do not mean to be understood as holding that a defendant in a suit against him to collect a tax cannot show any facts that will defeat the regularity or sufficiency of the assessment. Our decision is based upon the proposition that the plaintiff, upon showing from the assessment book an assessment which, on its face, purports to be sufficient, has, in the absence of any evidence to controvert it, established its right to recover. If the defendant would overcome the effect of this evidence, it was incumbent upon him, as an affirmative proposition, to introduce evidence therefor. No such evidence having been introduced by him, the court should have rendered its judgment in favor of the plaintiff. The judgment and order of the court below are reversed, and that court is directed, upon the facts heretofore found by it, to enter judgment in favor of the plaintiff, as prayed in the complaint.

We concur: SHARPSTEIN, J.; DE HAVEN, J.; MCFARLAND, J.; GAROUTTE, J.; PATERSON, J.

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93 Cal. 500

WHELAN v. BOYD *et al.* (No. 13,716.)

(*Supreme Court of California.* Feb. 26, 1892.)

DEDICATION OF HIGHWAY—EVIDENCE.

The fact that on the "Engineer's Map," and on "Humphrey's Map of the City and County of San Francisco," a certain street is laid down as a "public street," is not conclusive of the character of such street; it being determinable from proof as to whether such street was offered for dedication as a "public street," and accepted by user or otherwise as such.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action by John A. Whelan against Alexander Boyd and others. Judgment for defendants. Plaintiff appeals. Reversed.

Hutchinson & Campbell, for appellant. *Pillsbury, Blanding & Hayne*, for respondents.

FOOTE, C. This action was to enjoin the excavation of what is claimed to be a private street or alley-way. The only question at issue seems to be whether the land involved was or was not a public street. Findings were waived. The court below held, in effect, that it was conclusively proved to be a public street, because it was laid down as such upon what is called the "Engineer's Map" and "Humphrey's Map of the City and County of San Francisco," and on that account would not allow the plaintiff to introduce proffered testimony upon the point that there had been no dedication by the owner of the land to the public use, and no user thereof by the public as a street. The land here involved came direct to the original owner under an alcalde grant, and as private property. His grantee through mesne conveyances chose to make the land now in controversy a way for the common benefit of certain owners of lots who had purchased the same from him. Whether it also became a public street did not depend upon the fact alone that the land appears on these maps as a public street, but whether the proof showed that it had been offered for dedication, and accepted as such by user or otherwise. Upon these points the evidence offered was admissible, and it was prejudicial error to exclude it. The judgment and order should be reversed, and we so advise.

We concur: TEMPLE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

93 Cal. 393

BYRNES *et al.* v. MOORE. (No. 13,861.)

(*Supreme Court of California.* Feb. 16, 1892.)

Commissioners' decision. Department 1. Appeal from superior court, Lake county; R. J. HUDSON, Judge.

Action by John W. Byrnes, J. B. Robinson, and Charles Stubbs against Gawn Moore to recover the possession of personal property. From a judgment for defendant, and from an order denying a new trial, plaintiffs appeal. Reversed.

R. W. Crump and *Ira C. Jenks*, for appellants. *T. B. Bond*, for respondent.

FOOTE, C. This action of claim and delivery was brought against a sheriff, who had levied upon certain personal property under a writ of attachment, at the suit of certain parties who were the creditors of the seller of the property to the plaintiffs. The court below granted a nonsuit, apparently upon the ground that the debtor of the attachment creditors had not made a sale of the property to the plaintiffs which would satisfy the provisions of section 3340 of the Civil Code, because the transfer of the property was not accompanied by an immediate delivery and followed by an actual and continued change of possession. Every case of the kind here involved has its own peculiar features, and must be determined on the particular facts which surround the given transaction or transfer. Carefully examining all the evidence in this case, we are of opinion that it was of such a character as not to render it clear, as matter of law, that no evidence existed tending to show a transfer which would be good under the statute. Therefore, as it seems to us, the question was one of fact, which should have been permitted to go to the jury for determination. We therefore advise that the judgment and order denying a new trial be reversed.

I concur. VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed.

(93 Cal. 580)

People v. Mesa. (No. 20,878.)

(*Supreme Court of California*. March 11, 1892.)

Assault with Intent to Rape—Evidence—New Trial.

1. Pen. Code, § 959, provides that an information is sufficient if the act charged as the offense is clearly set forth in ordinary language, with such certainty as to enable the court to pronounce judgment. Section 960 provides that no information is insufficient by reason of a defect which does not tend to prejudice the rights of defendant on the merits. Section 1404 provides that a departure from the forms prescribed by the Code in respect to pleadings shall not render an information invalid where it does not affect the substantial rights of defendant. *Held*, that an information which charged that defendant "did assault W., a female child under 14 years of age, with intent to commit rape," etc., sufficiently charged the intent to commit rape on W.

2. On a trial for assault with intent to rape, where complainant, a girl 13 years of age, testified to facts which, if true, proved the crime, and her testimony was corroborated in many respects by other witnesses, a conviction will not be disturbed.

3. The denial of an application for a new trial on the ground of newly-discovered evidence will not be reversed where such evidence was merely cumulative, and in every material point contradicted by counter-affidavits.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; F. T. Williams, Judge.

Juan Mesa was convicted of an assault with intent to commit rape, and appeals. Affirmed.

Blackstock & Shepherd, for appellant. *Atty. Gen. Hart*, for the People.

Belcher, C. The defendant was found guilty of an assault with intent to commit rape, and sentenced to be imprisoned in the state-prison for the term of 10 years. He moved for a new trial, which was denied, and has appealed from the judgment and order. The first ground urged for a reversal is that the information was wholly insufficient to support the verdict and judgment, because it did not state the name of any person upon whom the rape was intended to be committed. The part of the information objected to is as follows: "The said Juan Mesa * * * did unlawfully, feloniously, with force and violence, assault Alice Westfall, a female child under fourteen years of age, with intent to commit rape, and without her consent and against her will." The Penal Code has the following provisions: "Sec. 220. Every person who assaults another with intent to commit rape * * * is punishable by imprisonment in the state-prison not less than one nor more than fourteen years." "Sec. 959. The indictment or information is sufficient, if it can be understood therefrom * * * (6) that the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended; (7) that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case. Sec. 960. No indictment or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." "Sec. 1404. Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." The information is substantially in the language of the statute defining the offense, and there was no demurrer to it. It was evidently intended to charge thereby that the defendant made an assault on Alice Westfall with intent to commit rape upon her; and, if the words "with intent to commit rape" had immediately preceded her name, there can be no question that the charge would have been sufficient.

People v. Swenson, 49 Cal. 388. Does the transposition make any difference? Can it be said that, while the defendant made the assault on Alice Westfall, he may have intended to commit the rape upon some one else, and therefore that the charge, so far as it relates to her, must be treated as one of simple assault? To so hold would be saying, in effect, that though a criminal act be set forth in an information in ordinary language, and in such a manner as to enable a person of common understanding to know what is intended, still, if there be a defect or imperfection in mere matter of form, though in no way prejudicial to any substantial right of the defendant, it may be availed of by him as good ground for having the information declared insufficient and set aside. But this would be in direct violation of the plain provisions of the Code above quoted, and the rule is that all the provisions of the Code are to be construed according to the fair import of its terms, with a view to effect its objects and to promote justice. Section 4, Pen. Code. In our opinion, therefore, the information here should be held sufficient.

It is next claimed that the evidence was insufficient to justify the verdict. The prosecutrix was a girl 13 years of age, and, if her testimony was true, the defendant was evidently guilty as charged. It is said that an inspection of the record will show that she was not a credible witness; but we are unable to find anything to warrant this conclusion. In a case like this, a conviction may be had upon the uncorroborated testimony of the prosecutrix. People v. Mayes, 66 Cal. 597, 6 Pac. Rep. 691; People v. Stewart, 90 Cal. 212, 27 Pac. Rep. 200. But here her testimony was corroborated in many respects by other witnesses. Whether the defendant was guilty or not was therefore a question for the jury to pass upon, and it cannot be said in this court that the verdict was not justified.

Objections are made to some of the instructions given by the court to the jury, but they are upon the theory that the information did not charge the crime of an assault with intent to commit rape, and that the instructions were therefore erroneous. This theory of appellant cannot, as we have seen, be maintained, and hence the objections are not well taken. The instructions as a whole seem to state the law of the case fully, fairly, and correctly.

One of the grounds on which a new trial was asked was that of newly-discovered evidence. At the hearing of the motion the defendant read several affidavits to show that, if a new trial were granted, he could prove by the affiants that the testimony on part of the prosecution, as to the time and place the assault was claimed to have been committed, could not have been true, and that his own testimony as to the matter was true. The alleged newly-discovered evidence was merely cumulative, and the authorities are numerous in this state that such evidence does not constitute good ground for granting a new trial. Besides, every material fact was contradicted by counter-affidavits. The motion was addressed to the discretion of the court below, and we cannot say that it abused its discretion in denying it. In our opinion the judgment and order should be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

93 Cal. 462

BAUM v. REAY. (No. 14,028.)[1]

(*Supreme Court of California.* Feb. 6, 1892.)

EJECTMENT—EVIDENCE OF POSSESSION—REFRESHING MEMORY OF WITNESSES.

1. Code Civil Proc. § 318, provides that no action for the recovery of real property can be maintained unless plaintiff, his ancestor or grantor, was seised or possessed of the property within 5 years before suit. In ejectment for an unimproved lot, the evidence showed that plaintiff and his grantors had held the legal title to the same for more than 10 years prior to the action, maintaining the fence inclosing it, and paying the taxes. *Held*, that the evidence was sufficient to support a verdict for plaintiff.

2. A witness may be permitted to refresh his memory from a writing or memorandum made by himself at the occurrence of the facts to which it relates, but the memorandum is not competent evidence to prove the facts stated in itself.

3. In ejectment, evidence that plaintiff and his grantor paid the taxes on the land in suit is admissible to show the claim of title, and that it had not been abandoned.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. FINN, Judge.

Ejectment by Julius Baum against Joseph W. Reay. Plaintiff had judgment, and defendant appeals. Affirmed.

This action was brought in 1877 to recover a 50-vara lot in the south-east corner of Van Ness avenue and Turk street, in the city of San Francisco. Plaintiff claims that one Jacob C. Beideman, who died prior to 1867, was in his life-time in possession of the whole of said lot sued for, and that by mesne conveyances he has succeeded to the title of said Beideman. The defendant denies that Beideman was ever in possession of that portion of the premises sued for. Plaintiff's deraignment of title from Beideman is as follows: Deed from Brumagin, administrator of the estate of Beideman, to Hess, dated March 13, 1868; deed from Hess to Muhlendorf, dated March 31, 1868; deed from Simon, executor of the will of Muhlendorf, to the plaintiff, dated August 12, 1874. Plaintiff produced as a witness J. W. Brumagin, who testified as follows: "I was administrator of the Beideman estate. I qualified as special administrator on the 16th of March, 1866. I qualified as general administrator with the will annexed on the 30th of April of the same year, 1866, and continued such administrator until the estate was closed. I know the lot in controversy on the corner of Van Ness avenue and Turk street. I had some connection with that lot as administrator of that estate. I had possession of all the property of the estate. That lot was fenced when I had charge of the estate. I retained the men that were employed by Mr. Beideman in his life-time, and by Mr. Parker, who preceded me as the executor. Those men were in my constant employ, as they had been before in Parker's. They were retained for the purpose of keeping up the fences, and keeping possession of all the property. The fences were boards and posts,—three boards, I believe." Witness was allowed, under objection, to testify that, while he was administrator of the estate of Mr. Beideman, he paid the taxes on the lot in suit, and no one was in actual possession. Frederick Hess testified that he purchased the lot in 1867 through Mr. Brumagin, as administrator of the Beideman estate; that the lot was fenced in, but there was no cross-fence, and no one living on the lot; that he sold it to Muhlendorf in 1868. Plaintiff testified as follows: "I have lived in San Francisco since 1852. I knew Mr. Muhlendorf in his life-time. I have known the lot in question as early as 1868 or 1869,—thereabouts. I lived about four blocks from this lot. Mr. Muhlendorf showed me this lot a good many times. I noticed the condition of the lot when I visited it in company with Mr. Muhlendorf. It was a 50-vara lot, fenced in. There were no cross-fences within it. At the time I bought this lot, in 1874, it was fenced in the same manner. When I bought the lot I did not do anything within it in the way of improving it. I had the lot a couple of years before I saw the cross-fence. I was passing around there quite frequently." Plaintiff also testified that he paid the taxes on the lot. Daniel Rogers was produced as a witness on the part of defendant, and testified as follows: "I am a member of the bar. I acted as appraiser of the estate of Robert Muhlendorf, deceased." The inventory and appraisement in the estate of Robert Muhlendorf, deceased, was here shown to witness. Said inventory and appraisement was sworn to by Daniel Rogers, Bradford, and Hinchman, as appraisers, on the 13th day of August, 1873, and filed in said probate court on the 16th day of August, 1873. The witness then continued as follows: "I see by the inventory that I signed it together with the other appraisers, Mr. Bradford and Mr. Hinchman. As appraiser of that estate, I appraised the lot at the south-east corner of Turk and Van Ness avenue. I have no recollection of the condition of the lot at that time as to occupation or inclosure. I am certain of this: that at the time I had a moral conviction from inspection of the lot or information from sources. I must have seen the lot at the time, and I have seen it long before that time, and many times since. When I made this appraisement, this matter was fresh in my memory. I would not have written that there unless I had at that time a knowledge of it. I observe that is in my hand-writing. The words, 'Valued at $8,000 with a good title, but in its present condition valued at $5,000,' on the fourth page of the inventory, are in my handwriting. I will state that very often I am called to sign my name to a will, and, when called into court to prove that, I have no recollection of anything at the time except seeing my name there. I know all the facts existed at the time of my signing that, knowing my care and particularity in these matters, although I may at the time have no recollection of it." Counsel for defendant then offered in evidence said inventory and appraisement in the estate of Robert Muhlendorf, deceased. Counsel for plaintiff objected to the evidence as irrelevant and incompetent. The court sustained the objection, and counsel for defendant excepted. Defendant's counsel then offered to prove by the witness Rogers that he knew, and, when the matter was fresh in his mind, made a memorandum as to, the possession of the property in the year 1873; and defendant's counsel placed in the hands of the witness the inventory and appraisement which he stated to have been signed by him; and thereupon the court excluded the said evidence, and defendant's counsel excepted.

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[1] Rehearing granted.

J. M. Seawell, for appellant. *Jarboe & Harrison* and *J. Naphtaly*, for respondent.

Per Curiam. This is an action of ejectment to recover a lot of land situate on the south-east corner of Van Ness avenue and Turk street, in the city and county of San Francisco. The answer denies plaintiff's alleged ownership and right of possession of a certain portion of the lot described in the complaint, and sets up the statute of limitations, (sections 318,[1] 319, Code Civil Proc.) There was a general verdict in favor of the plaintiff, and a judgment was entered thereon, from which the defendant has appealed.

The basis of plaintiff's title is the prior possession of himself and his grantors. It is claimed by appellant that the evidence is insufficient to show that either the plaintiff or any of his grantors ever had the actual possession of the land. We have carefully examined the evidence in the record, and think there is sufficient evidence to support the verdict.

We do not think the court erred in excluding the inventory, or in rejecting the proffered testimony of the witness Rogers. The inventory was admissible in evidence only as memoranda to refresh the memory of the witness. It was not competent evidence to prove the facts stated in the inventory itself. The defendant was not injured by the rejection of the testimony, because the witness had already been permitted to testify to all he could have testified to, using the inventory as a memorandum.

Exceptions were taken to some of the instructions of the court to the jury; but we think, taken as a whole, they are fair and correct.

It is claimed that the court erred in charging that the plaintiff had made out a record title. It is true that the court did say that "the plaintiff has made out a record title to the land in controversy;" but later on, when attention was called by an exception to that portion of the charge, the court said: "I do not remember my exact words. I say I have decided here, as the deeds were offered in evidence, that the record title was complete from Mr. Beideman's time down to the plaintiff in this case. Whatever title Beideman had at the time of his death, the records show that the plaintiff has acquired whatever title Mr. Beideman had." This latter statement was strictly correct, and must have been understood by the jury.

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[1] Code Civil Proc. § 318, provides: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action."

We do not think the court erred in permitting the plaintiff to prove payment of taxes by Brumagin. The evidence was admissible to show the nature and character of the claim, and that it had not been abandoned. The instructions of the court on the subject of taxes were correct.

The judgment and order are affirmed.

Mr. Justice HARRISON, being disqualified, did not participate in the foregoing opinion, and Justice MCFARLAND acted in his place.

93 Cal. 493

BYERS v. LOCKE. (No. 14,616.)

(*Supreme Court of California.* Feb. 24, 1892.)

STATUTE OF FRAUDS—AGREEMENTS RELATING TO LAND.

An agreement providing that defendant should advance the necessary money, and redeem the property of plaintiff, which had been sold under a decree of foreclosure, and that, for the purpose of enabling defendant to do so, plaintiff would convey the premises to defendant, to be held by him until such time as they might be sold, is not an agreement "for the sale of real property or of an interest therein," which Civil Code, §§ 1624, 1741, declare "invalid, unless in writing."

Department 1. Appeal from supreme court, San Joaquin county; ANSEL SMITH, Judge.

Action by Byers against Locke. From a judgment entered on a verdict for plaintiff, defendant appeals. Affirmed.

W. C. Green and *A. H. Carpenter*, for appellant. *Wilkes & Rutherford*, *J. G. Swinnerton*, and *John C. Byers*, for respondent.

HARRISON, J. It is alleged in the complaint that the plaintiff, being the owner of certain real estate which had been sold under a decree of foreclosure, made an agreement with the defendant just prior to the expiration of the time for redemption from said sale that the defendant should advance the money necessary therefor and redeem the property from said sale, and, for the purpose of enabling him to do so, he would convey the premises to the defendant, and that the defendant should hold the same until such time as they might be sold, and in the mean time advance such moneys as might be necessary for the payment of taxes and assessments thereon, and that upon the sale of said premises he would, after deducting from the proceeds therefrom the moneys so advanced, with interest thereon at the rate of 12 per cent. per annum, pay the balance of said proceeds to the plaintiff; that thereupon he did, on the 10th day of July, 1888, convey the premises to the defendant, who immediately redeemed the same from the foreclosure sale, and held them until April 12, 1890, on which day, with the consent of the plaintiff, he sold them for $12,160, paying, in the mean time, certain amounts for taxes, street assessments, and other charges; that after deducting the amounts so paid, with interest thereon, from the amount received upon the sale, there remained $2,021.87, for which he asked judgment against the defendant. The defendant denied that any such agreement had been made, and alleged that at the time of the conveyance to him he had purchased from the party his equity of redemption in the premises for the sum of $150, which he then paid him, and that thereafter, until the sale by him, he had been the absolute owner thereof. The cause was tried by a jury, who rendered a verdict in favor of the plaintiff for the amount claimed by him, and from the judgment entered thereon the defendant has appealed. The jury has determined, upon the contradictory evidence before it, that the agreement between the parties was as is alleged by the plaintiff, and its determination thereon is conclusive upon an appeal to this court. The errors of law urged by the appellant are based upon his contention that it was not competent to prove this agreement by oral testimony, for the reason that it was an agreement relating to the sale of land. The contract or agreement upon which the action is brought is not, however, an agreement for the sale of land, or for the creation of any interest therein. The action is merely for the payment of the money agreed upon as the consideration for which the plaintiff executed to the defendant the conveyance of the land. It is not every agreement relating to the sale of lands that is within the statute of frauds, but only such agreements as are intended to create an interest in lands. The provision of the Code is that an agreement "for the sale of real property, or of an interest therein, is invalid unless in writing," (Civil Code, §§ 1624, 1741,) and that "all contracts may be oral except such as are specially required by the statute to be in writing," (Id. § 1622;) and it is only when the agreement is required by the statute to be in writing that evidence of the agreement cannot be received without the writing, (Code Civil Proc. § 1973.) An agreement by the vendee to pay for the land sold and conveyed to him is not within the statute of frauds, (Thomas v. Dickinson, 12 N. Y. 364;) and the vendor, after the contract on his part has been executed by a conveyance of the land, may maintain an action upon such agreement, and establish it by oral testimony. The recital in the deed that the consideration has been paid is not conclusive, (Shephard v. Little, 14 Johns. 210,) nor is the vendor thereby estopped from maintaining an action for its price, (White v. Miller, 22 Vt. 380;) and it may be shown that the real consideration was of a different amount from that expressed in the deed, (Bowen v. Bell, 20 Johns. 338; Belden v. Seymour, 8 Conn. 304,) or of an entirely different character, (McCrea v. Purmort, 16 Wend. 460,) and that the vendee agreed to pay an additional amount, contingent upon some future event or transaction, as that upon a resale by him he would pay a portion of the proceeds that might be received in excess of the amount then paid by him, (Miller v. Kendig, 55 Iowa, 174, 7 N. W. Rep. 500; Michael v. Foil, 100 N. C. 178, 6 S. E. Rep. 264;) or the whole of said proceeds, (Hall v. Hall, 8 N. H. 129;) or the excess above the advances then made by him, (Linscott v. McIntire, 15 Me. 201.) In Collins v Tillou, 26 Conn. 368, the plaintiff had conveyed certain land to the defendant by an absolute deed, upon the verbal agreement by the defendant that he would sell the same, and turn over the proceeds to the plaintiff, and it was held that this agreement of the defendant was not within the statute of frauds, and that, after a sale by him, the plaintiff could maintain *assumpsit* for the proceeds, and prove the agreement by oral testimony. In Hess v. Fox, 10 Wend. 436, the mortgagor conveyed the mortgaged premises to the mortgagee, and the mortgage was canceled upon the verbal agreement of the mortgagee that he would sell the premises for the best price that could be got, and, after deducting the amount of the mortgage debt, pay over the surplus of the sales to the mortgagor, and the transaction was held not to be within the statute of frauds, and that *assumpsit* would lie for the surplus proceeds. See, also, Reyman v. Mosher, 71 Ind. 596; Hodges v. Green, 28 Vt. 358; Goodspeed v. Fuller, 46 Me. 141; Trowbridge v. Wetherbee, 11 Allen, 361; Price v. Sturgis, 44 Cal. 591; McCarthy v. Pope, 52 Cal. 561. The other rulings complained of were without error, and as the court did not err in receiving oral evidence of the agreement under which the property was conveyed to the defendant, and as the jury have found from such evidence that the defendant made the agreement as claimed by the plaintiff, judgment was properly rendered in accordance with such verdict.

The judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

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93 Cal. 502

RIX v. HORSTMANN *et al.* (No. 14,005.)

(*Supreme Court of California.* Feb. 26, 1892.)

ADVERSE POSSESSION—EVIDENCE.

1. In an action to quiet title claimed by adverse possession, it was shown that R. obtained possession of a certain lot as early as 1870; that S. acquired title to the lot in 1871; that R. continued to rent out the property, and make necessary repairs, down to 1889, when he deeded the lot to plaintiff, his son, without consideration; that, during such period, R. paid all taxes assessed on the lot, though assessed to S., and also paid the taxes assessed to a bank on a mortgage on the lot executed by S. to the bank; that in 1879 a mortgage on the lot was executed by S. to secure a creditor of R.; that no one ever heard R. claim that he owned the property; and that, as R. was in possession, S. just let him use it, and did not object. *Held*, that the possession of R. was not adverse.

2. The admission of the testimony of certain persons that plaintiff brought to their office an abstract showing S.'s title, and that he urged the sufficiency of the security for the mortgage to secure R.'s creditor, was harmless error.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action by William Rix against John Horstmann, Aaron G. Spencer, and Mary Spencer, to quiet title. From an order refusing a new trial, plaintiff appeals. Affirmed.

William Rix, in pro. per. Geo. A. Rankin, for respondents.

TEMPLE, C. Plaintiff appeals from an order refusing a new trial. The action is to quiet title to a lot of land fronting 19 feet on Pine street, in the city of San Francisco. Horstmann is the only defendant who answered, and he claims to have acquired title through A. G. Spencer, under a proceeding for the foreclosure of two mortgages executed by him. It was admitted at the trial that the legal title is in Horstmann, unless the plaintiff has title by the adverse possession of himself or his grantor. Since 1870 Alfred Rix, plaintiff's father, has owned a lot on the corner of Pine and Powell streets, in San Francisco, and upon it there has been a large boarding-house, which has been kept by Rix, his wife superintending and managing it. It was known as "743 Pine Street." Adjoining, being 739 Pine street, on the property in dispute, was a two-story house, of which it seems Alfred Rix had possession as early as 1870. How he became possessed, the record does not show. This property has a frontage on Pine street of 19 feet. Next to it, easterly, at 737 Pine street, was the residence of A. G. Spencer for three or four years, beginning with 1870. After that he lived in the boarding-house at 743 Pine street. Mrs. Spencer was a sister of Mrs. Alfred Rix, and seems to have assisted her in managing the boarding-house. There is some evidence tending to show that the boarding-house business included the three buildings above mentioned. A. G. Spencer acquired title to lot 739 in 1871, but Alfred Rix continued to rent the property, and to collect rents, and make such repairs as were required, down to May, 1889, at which time plaintiff received his deed. Rix also paid all taxes assessed on the property during that period. It was always assessed to A. G. Spencer. Spencer mortgaged the property soon after his purchase to secure a loan of $1,500 from the Hibernia Bank. Afterwards, he mortgaged the property to the Clay-Street Bank to secure a loan of the same amount, and then to the French Bank. The last-named mortgage was in existence on and after 1880, and the mortgage tax, as the law required, was assessed to the bank. Alfred Rix paid not only the tax assessed on the property to A. G. Spencer, but the tax on the mortgage assessed to the bank, for the interest acquired through its mortgage from Spencer. This mortgage was given before the new constitution took effect, and provided that the mortgagor should pay the taxes. Rix continued to pay them until 1886. In 1879 the furniture in the boarding-house was attached, and Mrs. Rix, settling an indebtedness which must have been her husband's, compromised the claims, and one of the conditions of the compromise was that the payment of $2,000 should be secured by a mortgage upon the property in dispute. It was so secured by a mortgage executed by A. G. Spencer. It is one of the mortgages under the foreclosure of which defendant Horstmann claims to have acquired title. Alfred Rix was not called as a witness by the plaintiff, who is his son. No one ever heard him say that he claimed the property as his own. His brother-in-law, Spencer, testified: "Mr. Alfred Rix never claimed to me to own the property. No one, except myself, ever claimed to own it, so far as I know." Plaintiff tells how he acquired his title: "No consideration actually passed. I wrote to my father, and told him I wanted the piece of property. I made out the deed, and sent it to him, and he executed it." Spencer was a witness for defendant. He is plaintiff's uncle, and his interest in the property had been foreclosed and sold. He does not seem to know how Rix came to keep possession of the property. He says: "I knew who was occupying it,—tenants of Mrs. Rix. She kept a boarding-house. I never gave her permission to use the property." "Question. Well, how did she come to use it? Answer. Well, she had possession of the premises. She never requested my permission. Q. Well, did you ever make any objection to her using them? A. I did not. Q. Just let her use them? A. She had possession. She might as well use it, anyway." His deposition was taken before the trial. Being asked in regard to improvements, he testified: "Question. Didn't you know the front of the place was different; that is, the front steps? Answer. Perhaps Mr. Rix did that; I never told him. It might have been for his own benefit. He said he ought to do something for the use of it." At the trial he testified that this answer was a mistake; that Rix did not make the remark attributed to him. The court may have believed the first statement. We think the trial court correctly held that the possession of Rix was not adverse.

The alleged error in allowing Freeman and Bates to testify that plaintiff brought to their office the abstract showing Spencer's title, and that he urged the sufficiency of the security for the $2,000 mortgage, conceding it to have been error, was harmless. So far as there was any point in it, the evidence was already in, without objection, in the testimony of plaintiff himself. We advise that the order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

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93 Cal. 505

ROSENTHAL v. McMANN *et al.* (No. 13,614.)

(*Supreme Court of California.* Feb. 27, 1892.)

CONVERSION—SUFFICIENCY OF COMPLAINT—JUDGMENT OF DISMISSAL—RES JUDICATA—ENTRY OF JUDGMENT.

1. In an action for conversion, a complaint which alleges that plaintiff is entitled to possession is sufficient, when not objected to, to support a judgment for plaintiff, though it fails to aver ownership in plaintiff.

2. A judgment dismissing an action by a non-resident for failure to furnish security for costs, as allowed by Code Civil Proc. § 1037, though within the class of cases in which section 582 provides that judgment "must" be rendered on the merits, is not a judgment on the merits, and therefore is not a bar to a subsequent suit on the same cause of action, since section 1908, subd. 2, provides that a judgment in such case is conclusive only "in respect to the matter directly adjudged."

3. Where there is a substantial conflict in the evidence as to the material facts, the evidence will not be reviewed on appeal.

4. Code Civil Proc. § 581, providing that an action "may" be dismissed by the court when, after verdict or final submission, the party entitled to judgment neglects to have the same entered for more than six months, is not mandatory; and a motion to dismiss, made five days after the expiration of the six months, was properly denied, where the unsuccessful party was not injured by the delay, and the attorney for the other party testified that he paid the clerk the fee for the entry of judgment, which, under the rules, was equivalent to an order to enter judgment, and that he informed the clerk of the opposing attorney that he would not proceed on the judgment until the motion for new trial was disposed of.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action for conversion by Jennie Rosenthal against William McMann and Ben Schloss. Judgment for plaintiff. Defendants appeal. Affirmed.

M. J. Platshek, *Frank Eisner*, and *Mitchell & McPike*, for appellants. *M. C. Hassett* and *Jas. F. Tevlin*, for respondent.

TEMPLE, C. This record presents three appeals,—from the judgment, from the order refusing a new trial, and from an order made after judgment refusing to dismiss the action because judgment was not entered within six months after its rendition. The action was brought to recover damages for the conversion of $500, and it is averred in the complaint "that on the 14th day of June, A. D. 1887, plaintiff was possessed of five hundred ($500) dollars in gold coin of the United States, and that she then was, and ever since has been, and now is, entitled to the possession thereof." Conversion and damage are then charged, but there is no averment of ownership. The defendants did not demur, but answered by a general denial and plea of a former judgment in bar. On the trial no objection was made to the sufficiency of the complaint, but the issue of fact was whether the money belonged to plaintiff or her husband, whose creditors had attached it. It is now claimed that the complaint is insufficient to support the judgment, which was for the plaintiff, because it does not aver ownership or title in the plaintiff. To enable a plaintiff to recover for property taken by a wrong-doer, he must have the general ownership or a special ownership in the goods, and one having the possession, merely, is the owner as against a wrong-doer. But it is said that possession is merely probative. One may recover against a wrong-doer upon a complaint averring ownership although he prove possession only, because, as against a mere trespasser, that proves ownership; but here it is claimed the question is not one of evidence, but of pleading. But even on that theory the facts necessary to show a cause of action in the plaintiff are all contained in the complaint, although some essential fact may appear only by inevitable inference. If the findings had included the facts averred, and had gone further, and stated that the property was not plaintiff's, but belonged to some third person whose bailee she was, it would have supported the judgment. In fact, the allegation formerly deemed requisite, or at least held to be sufficient, "was lawfully possessed as of his own property," contained nothing more. The possession would be presumed lawful, and, as against a trespasser, even one who obtained possession wrongfully was deemed to have been lawfully possessed.

It is claimed that the judgment is not sustained by the findings. Finding No. 3 shows that the plaintiff, July 21, 1887, commenced an action against these defendants for the same cause of action set up in the complaint herein; that the defendants appeared and answered in that action; that afterwards, November 5, 1887, a notice demanding from plaintiff security for costs, on the ground that she resided out of the state, was served on plaintiff's attorney in that suit, and thereafter, to-wit, December 7, 1887, no undertaking having been given, the court ordered said action to be dismissed, and judgment was accordingly duly made, given, and entered, dismissing said action. The proceedings which resulted in that judgment were under sections 1036 and 1037 of the Code of Civil Procedure. It is contended that the judgment so entered dismissing the action was a judgment on the merits, and therefore a bar to any other action founded upon the same cause of action. It is not denied that this suit is identical in that respect with the first suit. The argument in support of this position is as follows: Section 581, Code Civil Proc., enumerates six different cases in which judgment of dismissal or nonsuit may be entered. Judgment of dismissal for failure to give security for costs, as authorized by section 1037, is plainly not one of the cases provided for in section 581. The next section (582) reads: "In every case, other than those mentioned in the last section, judgment must be rendered on the merits." This case is not one of those mentioned, and therefore it is a judgment on the merits. This contention may be summarily disposed of by reference to the second subdivision of section 1908, Code Civil Proc., by virtue of which the judgment is made a bar, if it be one: "The judgment or order is, in respect to the matter directly adjudged, conclusive," etc. The matter directly adjudged here was that plaintiff had failed to give security for costs, and therefore could not be heard, and not that she had no cause of action, or that defendants had a valid defense. A judgment upon the merits is one which determines, either upon an issue of law or fact, which party is right. A judgment that a party cannot be heard can only conclude as to that question. It could not determine the merits of the action, which the court refused to consider at all. Although not on the merits, should it preclude an absent plaintiff, after becoming a resident here, or after he is able to give security, from bringing another suit? Not being a bar under the statute, we see no reason why it should.

There is nothing in the objection to the admission in evidence of certain statements of plaintiff, and the matter seems utterly harmless if admitted to have been erroneous. There was a substantial conflict in the testimony, and we cannot review it. The alleged discrepancies in plaintiff's testimony are too obvious. When speaking of her lack of means, she must refer to means furnished by her husband. She speaks of her lack of money and her $500 in bank almost in the same breath. She was not asked to explain. Her evidence, however, does not seem very satisfactory, but she positively states the essential facts of her case, and the court may have concluded from the appearance and bearing of defendants' witnesses that they were unworthy of belief. At any rate, under the well-established rules, this court cannot interfere.

The appeal is from the order refusing to dismiss the case because judgment was not entered within six months after its rendition. The findings were filed March 11, 1889. Notice of motion to dismiss was served September 17th, and judgment was recorded September 19th. The notice was given, therefore, five days after the six months had expired, and the judgment was entered seven days after the expiration of that period. Two excuses were given for the neglect: One, that plaintiff's attorney paid four dollars, which he avers the rules of the court required as a fee for the entry of judgment, but did not tell the clerk to enter or to forbear entering the judgment. He claims that this was equivalent to an order to enter it. Appellants deny the existence of the rule, and the rules are not brought up. We still have, however, the affidavit of plaintiff's attorney that he paid four dollars to the clerk as a fee for recording the judgment. The other excuse is that he informed the clerk of defendants' attorney that he would not proceed on the judgment until the motion for a new trial was disposed of. This fact is denied by appellants' attorney, and it seems a little inconsistent with other reasons given for the delay. It appears that appellants were not injured by the delay. The affidavit of the attorney shows that he did not know that judgment had not been entered. But appellants claim that section 581 of the Code of Civil Procedure is mandatory, and that the court had no discretion in the matter. Plaintiff had neglected to have the judgment entered for more than six months, and defendants were absolutely entitled to the order. The first clause of section 581 reads: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases." Then follow six subdivisions specifying the cases, in all of which it is claimed the right of a party to a dismissal is absolute. Therefore "may" in the first clause, which applies to all the subdivisions, should be read "must." But this is a mistaken assumption. The two first cases are where the parties "may" dismiss. These subdivisions are not addressed to the clerk, as appellants assume. Under the first, the plaintiff "may" dismiss; under the second, either party. It is evident that the word cannot be read "must," as applied to either of these cases. The third applies to the court, and authorizes a dismissal when the plaintiff fails to appear at the trial. This has never been regarded as mandatory, and, if it were, the party in default could apply for relief under section 473, when his neglect may be excused. The fourth provides for the right to have a case dismissed when the plaintiff abandons it. This seems a natural right of the defendant, and may be therefore considered as mandatory. The fifth is the ordinary motion of nonsuit, and is not mandatory in any other sense than that every judicial determination should be correct. It is really a judgment upon the evidence as to the rights of the parties, not conclusive, because the statute so ordains. The only remaining subdivision is the one in question. We have seen the argument that the language is mandatory, because the right is absolute in the other subdivisions, cannot be maintained. The authorities cited do not apply; they are merely to the effect that a public officer cannot decline to do an act which is enjoined upon him by law, or to perform an official duty. The judge cannot decline to try a case properly pending in his court, or to hear an application for an order he has the power to make, nor can the clerk decline to file papers which parties have a right to have filed. To suppose that they apply to this case is to assume the very point in debate,—that the right is absolute. But, if the right were absolute, the party in default would have the right to apply to be relieved from the order, if made through his excusable neglect, under section 473 of the Code of Civil Procedure, and, that being so, it seems trifling to say the excuse cannot be heard when the order is applied for. Considering that no harm has occurred through the delay, we cannot say that the court abused its discretion in making the order. We advise that the judgment and the orders be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and the orders appealed from are affirmed.

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93 Cal. 516

PEOPLE v. SCOTT. (No. 20,842.)

(*Supreme Court of California.* March 2, 1892.)

CRIMINAL LAW—REJECTION OF EVIDENCE—HARMLESS ERROR.

Defendant, on trial for assault with intent to kill, was not allowed to ask the prosecuting witness if he had not stated to various parties (naming them) that he (witness) would use his shotgun on defendant, or words to that effect. Subsequently defendant was allowed to prove by these "various parties" the statements made by the prosecuting witness. *Held*, that the refusal, if error, was harmless.

Department 1. Appeal from superior court, Napa county; E. D. HAM, Judge.

J. W. Scott was convicted of assault with intent to commit murder, and appeals. Affirmed.

C. S. Harker, for appellant. *Atty. Gen. Hart*, for the People.

GAROUTTE, J. Defendant was convicted of an assault with intent to commit murder, and now prosecutes an appeal to this court. The instructions asked by defendant, and refused, were substantially given in the charge of the court. Neither do we think the evidence was of the character upon which to predicate an instruction that the defendant could be convicted of a simple assault. He was either justifiable, or guilty of a graver offense. People v. Madden, 76 Cal. 521, 18 Pac. Rep. 402. Again, if counsel desired such an instruction to be given, he should have requested the court to that effect.

It is insisted that the court erred in refusing to allow defendant to ask the prosecuting witness, on cross-examination, questions concerning alleged threats made by said witness against defendant prior to the day of the shooting. These matters were not adverted to in the examination in chief, and could only be proper in cross-examination for the purpose of indicating the prejudice and bias of the witness upon the stand, and thereby tending to weaken the effect of his testimony. Inasmuch as the witness was then testifying in the role of a prosecuting witness against the defendant upon an accusation charging the defendant with assault to murder him, it would seem that the presentation of evidence upon the part of the counsel tending to show the bias of the witness against the defendant was a waste of energy. The record recites: "Counsel for defendant then inquired fully into a quarrel defendant and the witness had on the 21st and 22d days of January, and as to witness' feelings towards defendant; all of which said inquiries were fully answered by the witness." It would seem from this disclosure in the record that the court allowed defendant quite a wide latitude in exhibiting the *animus* of the witness' mind to the jury. The main point in defendant's contention appears to be that the error was committed in not allowing him to ask the witness if he had not stated to various parties (naming them) that he (witness) would use his shotgun upon the defendant, or words to that effect. Counsel insists that these questions were proper for the purpose of laying a foundation for impeachment. Conceding such to be the fact, the error of the court rejecting the offered testimony was entirely harmless; for the defendant, in presenting his own case to the jury, proved by these various parties the statements made by the witness, and being the same matters upon which the court refused to allow the witness to be interrogated. There could be no error in refusing to allow defendant to lay a foundation for impeachment, when the court subsequently admitted the impeaching testimony without a foundation. The statements were admitted in evidence before the jury, and that was all the defendant could ask. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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93 Cal. 519

KIRMAN *et al.* v. HUNNEWILL *et al.* (No. 14,463.)

(*Supreme Court of California.* March 4, 1892.)

REVIEW ON APPEAL—WATER-RIGHTS—ABANDONMENT.

1. The insufficiency of findings to support a judgment cannot be considered on an appeal from an order denying a new trial.

2. Defendants claimed title to a water-right through a company that had absolutely abandoned the right for more than 20 years immediately prior to the time when defendants attempted to assert ownership. During all this time plaintiff had the rights of riparian owner, and most of the time appropriated it to particular uses. *Held*, that abandonment had destroyed the right claimed by defendants.

Department 2. Appeal from superior court, Mono county; O. F. HAKES, Judge.

Action by Kirman and others against Hunnewill and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Wm. O. Parker, C. A. Schuman, James E. Goodal, and *Fox, Kellog & King*, for appellants. *Richard S. Miner*, for respondents.

MCFARLAND, J. This action was brought to enjoin defendants from diverting the waters of a natural water-course, and to recover damages for past diversion thereof. Judgment was rendered in favor of plaintiffs; and defendants, having made a motion for a new trial, and the court having denied the same, appeal from the order denying said motion. There is no appeal from the judgment.

1. Nearly the whole force of the arguments of appellants' counsel is directed to the point that the findings do not support the judgment. In their final brief, after having referred to Dedmon v. Moffitt, (Cal.) 26 Pac. Rep. 800, they say: "We are not asking here, as was asked there, to reverse the judgment for want of a particular finding; but our contention is that this judgment should be reversed because it is not supported by the findings made." But it is definitely settled that the insufficiency of the findings to support the judgment cannot be considered on an appeal from an order denying a new trial. That point can be raised only on an appeal from the judgment. Brison v. Brison, 90 Cal. 323, 27 Pac. Rep. 186; In re Doyle, 73 Cal. 567, 15 Pac. Rep. 125; Martin v. Matfield, 49 Cal. 45. Counsel for appellants say, among other things, that certain general findings are inconsistent with certain special findings, that therefore the special findings should prevail, and that upon the special findings the judgment should have been for appellants. But that is nothing more than saying that the findings do not support the judgment,—a position which, as we have seen, cannot be taken on this appeal. If a court, upon an issue essential to the decision of the case, should make two findings directly contradictory of each other, the point might possibly be made, on an appeal from an order denying a motion for a new trial, that there was no finding upon such essential issue, and therefore a mistrial. Such point, however, is not made here; and, moreover, we find in this case no such contradictory findings.

2. There is some contention, apparently not much relied on, that the evidence is insufficient to support some of the findings. There are about 600 pages of evidence in the printed transcript. Most of it consists of the testimony of witnesses by question and answer, apparently taken bodily from the reporter's notes. It could hardly be expected that this court would critically examine this mass of matter, which ought to have been condensed to one-sixth of its present volume. We have looked through it, however, and have seen no reason for disturbing the findings for want of support in the evidence.

3. It is contended by appellants that the court erred in sustaining objections to certain deeds, bills of sale, and records offered by appellants as tending to prove paper title in them to a certain ditch and water-right claimed by them. It appears from the findings that as early as 1862 plaintiffs' grantors settled upon lands through which a natural water-course runs, called "Dogtown Creek;" and since then plaintiffs and their grantors have continuously used the water of said stream to irrigate said lands, and for general farming and domestic purposes. The said lands were then public lands, and they afterwards commenced to obtain title thereto. They first perfected their title to part of the land, through a United States patent, in 1871, and gradually, through the next few years, perfected their title to the whole. It is not necessary to accurately determine what rights plaintiffs had to the use of the water during the period when they were taking steps to acquire the title of the government, because after they received the first patent in 1871 they had all the rights of riparian proprietors, and the decision of the case would be the same if their rights are held as commencing only from that date. Dogtown creek runs in a southerly direction to and over plaintiffs' land, and has a fork or tributary, called "West Fork of Dogtown Creek," and also another tributary, further to the east, called "Virginia Creek," both of which empty into the main creek above the land of plaintiffs. In the fall of 1860 an association of miners working mines at Monoville, which is east of and beyond the water-shed of said Dogtown creek and its said tributaries, built a ditch from said West Fork across said Virginia creek to said Monoville, and thus conveyed all the water of said West Fork, except about 40 inches, to said Monoville, for the purpose of working mines at said latter place. This unincorporated, and apparently unorganized, association, composed of about 200 persons, was called, as the findings show, the "New Ditch Company;" but as early as 1862 it began to disband, and the members of it began to scatter and go to other localities, but "various persons and strangers" con-

tinued to use the ditch until some time in 1864. The ditch then fell into disuse, and was abandoned, except a small part of it running from said West Fork of Dogtown creek to a point called "Outlet," between said West Fork and said Virginia creek. The rest of it, from 1864 to 1886,—more than 20 years,—"was absolutely abandoned, and no person or persons whatever exercised any ownership over or used the same for any purpose whatever." From 1864 to 1886 the water either ran directly down the said West Fork and upon plaintiffs' land, or it was carried during the mining seasons through the remnant of the ditch to said "Outlet," and was used "by various persons" to mine some gravel diggings in the neighborhood, from whence it ran down to and upon plaintiffs' land. It does not appear that this use of the water at said gravel diggings impaired its value to plaintiffs. They do not complain of it, and such use is not affected by the judgment herein. And during said period, from 1864 to 1886, all of said water continuously flowed down to the land of plaintiffs, and was used by them to irrigate their land, and for domestic and general farming purposes. But in 1886 and 1887 the defendants diverted all the water of said West Fork of Dogtown creek, and carried it entirely beyond the said water-shed, so that it could not flow back to plaintiffs' land. Now the defendants sought to connect themselves with the right of said old disbanded association of miners of 1860–62, and for this purpose offered the papers which the court ruled out. The first was a money judgment in the district court in favor of one Shaw against the "United Water-Ditch Company" for $11,500. The next paper offered was a deed to said Shaw from a constable, purporting to have been made in pursuance of a sale upon an execution issued out of a justice's court on a money judgment in favor of one Phelps against the United Water-Ditch Company, nothing having been offered except the deed itself. The next was a deed from Shaw to a grantor of the defendants. The said judgment was rendered and said two deeds were executed in 1862 and 1863. The other papers offered were bills of sale, dependent for their value upon said deed by Shaw. There are some apparent objections to the evidence offered, even if it had been material. It is difficult, for instance, to see how a valid judgment could have been obtained against such a body as said "association of miners." But, as their name was the "New Ditch Company," how could they or their property be affected by a judgment against the "United Water-Ditch Company?" And how could a mere money judgment be evidence of title to real property? As to the constable's deed, there was no basis for its introduction. But, if the offered evidence had been admitted, it would not have changed the aspect of the case at all. The court found that the old ditch and water-right, by which the water had for a short time been carried beyond the water-shed of Dogtown creek, had been abandoned for more than 20 years next preceding the time when, in 1886–87, the defendants undertook to again carry it beyond said water-shed; and that during most of that time plaintiffs not only had the right to it as riparian owners, but had also appropriated it to particular uses. If, therefore, the old "association of miners" could now be materialized, and made a present legal entity, it could not maintain the right which appellants sought to assert under it. Decisions are cited to the proposition that a water-right may be changed both as to the point of diversion and the place of use; but after it has been destroyed by abandonment there is nothing left to change. See Davis v. Gale, 32 Cal. 27. The order appealed from is affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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93 Cal. 530

MEADS *et al.* v. LASAR *et al.* (No. 14,226.)

(*Supreme Court of California.* March 5, 1892.)

COSTS ON APPEAL—AUTHORITY OF CLERK—INSERTION OF COSTS IN REMITTITUR.

Where, in an action of claim and delivery, verdict is for plaintiff for the return of the property, or for the value thereof, but the clerk enters judgment for the value, and not in the alternative, and, on appeal by defendant, the supreme court affirm the judgment, but order it to be amended to conform to the verdict, the clerk properly inserted costs in the *remittitur* in favor of defendant, under supreme court rule 24, which provides that, in all cases in which the judgment appealed from is reversed, or modification contains no direction as to costs, the clerk will insert in the *remittitur* a judgment that the appellants recover the costs of appeal.

In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

In the case of Meads v. Lasar, 28 Pac. Rep. 935, an amendment of the judgment was ordered, and the clerk inserted in the *remittitur* the words "with costs." Motion of plaintiffs to recall the *remittitur.* Denied.

S. F. Geil, H. V. Morehouse, and *J. M. Wilcoxen,* for appellants. *N. A. Dorn, W. M. R. Parker,* and *G. W. Webster,* for respondents.

MCFARLAND J. This is a motion of respondent for an order recalling the *remittitur* hereinbefore issued, because, as is contended, the clerk of this court inadvertently or improperly inserted in the judgment the words "with costs." The action was "claim and delivery," and the verdict of the jury was in favor of the plaintiffs for the property sued for, or its value, which was found to be $1,000. The clerk of the trial court, however, entered judgment against defendants for $1,000, and not in the alternative. The defendants appealed from the judgment, and from an order denying a new trial; and this court, in its opinion in deciding the appeal, after holding that the judgment should have been in the alternative, said, "This error, however, can be corrected by an amendment of the judgment," and ordered judgment in these words: "The order denying a new trial is affirmed, but the court below is directed to correct the judgment as entered by making it conform to the verdict, and, as so corrected, it will stand affirmed." This was a clear and quite important modification of the judgment; and the clerk of this court properly included costs in the judgment entered in this court, under rule 24, which provides that, "in all cases in which the judgment or order appealed from is reversed, or modification contains no direction as to costs of appeal, the clerk will enter upon the record, and insert in the *remittitur*, a judgment that the appellants recover the costs of the appeal." There is therefore no ground for granting the motion here made, assuming that this court has the power to recall the *remittitur* under certain contingencies. The motion is denied.

We concur: Garoutte, J.; De Haven, J.; Harrison, J.; Paterson, J.; Sharpstein, J.

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93 Cal. 536

People v. Arthur *et al.* (No. 20,894.)

(*Supreme Court of California.* March 7, 1892.)

Burglary—Evidence—Sufficiency.

1. Evidence that, early on the morning after a burglary, footsteps were traced from the barber-shop burglarized to a building in which the two defendants were found, apparently asleep; that part of the stolen goods were concealed in the building; that goods stolen from a store at the same time were concealed near the entrance of the building; that chisels were concealed therein, one of which fitted the marks made by forcing open the door of the barber shop; that within two days before the burglary one of the defendants inquired of a bootblack of the barber-shop where he kept his money; and that on the day after the burglary one of the defendants told his young brother to go to a place where a part of the goods were afterwards found, and see if they were still there,—was sufficient to sustain a conviction.

2. Where defendants introduced a part of the written testimony of a certain witness, taken at the preliminary examination, it was proper for the prosecution to explain such testimony by introducing the preceding part thereof, which related to substantially the same subject.

Department 2. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

James Arthur and Frank Stewart were convicted of burglary, and appeal. Affirmed.

John C. Devel, for appellants. *Atty. Gen. Hart*, for the People.

McFarland, J. The defendants were convicted of burglary in the first degree, and appeal from the judgment, and an order denying a new trial. There are a great many points formally made in the bill of exceptions, and merely alluded to in appellants' brief, which it would serve no valuable purpose to notice in detail. We see no material error of law committed by the trial court, and the real question in the case is whether this court should grant a new trial because the evidence is insufficient to sustain the verdict. There was evidence showing, or tending to show, among other things, that, early on the morning after the burglary, footsteps were traced from the barber-shop burglarized to a vacant building near by, in which the defendants were found, apparently asleep; that goods taken from the barber-shop were found concealed under sawdust in said building, within a few feet of the place where defendants were sleeping; that other goods taken from a store adjoining the barber-shop, which store had also been burglarized on the same occasion, were found concealed near the entrance of said vacant building beneath some old pipe and barrels; that some chisels were found concealed in said building, one of which fitted the marks on the door of the barber-shop, which had been evidently forced open by the use of some hard instrument; that, within one or two days before the commission of the burglary, one of the defendants inquired of a bootblack connected with the barber-shop how much money he was making, and where he kept it; and that the day after the burglary one of the defendants was heard telling his young brother to go to the spot where a part of the goods were afterwards found, and see if they were still there. No doubt the evidence left room for a plausible argument to the jury that the guilt of the defendants had not been sufficiently established; but it so presented an issue of fact as to place the determination of such issue entirely within the proper province of the jury. There was no error in the instructions given by the court on its own motion or at the request of the prosecution, and all the instructions asked by defendants were allowed. The defendants introduced a part of the written testimony of the witness James Wilson, which had been taken at the preliminary examination; and it was not error for the court to allow the prosecution to introduce a preceding part of that testimony, as it was substantially upon the same subject, and explanatory and illustrative of the part introduced by the defendants. The point sought to be made as to the cross-examination of defendants' witness Henry Arthur does not properly appear in the record. There are no other points which need special notice. Judgment and order denying a new trial affirmed.

We concur: Harrison, J.; De Haven, J.

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93 Cal. 538

Marysville Electric Light & Power Co. v. Johnson. (No. 14,478.)

(*Supreme Court of California.* March 8, 1892.)

Corporations—Subscription to Stock—Assessments—Pleading.

1. Defendant and others, for the purpose of forming a corporation, agreed to "subscribe for stock to the amount set opposite to our respective names; amounts to be due and payable on the formation of the company and the issuance of the stock." *Held*, that the corporation, when formed, could sue on such agreement as a contract made for its benefit.

2. Civil Code, § 332, providing for the recovery of assessments on the subscribed stock of a corporation, does not apply; the action having been brought on the agreement. Manufacturing Co. v. Schafer, 57 Cal. 396, distinguished.

3. Where the complaint does not show that the articles of incorporation failed to state that defendant was a subscriber to the capital stock, or the amount of such subscription, it is good against a general demurrer.

Department 2. Appeal from superior court, Yuba county; John C. Gray, Judge.

Action by the Marysville Electric Light & Power Company against one Johnson. Complaint dismissed, and plaintiff appeals. Reversed.

C. A. Webb and *Wm. G. Murphy*, for appellant. *W. H. Carlin*, for respondent.

DE HAVEN, J. This is an action brought by the plaintiff against the defendant upon the following agreement, alleged to have been signed by him and others: "For the purpose of forming a corporation to have for its object the furnishing of the incandescent system of electric lighting to those who may desire the same, and to provide the funds for the purchase of the necessary plant, we, the undersigned, hereby subscribe for stock to the amount set opposite to our respective names; amounts to be due and payable upon the formation of the company and the issuance of the stock." The complaint alleges that the agreement was made and signed in contemplation of incorporating the plaintiff for the purpose of carrying on the business therein stated, and that thereafter it was duly incorporated under the laws of this state by the defendant and the other persons signing said agreement. It is further alleged "that said corporation, this plaintiff, succeeded to and acquired all the rights of said subscribers, and each of them, to the amounts so subscribed" under the said agreement, and that plaintiff has issued its stock to the subscribers, and tendered to the defendant the amount of stock subscribed for by him, and that he has refused to pay for the same. It is also alleged that plaintiff "duly made," at different times, calls for 15, 60, and 25 per cent. of the amounts so subscribed by the defendant and others. The court below sustained a demurrer to the complaint upon the ground that the facts therein stated are not sufficient to constitute a cause of action. This ruling of the court presents the only question to be considered by us at this time.

1. The agreement above set out is certainly valid. The corresponding promises of the other signers, and the common object sought to be accomplished by all the parties to it, constitute a sufficient consideration for the promise of defendant; and upon the formation of the plaintiff corporation by the persons signing the agreement, and plaintiff's acceptance of the agreement, the defendant became bound to take and pay for the number of shares subscribed for by him. Music-Hall Co. v. Carey, 116 Mass. 471; Hotel Co. v. Friedrich, 26 Minn. 112, 1 N. W. Rep. 827; Hughes v. Manufacturing Co., 34 Md. 316; Association v. Walker, (Mich.) 47 N. W. Rep. 338. And it is not material to the right of the plaintiff to maintain this action that it is not expressly named in such agreement as the promisee. The agreement is to be construed according to the evident intention of the parties to it. It just as clearly appears that it was the intention of all the parties that the promise of each should inure to the benefit of the corporation when formed, as if such intention were expressly declared; and therefore, in legal effect, the promise of defendant was to pay to the plaintiff corporation when organized. The corporation really represents the parties to the agreement. It was brought into existence by them as an agent to carry on the business named in the agreement, and through which they were to secure the benefits to arise from their mutual and corresponding promises. There is no difference in principle between the above contract, signed by the defendant, in this case, and that construed by the supreme court of Massachusetts in the case of Music-Hall Co. v. Carey, 116 Mass. 471. In that case the agreement was that the parties signing it would form a corporation, and "pay to the treasurer of the corporation the amount of the several shares" subscribed for; and, in speaking of such an agreement, the court said: "In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, 'to and with each other,' is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced, between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the proposition offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case, to-wit, as a contract with the common representative of the several associates." In Shoe Co. v. Hoit, 56 N. H. 548, certain persons signed the following paper: "The undersigned mutually agree that they will take and pay for the number of shares set against their respective names in the capital stock of a corporation to be organized under the general statute of New Hampshire for the purpose of manufacturing boots," etc. Immediately following the names of those signing this agreement, the defendants in that action signed the following: "We, the undersigned, agree to pay in cash a gratuity of one thousand dollars." The plaintiff in that case was subsequently incorporated by the persons who had subscribed the above agreement to take its stock, and brought the action to recover the gratuity of $1,000 agreed to be paid by the defendants therein; and the court held that the action could be maintained, although the plaintiff was not named in the written promise of defendants to pay such gratuity, nor was it in existence when defendants signed the same. The court said: "The agreement was, on the one part, by the subscribers to the stock, of whom the plaintiffs are the successors, or, rather, with the plaintiff,—for the understanding and agreement was that the subscribers to the stock should unite and form the plaintiff corporation,—and, on the other part, by the de-

fendants." So, in this case, the agreement between the parties signing it was, in legal effect, that they would form the plaintiff corporation, and pay to it, as their common representative, the amount by them subscribed for its stock; and the plaintiff is therefore authorized to sue upon such agreement as a contract made for its benefit.

2. The averments of the complaint in regard to the assessments or calls made by plaintiff upon those signing the agreement do not add any strength to it, and may be disregarded as surplusage. There is in the complaint an entire failure to state any facts showing that the plaintiff had the right, under the statute, to make assessments or calls in the amounts named; and it is evident that the action is not to recover assessments upon the subscribed capital stock of the plaintiff, but upon the agreement above set out. Section 332 of the Civil Code, so far as the same applies to corporations like the plaintiff, declares: "No one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows: (1) If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount." The respondent insists that if plaintiff is entitled to recover upon defendant's subscription to its capital stock, as contained in the agreement under consideration, it cannot demand the full amount subscribed, unless the same is presently needed to meet its liabilities, or to satisfy the claims of its creditors; and that as the complaint fails to show such a necessity, or that the plaintiff corporation is making an equal demand upon all the subscribers, the demurrer was properly sustained. This action, however, as we have seen, is not one brought under the statute to recover assessments upon the subscribed capital stock of the plaintiff, but is upon the agreement above set out, and that provides that the amount subscribed is "to be due and payable upon the formation of the company and the issuance of the stock;" and in this respect the agreement is similar to that considered by this court in West v. Crawford, 80 Cal. 19, 21 Pac. Rep. 1123, and in relation to which the court, in its opinion by WORKS, J., said: "Here is a positive agreement on the part of the parties who subscribed to this stock to pay a fixed and certain sum of money at a certain time to a certain party. It is clear from the contract itself that it was not the intention that the liability to pay the sum of money named should in any way depend upon an assessment being made by the corporation after its organization. This is quite clear from the fact that the payment is fixed so soon after the organization of the company that such an assessment and its enforcement would have been impossible." So, in this case, the agreement of defendant was to pay the amount of his subscription upon the formation of the company and the issuance of its stock, and not as the same might be called for under section 332 of the Civil Code above quoted; and the agreement being a valid one, and this action being one to enforce it, the measure of defendant's liability is fixed by its terms, and not by the section of the Code referred to. The case of Manufacturing Co. v. Schafer, 57 Cal. 396, (cited by respondent,) is not in conflict with the conclusion we have reached upon this point. There the agreement was to take shares at $5 each; "$1 per share to be paid at the time of subscribing, and $1 more per share every thirty days thereafter until the whole $5 shall be paid into the treasury, in case it is required." The agreement was made after the plaintiff in that case was incorporated. The promise to pay the balance remaining after the first payment was not absolute, as is that of defendant here, but was conditional, and necessarily contemplated that calls should be made upon all alike, and no more should be collected from any one than his proportion; and the court construed the same as having been made with reference to the statute, which declares the circumstances under which corporations may, by assessment, call for payment of the full amount of their subscribed capital stock.

3. It is lastly claimed by the respondent that the complaint does not show that the defendant was named in the articles of incorporation as a subscriber for the stock of plaintiff, and that therefore the complaint is insufficient, under the rule announced in Railroad Co. v. Hildreth, 53 Cal. 123. It is sufficient to say upon this point that the complaint does not show that plaintiff's articles of incorporation failed to state that defendant was a subscriber to or the amount of his subscription to its capital stock. It is therefore good as against a general demurrer. If, in the articles of incorporation, the offer of defendant to subscribe for shares of its stock, as contained in the agreement sued upon, was rejected, and the defendant thereby excluded as a shareholder, the fact must be shown by answer. Such a defense, if it exists, does not arise upon the face of the complaint.

Judgment reversed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

93 Cal. 573

Kirsch v. Derby. (No. 14,576.)

(*Supreme Court of California.* March 10, 1892.)

Appeal by Executor—Necessity of Bond.

A complaint alleged that defendant, as executor of a certain estate, received money belonging to plaintiff, and that plaintiff made a demand therefor, which was refused. It also asked that a personal judgment be rendered against defendant for such money, which was done on defendant's failure to appear. Afterwards, on defendant's motion, the court below dispensed with the undertaking on appeal. *Held*, that under Code Civil Proc. § 946, providing that when an appellant is an executor the court may in its discretion dispense with a bond on appeal, it not appearing that the rights of the estate were not involved, the appeal would not be dismissed.

In bank. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Nye & Richardson, for appellant. *Dodge & Fay*, for respondent.

De Haven, J. Motion to dismiss an appeal from a judgment rendered in favor of plaintiff and against defendant. The ground of the motion is that no undertaking on appeal has been filed. In the complaint it is averred that the defendant is the duly appointed, qualified, and acting executor of the estate of Julia Kirsch, deceased, and also "that on or about the 22d of May, 1890, the defendant, as such executor as aforesaid, received the sum of $3,725 from the German Savings and Loan Society, (a corporation,) to and for the use and belonging to plaintiff." The complaint further alleges plaintiff's demand upon defendant for the money, and his refusal to pay, and asks for a personal judgment against him for the amount named. The defendant did not answer, and judgment by default was rendered against him personally, as prayed for in the complaint. The court below, upon motion of defendant's attorneys, made an order under section 946 of the Code of Civil Procedure dispensing with the undertaking on appeal, which order also recites that it appeared that the defendant was an executor, and about to appeal from the judgment. We cannot say from the record that this order was made in a case to which section 946 of the Code of Civil Procedure does not apply. That section provides that when the appellant is an executor, or other person acting in another's right, the court may in its discretion dispense with the security required by the chapter of the Code in which that section is found. It is not indispensably necessary, in order to bring a case within this section, that a judgment should have been rendered against the appellant in his representative capacity. It is sufficient if it is made to appear to the court that the matter in litigation really involves the rights of the estate, and that, if the judgment is unreversed, the property rights of such estate will be affected and its assets diminished. Thus, in this case, if the defendant had answered, and claimed the right to retain as funds of the estate of which he is executor the money sued for in this action, and this issue had been found against him, and judgment thereupon rendered against him, personally, as here, it would seem clear that in appealing from such judgment he would be really acting for the estate. Such appeal would be a continued assertion by him of the right of the estate to the fund in controversy; and it makes no difference that in this case no such answer has been filed by the appellant. As we construe the complaint, it in effect charges that the defendant collected the money sued for in his capacity as executor, and claims the right as such executor to retain it, and not otherwise. If this be so, and he is allowed to retain it, he would be compelled to charge himself with such money in his account as executor, and the same would be subject to distribution as assets of the estate. If, however, the money sued for rightfully belongs to plaintiff, and not to the estate of which defendant is executor,—and this is what the judgment appealed from determines,—then, if already charged with it, the defendant would be entitled to a credit therefor, upon showing this fact, and that he had been compelled, without fault on his part, to pay it to plaintiff under such judgment. Whether a personal judgment against the defendant was proper under the complaint is a question which involves the merits of the appeal, and upon which we express no opinion at this time. Motion to dismiss appeal denied.

We concur: BEATTY, C. J.; MCFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.

(93 Cal. 653)

CAMPBELL v. WEST *et al.* (No. 14,501.)[1]

(*Supreme Court of California.* March 24, 1892.)

DEATH OF PARTY—SUBSTITUTION—AMENDMENT OF COMPLAINT—ALLEGATION OF REPRESENTATIVE CAPACITY.

1. Under Code Civil Proc. § 385, which provides, *inter alia*, that, "in case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest," the substitution will be made on suggestion of the death of a party, and on *ex parte* motion showing the appointment and qualification of an executor or administrator.

2. An amended complaint alleged that the original plaintiff died testate, and that D. was "duly appointed and qualified as executor of the last will and testament of said deceased, and ever since has been and now is the duly acting and qualified executor of the estate of said deceased." *Held* that, while the allegation of representative capacity would have been insufficient if the action had been originally brought by the executor, it served the purpose where the amended complaint was filed by leave of court, in connection with a decree, for the purpose of showing that the action was continued in the name of plaintiff as executor.

Commissioners' decision. In bank. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Victor Montgomery, for appellants. *Ray Billingsley*, for respondent.

FITZGERALD, C. This is an appeal, upon the judgment roll, from a decree foreclosing a mortgage executed by defendants. It appears that the original plaintiff died while this case was pending here on a former appeal, (86 Cal. 197, 24 Pac. Rep. 1000,) and that the present plaintiff was thereupon substituted as administrator of the estate of said deceased upon the suggestion and motion of plaintiff's attorney. After the reversal of the judgment and the filing of the *remittitur* in the court below, plaintiff moved for and obtained leave to file an amended complaint, in which, among other things, he alleges "that on or about the —— day of April, 1890, Robert Campbell, the original plaintiff in said action, died testate in the county of Los Angeles, Cal., and that subsequently, to-wit, on or about the 12th day of June, 1890, said David F. Campbell was duly appointed and qualified as executor of the last will and testament of said deceased, and ever since has been and now is the duly acting and qualified executor of the estate of said deceased." The amended complaint was duly filed, and a copy thereof personally served on each of the defendants, but no copy was served on their attorney. Defendants having failed to appear and answer or demur to the amended complaint within the time allowed by law, no further time having been granted by the court, the default of the defendants was duly entered.

It is claimed, with some show of seriousness, that "the facts upon which the present plaintiff's cause of action depends are the death of the original plaintiff, and his appointment as executor of the estate of said deceased, and substitution as such executor in place and stead of said deceased. These facts could not be set forth by amended complaint," but should have been pleaded by supplemental complaint. Section 385 of the Code of Civil Procedure provides, among other things, that "in case of the death or any disability of a party the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest;" and the practice in this state is well settled, in such cases, for courts to allow the substitution to be made upon suggestion of the death of a party, and on *ex parte* motion showing the appointment and qualification of the executor or administrator of the estate of the deceased party. The other provisions of this section relating to substitution "in case of any other transfer of interest," when set in motion by plaintiff or the person to whom the transfer is made, or by defendant, if for any reason he desires to avail himself of such transfer for any purpose, must be made by supplemental complaint or answer.

It is further claimed that the amended complaint is insufficient because it fails to properly allege plaintiff's appointment as executor. If this action had been originally brought by plaintiff as executor, etc., there would be some force in the suggestion, for in that case the complaint should allege the death of the testator, "his leaving a last will and testament, the appointment therein of plaintiff as executor, the probate of the will, the issuance of letters testamentary thereon to plaintiff, and his qualification and entry upon the discharge of his duties as executor;" and while the allegation of representative capacity, objected to, is insufficient, it was not essential, but it serves the purpose, having been filed by leave of court, in connection with the decree of foreclosure, of showing that this action was continued in the name of the plaintiff as executor, which must have been preceded by the suggestion of the death of the original plaintiff, and satisfactory proof on an *ex parte* motion in the court below, after the case was reversed, of the appointment and qualification of plaintiff as executor. Nor is this presumption inconsistent with plaintiff's substitution as administrator by order of this court, while the case was pending here on a former appeal, which we are satisfied was a clerical error. But admitting that it was not a clerical error, and that the substitution here was the only one made, the powers and duties of executors and administrators, under our statute in relation to actions of this character, are in all respects the same. In either case, he is permitted to continue the action as the representative or successor in interest of the deceased plaintiff, and whatever may be recovered therein are assets of the estate of which he is the legal representative; and the misnomer or misdescription of the plaintiff's representative capacity is immaterial, for the reason that the object was to continue the action in the name of the legal representative of the deceased, and, as the powers and duties of executors and administrators are the same with respect to actions of this character, the mistake of the clerk (if it was a mistake) in confounding these representative titles was one which a person in his position would be liable to make, and one that could not by any possibility have operated to the injury of the defendant.

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[1] Rehearing denied. 29 Pac. Rep. 645.

As these are the only questions necessary to be considered, it follows from the views which we have expressed that the judgment should be affirmed, and we so advise.

We concur: Foote, C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

93 Cal. 600

SICHLER v. LOOK *et al.* (No. 14,472.)

(*Supreme Court of California.* March 11, 1892.)

Foreclosure of Mortgage—Jurisdiction—Record on Appeal—Judgment Roll—Presumptions—Effect of Foreclosure—Pleading—Decree.

1. On appeal from a judgment on the ground that the court had no jurisdiction, the verity of all matters in the record which are essential to show jurisdiction will be conclusively presumed.

2. Code Civil Proc. § 415, provides that proof of service of summons and complaint in case of publication must be the affidavit of the printer, and an affidavit of a deposit of a copy in the post-office, if the same has been deposited. Section 670 declares that the judgment roll, in case the complaint be not answered by any defendant, consists of the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment. *Held*, that since the judgment roll can alone be looked to on appeal, in determining whether the court had jurisdiction, the fact that the order of publication was made three days after the first publication cannot be shown by the order of publication, but only by a bill of exceptions.

3. Under section 670, providing that the judgment roll must contain the affidavit or proof of service, the record is not defective, though it contains only a copy of such affidavit, since it will be presumed that the original was lost, and that a copy was substituted by order of the court, as allowed by section 1045.

4. The indorsement on the complaint of the default of the defendant, as required by section 670, will be presumed to have been made upon proper proof of the mailing of the complaint, though such indorsement is prior to the date of the affidavit of mailing.

5. In an action to foreclose a mortgage an averment of the complaint that defendant "has or claims to have some interest or claim upon said premises, which interest is subsequent to and subject to the lien of the plaintiff's mortgage," is sufficient to show that defendant is a proper party. The character of defendant's interest need not be set forth.

6. In California a mortgage is only a lien on the land, and the effect of a sale under a decree of foreclosure is to extinguish the rights of all defendants acquired subsequently to the date of the mortgage. Therefore a provision of the decree that defendant, and all persons claiming or to claim under him, "be forever barred and foreclosed of and from all equity of redemption and claim in and to said mortgaged premises," is mere surplusage, and adds nothing to the effect of the sale.

7. The omission from the decree of the name of a defendant who has been summoned does not affect his rights.

8. A mortgagee need not, before bringing suit to foreclose the mortgage, give notice of his election to consider the whole debt due, either to the mortgagor or to persons claiming under him.

In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action to foreclose a mortgage by Philip Sichler against P. H. Look and D. A. Arrasmith. Judgment for plaintiff. Defendant Arrasmith appeals. Affirmed.

Geo. Hayford, *I. N. Everett*, and *Frank C. Prescott*, for appellant. *I. E. Messmore*, for respondent.

Harrison, J. Action for the foreclosure of a mortgage. Judgment by default was entered against all of the defendants. The defendant Arrasmith has appealed upon the grounds that the court had no jurisdiction to enter the judgment against him, and that the judgment as entered exceeds the allegations of the complaint. The service upon the appellant was by the publication of the summons. It is recited in the judgment "that P. H. Look * * * and D. A. Arrasmith, the above-named defendants, have been duly and regularly summoned to answer unto the plaintiff's complaint herein, and that the said defendants, and each of them, have made default in that behalf," etc., and in the judgment roll is found an affidavit which was filed December 29, 1890, sufficient in form and substance, of a publication of the summons in the Santa Ana Standard, commencing September 20, 1890. The judgment roll also contains a document which was filed March 4, 1891, which purports to be a copy of an affidavit made January 5, 1891, of the deposit on the 19th of September, 1890, "pursuant to an order of the court," of a copy of the summons and complaint in the post-office, directed to the appellant at Keokuk, Iowa. A memorandum of the default of the appellant, bearing date December 29, 1890, is attached to the complaint, and the judgment was rendered January 8, 1891. There is printed in the transcript, after the judgment roll and notice of appeal, a document which purports to be an order for the service of the summons upon the appellant by publication in the Santa Ana Standard for two calendar months from the 19th day of September, 1890. This order bears the date of September 23, 1890, and was filed on that day, and is authenticated by a certificate of the county clerk that it is a "correct copy of the original on file in my office."

1. It is contended by the appellant that the constructive service shown by this record was insufficient to give the court jurisdiction over him for the reason that the deposit in the post-office and the first publication of the summons, having been made prior to the date of the order therefor, were of no effect, and that the publication after the date of the order was not for the period of time therein directed; also, that the only evidence of mailing a copy of the summons is a copy of an affidavit made after the memorandum of the default had been attached to the complaint, and not filed until after the entry of judgment. The presumption of verity which attaches to the record of a domestic judgment is the same upon a direct appeal therefrom as exists in a collateral attack; the only difference being that, upon a direct appeal, it is essential for the party seeking to sustain the judgment to show by the record itself that the court had jurisdiction of the defendant, whereas in a collateral attack the entry of the judgment is itself conclusive of such jurisdiction. Upon a direct attack, there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant, but, in all matters of which the judgment contains a record, its verity, in the absence of any contradictory evidence, will be presumed as fully as upon a collateral attack. The defendant may upon a direct appeal, by bill of exceptions, present evidence outside of the record for the purpose of showing that the court did not have jurisdiction over him, while in a collateral attack such objection is available only when it appears from the record itself. In both cases the record is conclusive as to all matters as to which it speaks, unless impeached in the foregoing manner. As was said by Mr. Justice McFarland in Lyons v. Roach, 84 Cal. 30, 23 Pac. Rep. 1026: "The main difference between collateral and direct attacks is that in the former the record alone can be inspected, and is conclusively presumed to be correct, while on direct attack the true facts may be shown, and thus the judgment itself on appeal may be reversed or modified." The recitals in a judgment are the court's record of its own acts, and although upon a direct appeal the jurisdiction of the court is not to be established by its mere assertion in the judgment that it had acquired jurisdiction, yet, if such recital finds support in other portions of the record, which under any condition of facts could exist, it will be presumed, in the absence of any contradictory showing, that such condition of facts existed.

The "record" of the judgment is the judgment roll. The documents which shall constitute this record are specified in section 670, Code Civil Proc., to be, "in case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment;" and section 415, Id., provides that "proof of service of summons and complaint must be (3) in case of publication, the affidavit of the printer or his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, if the same has been deposited." Under these provisions, we must hold that the record of the judgment in the present case affirmatively shows that the court had jurisdiction of the appellant. It is recited therein that he had been "duly and regularly summoned;" and there is found in the judgment roll, in support of this recital in the judgment, an affidavit of publication of the summons, and of a deposit of a copy thereof as required by the statute. The statute has provided that under certain circumstances the court may obtain jurisdiction of a defendant by a service of the summons by publication, and what shall be the proof of such service; and, in support of the judgment of the court, it will be presumed upon a direct appeal, in the absence of any evidence to the contrary, that this mode of service was made under a proper order of the court therefor, and that a sufficient affidavit for such order was presented to the court before making the order. The order of publication bearing date September 23, 1890, cannot be considered for the purpose of impeaching the record of the judgment, and cannot be used in contradiction of such record any more than any other order or minute of the court made in the action. Upon an appeal from a final judgment the only papers that can be considered, where there is no bill of exceptions, are the notice of appeal and judgment roll. Spinetti v. Brignardello, 53 Cal. 283. If the appellant had desired to show that no order for publication was made until September 23d, and that the publication and mailing of the summons were premature and unauthorized, he should have presented such facts in a bill of exceptions by which the proofs upon which he would rely would be properly authenticated.

Under the same rule, it must be intended that the original affidavit of mailing had been lost, and that the copy found in the judgment roll was substituted therefor by the order of the court upon a proper showing, (Code Civil Proc. § 1045;) also, that the indorsement upon the complaint of the default of the defendant prior to the date of the affidavit was made upon proper proof of such mailing, even though the same does not now appear in the record. The jurisdiction of the court did not depend upon the preservation of the proof of the service, but upon the fact that the service had been made, (Estate of Newman, 75 Cal. 220, 16 Pac. Rep. 887; Mason v. Messenger, 17 Iowa, 263;) and the entry of the default was not a step in acquiring jurisdiction, but an act of the court after jurisdiction had been acquired. When jurisdiction has once been acquired, it is not lost by a failure to preserve a record of the acts by which it was acquired; and the acts of the court in exercising its inherent power to amend its record or to supply a lost record will be presumed to have been properly exercised. It appears from the record of the judgment that at the date of this memorandum of default the service upon the appellant was complete, and that the time for his appearance had expired.

2. The averment in the complaint that the appellant "has or claims to have some interest or claim upon said premises, which interest or claim is subsequent to and subject to the lien of the plaintiff's mortgage," was for the purpose of showing that the appellant is a proper party defendant, and is sufficient therefor. The character of his interest is immaterial to the plaintiff, and need not be set forth in the complaint. Poett v. Stearns, 28 Cal. 226; Anthony v. Nye, 30 Cal. 401. Such an averment is not an issuable fact. Elder v. Spinks, 53 Cal. 293. If the appellant had desired to protect such interest, he should have appeared and presented it to the court, with the grounds upon which he claimed its protection. If he has any interest in the mortgaged premises paramount to the mortgage, it will not be affected by the judgment or the sale thereunder. A sale of the mortgaged premises under the judgment entered against him by default will be limited in its effect to the rights acquired therein by him subsequent to the mortgage, irrespective of the character of the averment. McComb v. Spangler, 71 Cal. 418, 12 Pac. Rep. 347; Payn v. Grant, 23 Hun, 134; Frost v. Koon, 30 N. Y. 428; Bank v. Goldman, 75 N. Y. 127; Smith v. Roberts, 91 N. Y. 477; Jones, Mortg. § 1589.

3. The provision in the judgment foreclosing all persons claiming under the defendant Look must be construed under the foregoing rule, which limits the effect of a sale under the ordinary decree of foreclosure to a transfer of the title of the mortgagor as it existed in him at the date of the mortgage. The omission of the name of the appellant from the decree does not affect his rights; nor does the provision therein, "that the defendant Look, and all persons claiming or to claim under him, * * * be forever barred and foreclosed of and from all equity of redemption and claim in and to said mortgaged premises," add in any respect to the effect of a sale under the decree, beyond what it would have had if the provision had been omitted. This provision, although generally found in judgments of foreclosure, does not in reality, under our system of procedure, add anything to the effect of the judgment. Its insertion is due to the conservatism of the profession, which hesitates to adopt a reform in procedure, and prefers to adhere to the forms which were used under a different system. Under the old chancery system, where it was considered that a mortgage was a conveyance of the title to the land, courts of equity permitted the mortgagor to redeem his land from the mortgage notwithstanding the law-day of the mortgage had passed. In order to cut off this equity of redemption, the mortgagee presented his bill for a strict foreclosure of the mortgage, and in the decree upon that bill the court named a day prior to which the mortgagor might redeem, and that upon his failure to do so he should thereafter be forever foreclosed of his equity of redemption, and all right and title in the lands. This procedure continued to prevail in those states in which courts of equity were distinct from courts of law after it had been determined that a mortgage was only a lien, and did not convey the title. Under the system of procedure in this state, where the mortgage is held to be only a lien upon the land, to be enforced by its sale under the judgment of a court, the effect of such sale is of itself to extinguish the right and claim of all the defendants in the action acquired subsequent to the date of the mortgage, and to vest in the purchaser the title of the mortgagor at the date of the mortgage, discharged of all such right and claim. Goodenow v. Ewer, 16 Cal. 461; San Francisco v. Lawton, 18 Cal. 465; Montgomery v. Middlemis, 21 Cal. 103. There are instances in which rights of defendants acquired prior to the date of the mortgage may be adjudicated and determined by the judgment, but these are exceptional and well recognized in practice. In the ordinary action of foreclosure the judgment need only determine the amount of the debt, the defendant who is personally liable therefor, and direct a sale of the mortgaged lands, and an application of their proceeds to satisfy this amount, with such provision for the rights of the defendants between themselves may be presented in the case. Leviston v. Swan, 33 Cal. 480. For the purpose of procuring a writ of assistance without delay, in case it may be required, it is expedient to include a provision that it may issue without further notice, as this is but a part of the execution of a judgment for foreclosure. Montgomery v. Tutt, 11 Cal. 190; Montgomery v. Middlemis, 21 Cal. 103. Whether the interest of the defendants in the lands is set forth by them in their answer, or whether they suffer default, the effect of the sale under the judgment is in itself to foreclose and extinguish whatever rights they have acquired in the lands subsequent to the mortgage. The term "foreclosure" has itself acquired a modern significance, corresponding with the change in the procedure. Instead of being effected by the judgment itself, it is effected by the sale under the judgment; and therefore a provision in the judgment for the foreclosure becomes meaningless and redundant. Goldtree v. McAlister, 86 Cal. 105, 24 Pac. Rep. 801.

4. It was not necessary for the plaintiff, before bringing suit, to give to the mortgagor or to the appellant any notice of his election to consider the whole of the

debt due. Hewitt v. Dean, 91 Cal. 5, 27 Pac. Rep. 423. The judgment is affirmed.

We concur: McFarland, J.; De Haven, J.; Garoutte, J.; Paterson, J.; Sharpstein, J.

Sichler v. Look *et al.* (No. 14,473.)

(*Supreme Court of California.* March 11, 1892.)

In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

Accion to foreclose a mortgage by Philip Sichler against P. H. Look and D. A. Arrasmith. Judgment for plaintiff. Defendant Arrasmith appeals. Affirmed.

Geo. Hayford, *I. N. Everett*, and *Frank C. Prescott*, for appellant. *I. E. Messmore*, for respondent.

Per Curiam. For the reasons given in Sichler v. Look, 29 Pac. Rep. 220, (No. 14,472,) the judgment is affirmed.

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93 Cal. 578

Cody v. Bean *et al.* (No. 14,402.)

(*Supreme Court of California.* March 11, 1892.)

Mortgages—Foreclosure—Litigation of Paramount Title.

Where one of the defendants in a mortgage foreclosure, other than the mortgagor, answers and sets up a title paramount to that of the mortgagor and mortgagee, such title cannot be litigated in the foreclosure suit, and the judgment will be so modified as not to prejudice the rights of the claimant of such paramount title.

Department 2. Appeal from superior court, Mono county; O. F. Hakes, Judge.

Action by M. J. Cody against A. E. Bean and others. Judgment for plaintiff. Defendant Sturgeon appeals. Judgment modified and affirmed.

Chas. L. Hayes, *Richard S. Miner*, and *H. M. Eddy*, for appellant. *Reddy*, *Campbell & Metson*, for respondent.

McFarland, J. The defendants Bean and Brown executed a mortgage to the assignor of plaintiff upon two adjoining mines, one of which is called the "Rattlesnake Extension Mine." Several other persons were made defendants as claiming some interest in the mortgaged premises. All the defendants made default except James H. Sturgeon, who answered, setting up, in brief, that plaintiff acquired no interest in the undivided two-thirds of said Rattlesnake Extension by said mortgage made by Bean and Brown; that the latter had no right or title to or in said two-thirds; and that at the time of the execution of said mortgage, and ever since, said Sturgeon was and has been "the sole, lawful, and exclusive owner" thereof; and the prayer of the answer is that he (Sturgeon) "be adjudged and decreed the sole exclusive owner of" said two-thirds, and that plaintiff be enjoined from asserting any interest therein. His answer contains no denial of any of the averments of the complaint which are material in an action to foreclose a mortgage. Judgment was rendered for plaintiff, and said defendant Sturgeon appeals therefrom, and from an order denying a new trial.

The title to a portion of the mortgaged premises thus asserted in appellant's answer was paramount and hostile to the title of the mortgagors and mortgagee; and it has been held here, uniformly and repeatedly, that such a title cannot be litigated in an action to foreclose a mortgage. Ord v. Bartlett, 83 Cal. 428, 23 Pac. Rep. 705, and cases there cited; McComb v. Spangler, 71 Cal. 418, 12 Pac. Rep. 347; San Francisco v. Lawton, 18 Cal. 474; Sichler v. Look, 29 Pac. Rep. 220, (No. 14,472, filed March 11, 1892,) and cases there cited. In Ord v. Bartlett, supra, it was held that a demurrer to such a complaint was properly sustained. In the case at bar, when the appellant commenced offering his evidence to show his paramount title, respondent objected to it because it was "irrelevant, immaterial, and tends to prove no issue in the case." The objection should have been sustained, but it was erroneously overruled. After that the trial proceeded upon no very well defined theory, but it is probable that the court undertook to try and determine appellant's said paramount title. If the issue as to that title had been properly before the court, we are not prepared to say that its conclusion about it was erroneous; but we shall not examine that question, for to allow such issues to be litigated in an action to foreclose a mortgage when the sale under the decree carries to the purchaser merely such title as the mortgagor had, would be to sanction a condemned practice and confuse litigation. Titles like that asserted by appellant "must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance." San Francisco v. Lawton, supra. As to the general averment in the complaint that the defendants named "have or claim to have some interest" in the mortgaged premises which were "subject to the lien of plaintiff's mortgage," and when it is an issuable averment, see Sichler v. Look, supra. Whether or not a judgment rendered in a foreclosure suit which determined an issue of paramount title thus improperly presented could afterwards be collaterally attacked, is a question not arising here. We do not think that the judgment in the case at bar really affects the title which appellant sets up in his answer; but, to make that point clear, we have considered it proper to follow the precedent of Ord v. Bartlett, and modify the judgment in that respect. It is ordered that the judgment of the superior court herein be modified by adding thereto, immediately before the words "done in open court," the following: "Provided, that nothing in this judgment shall be construed or held to prejudice or affect any right or title of the defendant James H. Sturgeon to any part of the said mortgaged premises which he may have had prior to and at the time of the execution of the mortgage set forth in the complaint herein, and which he asserts adversely to the title of the mortgagors therein." And as thus modified the judgment and order denying a new trial are affirmed, without costs to respondent.

We concur: De Haven, J.; Sharpstein, J.

93 Cal. 613

In re Burton's Estate. (No. 14,954.)

(*Supreme Court of California.* March 12, 1892.)

Dismissal of Appeal—Failure to File Bill of Exceptions.

Though rule 2 of the supreme court requires an appellant to file his bill of exceptions within 40 days after perfecting his appeal, failure to file such bill within more than a year after perfecting an appeal is no ground for dismissal, where appellant has been trying, in good faith, to secure a settlement of her bill of exceptions, and a mandate of the court has issued to compel the settlement thereof.

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Appeal of Maggie Leach from an order allowing attorney's fees in the matter of the estate of Henry S. Burton, deceased. Motion to dismiss denied.

Wellborn, Parker & Stevens, for appellant. *Works, Gibson & Titus*, for respondents.

Per Curiam. This is an appeal from an order of the superior court of San Diego county, allowing an attorney's fee to J. S. Callen, attorney for the absent heirs of said estate. Respondents move to dismiss the appeal upon the clerk's certificate that no transcript has been certified, and no bill of exceptions or statement of the case has been settled. Notice of appeal was filed and served March 2, 1891, and an undertaking on appeal in due form was also filed on said day. Under rule 2 of this court the appellant has 40 days after the appeal is perfected, and the bill of exceptions and statement (if there be any) are settled, to file the transcript. Since appellant perfected her appeal, it appears she has been endeavoring, in good faith, to secure a settlement of the bill of exceptions; and upon the 12th day of March, 1892, this court issued a writ of mandate, etc., to the judge of the superior court of San Diego county, requiring him to settle a bill of exceptions upon the appeal in this case. For these reasons the motion to dismiss will be denied. McGrath v. Hyde, 71 Cal. 454, 12 Pac. Rep. 497.

In re Burton's Estate. (No. 14,952.)

(*Supreme Court of California.* March 12, 1892.)

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Appeal of Maggie Leach from an order making a family allowance to the widow in the matter of the estate of Henry S. Burton, deceased. Motion to dismiss denied.

Wellborn, Parker & Stevens, for appellant. *Works, Gibson & Titus*, for respondents.

Per Curiam. This is an appeal from an order making a family allowance to the widow of a deceased. Upon the authority of case, same title, supra, (No. 14,954,) this day filed, the motion to dismiss is denied.

In re Burton's Estate. (No. 14,953.)

(*Supreme Court of California.* March 12, 1892.)

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Appeal of Maggie Leach from an order authorizing the sale of real estate in the matter of the estate of Henry S. Burton, deceased. Motion to dismiss denied.

Wellborn, Parker & Stevens, for appellant. *Works, Gibson & Titus*, for respondents.

Per Curiam. This is an appeal from an order authorizing the sale of certain real estate. Upon the authority of case, same title, supra, (No. 14,954,) this day filed, the motion to dismiss is denied.

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93 Cal. 630

People v. Turnbull. (No. 20,838.)

(*Supreme Court of California.* March 17, 1892.)

Bribery—Indictment.

Under Pen. Code, § 165, inflicting a penalty for offering bribes "to any member of a common council, board of supervisors, or board of trustees of any county, city, or corporation," etc., an indictment charging defendant with having offered a bribe "to one G., a member of the board of directors of a corporation, to-wit, 'Alta Irrigation District,'" etc., and failing to allege that such corporation is a public corporation, is fatally defective, as the section applies only to public and *quasi* public corporations.

In bank. Appeal from superior court, Tulare county; William W. Cross, Judge.

Walter Turnbull was indicted for offering a bribe. A demurrer to the indictment was sustained, and the people appeal. Affirmed.

Atty. Gen. Hart and *Maurice E. Power*, Dist. Atty., for the People. *Brown & Daggett* and *Geo. A. Knight*, for respondent.

Per Curiam. This is an appeal by the people from a judgment sustaining a demurrer to an indictment. The indictment is based upon an alleged violation of section 165 of the Penal Code, which reads as follows: "Every person who gives or offers a bribe to any member of a common council, board of supervisors, or board of trustees of any county, city, or corporation, with intent to corruptly influence such member in his action on any matter or subject pending before the body of which he is member, * * * is punishable by imprisonment in the state-prison for a term not less than one year nor more than fourteen years, and is disqualified from holding any office in this state." The defendant, by the indictment, is charged with offering a bribe "to one E. E. Giddings, a member of the board of directors of a corporation, to-wit, 'Alta Irrigation District,' with intent to corruptly influence," etc. It is insisted that the words "member of a board of trustees of a corporation" are not broad enough to include a member of a board of directors of a corporation. Section 4 of the Penal Code reads: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice." Section 958 of the Penal Code is as follows: "Words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used." Construed in the light of the foregoing provisions of the statute, it necessarily follows that in the use of the word "trustee" in said section the legislature intended that it should be applied in its widest and broadest sense. In Bank v. Downey, 53 Cal. 468, it was decided that the directors of a corporation were its trustees, and the decision is supported by abundant authority. It is insisted that the word "corporation," as used in the section, has no reference to private corporations, but refers solely to public and *quasi* public corporations. If such be the fact the indictment is fatally defective, for there is nothing alleged to indicate that the Alta irrigation district is even a *quasi* public corporation. An irrigation district organized under the "Wright act" is a public corporation. Crall v. Irrigation Dist., 87 Cal. 145, 26 Pac. Rep. 797. But there is nothing in this accusation to indicate that the Alta irrigation district was organized under the Wright act. While this court will take judicial notice of the Wright act, and that a corporation organized under its provisions would be a public corporation, there are no such allegations. There is nothing in the indictment to contradict the fact that the Alta irrigation district may have been a purely private corporation, created under and controlled by the general corporation laws of the state. We have nothing here but its name, and the name of a corporation is not always a true index of its objects and purposes. It follows that the indictment does not charge the Alta irrigation district to be a public corporation, and it is therefore subject to a demurrer; for it is quite clear that the section of the Penal Code defining the offense relied upon by the prosecution was not intended to include private corporations. The chapter of the Code including this section treats of "offenses against public justice," and the section itself, taken as a whole, leads to the conclusion that it is only applicable to public and *quasi* public corporations. Let the judgment be affirmed.

Harrison, J., took no part in the foregoing decision.

People v. Turnbull. (No. 20,839.)

(*Supreme Court of California.* March 17, 1892.)

Appeal from superior court, Tulare county; William W. Cross, Judge.

Walter Turnbull was indicted for bribery. A demurrer to the indictment was sustained, and the people appeal. Affirmed.

Atty. Gen. Hart and *Maurice E. Power*, Dist. Atty., for the People. *Brown & Daggett* and *Geo. A. Knight*, for respondent.

Per Curiam. The judgment is affirmed upon the authority of People v. Turnbull, (No. 20,838,) 29 Pac. Rep. 224, this day filed.

Harrison, J., took no part in the foregoing decision.

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93 Cal. 532

Crocker *et al.* v. Field's Biscuit & Cracker Co. *et al.* (No. 13,677.)

(*Supreme Court of California.* March 7, 1892.)

Bonds—Construction—Sales—Breach by Buyer—Liability.

1. Where a bond is conditioned to pay plaintiffs the amounts due or to become due for labels sold or to be sold to the principal under existing contracts, and the manufacture of the labels requires the making of plates, which are useful for no other purpose, the principal and sureties are liable, after the principal orders that the labels be not printed, for the expense already incurred by plaintiff in making the plates.

2. A mere offer of delivery of the labels, without actual delivery, was sufficient to satisfy the terms of the bond, and fix the liability of the principal and sureties therefor.

3. Where a person contracts to buy labels, the manufacture of which requires the making of special plates, useful for no other purpose, and subsequently notifies the seller not to print the labels, such buyer is liable for the cost already incurred of making the plates.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; E. R. Garber, Judge.

Action on a bond, by H. S. Crocker and another, against the Field's Biscuit & Cracker Company and others. Verdict and judgment for plaintiffs. Defendants appeal. Affirmed.

J. C. Martin, R. Percy Wright, and *Theo. Brodley*, for appellants. *John H. Dickinson* and *Henry E. Monroe*, for respondents.

Foote, C. This action is upon a bond for $2,500, executed by the Field's Biscuit & Cracker Company as principals, and R. Percy Wright and William Collins as sureties. Judgment passed for the plaintiffs, from which, and from an order denying a new trial, this appeal is taken.

The defendant corporation had contracted with the plaintiffs for the sale and delivery to it of certain show-cards, labels, and linings for boxes, and had failed to pay for them as agreed upon, and the plaintiffs had levied an attachment upon the defendant's property. In order to obtain a release of that attachment, the bond was entered into by the corporation as principal and Wright and Collins as sureties. The condition of the bond is "that if the said Field's Biscuit and Cracker Company shall pay to said H. S. Crocker & Company the amount due and to become due to them for goods sold and delivered to said Field's Biscuit and Cracker Company, or to be sold and delivered to said company, according to the terms of the contracts between said H. S. Crocker & Company and said Field's Biscuit and Cracker Company respecting the same, and shall fulfill said contract, then this obligation to be void; otherwise to remain in full force and effect." The corporation, it is alleged, failed to pay what it owed for goods sold and delivered under its contracts, and this action was then brought to recover what was claimed to be due the plaintiffs. There seems to be no question, from the defendant corporation's answer, but what at least $1,960.50 was due the plaintiffs for goods sold and delivered, so that the real matter for determination is whether the court improperly allowed evidence to go to the jury as to the cost of certain plates from which labels contracted for by the defendant corporation were to be printed, and in refusing to grant, as asked for, two instructions of the defendants. It is insisted that there was no contract to furnish plates, no claim made in the complaint for their value, and no responsibility on the bond as to them. The contract, with reference to which the bond was made, was for the sale and delivery of certain labels, among other things, and it appears that, as a necessity for the printing of these labels, and their delivery to the defendant corporation under the contracts, the plates had to be made at a certain expense to the plaintiffs, and that, after they were thus made, and the expense incurred, by the plaintiffs, one of the defendants, R. Percy Wright, the agent and attorney for the other parties, ordered that the labels contracted for should not be printed and should not be delivered. To deliver the labels under the contract it was as much a necessity to have the plates as the paper on which to print them, and Wright knew that the plates were to be charged for before the bond was executed if the goods ordered were not taken, as agreed. Therefore we do not see how the defendants can successfully contend that, as a part of their contract, they are not responsible for the expense of making the plates, now useless to the plaintiffs. Defendants refused to let the contract be carried out. They caused the expense which was essential to enable the delivery of the labels contracted for, and that expense was necessarily intended, under the contract which the bond referred to; and, besides that, it was claimed by plaintiffs to be due under the contract, which fact Wright knew when he signed the bond.

The instructions to be considered, asked by defendants, were these: (1) "The jury must leave out of consideration all evidence respecting goods sold by plaintiffs to the defendant Field's Biscuit and Cracker Company, which are not shown to have been actually delivered." (2) "The jury must leave out of consideration all evidence respecting goods sold or delivered by plaintiffs to the defendant Field's Biscuit and Cracker Company, except show-cards, labels, and manilla linings for boxes." The court qualified the first instruction by reading to the jury section 1141 of the Civil Code, which is as follows: "Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the chapter upon 'Offer of Performance.'" The court then said: "Now, of course, if in this case the plaintiffs prepared these labels on the order of defendant, and it was defendant's place, as part of its contract, to call for them, and did not do it, then the fact that they were not actually delivered is of no consequence." The defendants contended that nothing but manual delivery will satisfy the terms of the bond. The record shows that certain labels contracted for were prepared and offered for delivery to the defendant corporation, which it did not take, but left them in the hands of plaintiffs. The corporation was responsible for the payment of the contract price for them, and the court committed no error in the course pursued. The second instruction, not given as asked, was not proper under the facts of the case. The price of the plates was as much included in the contract, if the defendant refused, after the expense was incurred at its request, to allow the labels to be printed and delivered, as if the labels had been printed and refused by the defendant when offered for delivery. The plates were a necessary ingredient in printing and delivering the labels, and the fault of having them made and left as useless in the hands of plaintiffs was that of the defendant corporation. The instruction excluded all compensation on this head to be taken into consideration by the jury. The contract and bond were both made with reference to the law governing such sales of goods, and we see nothing in the admission of evidence or the action of the court as to instructions in the least degree prejudicial to the defendants. Upstone v. Weir, 54 Cal. 126. The appeal has no merit, as we think, and the judgment and order should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

DE HAVEN, J. I concur in the judgment.

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93 Cal. 588

WILCOX *et al.* v. LATTIN. (No. 14,528.)

(*Supreme Court of California.* March 11, 1892.)

VENDOR AND VENDEE—RESCISSION OF CONTRACT—WAIVER OF RIGHT.

1. Defendant agreed to convey to plaintiff a tract of land for a fixed sum, secured by plaintiff's notes. The contract provided that plaintiff should plat and sell the land in small tracts, defendant agreeing to make conveyances to the purchasers as requested by the plaintiff, as fast as sales were made, and credit the moneys arising therefrom on plaintiff's notes. Plaintiff, relying on defendant's express representations that his title was perfect, did not cause it to be examined before purchasing. After the sale of a number of lots, an adverse claim was asserted to an undivided half of the land, and adjudged to be good, by reason of which plaintiff was precluded from making any further sales. *Held*, that the inability of defendant to make conveyances was such a failure of consideration as to entitle plaintiff to rescind the contract, under Civil Code, § 1689, subd. 4, providing that a party to a contract may rescind the same if the consideration, before it is rendered to him, fails in a material respect from any cause.

2. Such right of rescission was not waived by plaintiff's delay in asserting it until the court determined the adverse claim good, he having a right to assume that the title was as represented by defendant until such final adjudication to the contrary.

3. The tender of a deed by defendant subsequent to the rescission by plaintiff, even if such deed had been sufficient to transfer title, did not revive the contract, it having been extinguished by its rescission, under Civil Code, § 1688.

4. In an action to enforce the rescission of the contract, a judgment that plaintiff was entitled to exercise his right of rescission confirms the extinguishment of the contract as of the date when the rescission was made.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Wilcox and another against

Lattin. Judgment for plaintiffs. Defendant appeals. Affirmed.

Dooner & Burdette and *Anderson, Fitzgerald & Anderson*, for appellant. *A. M. Stephens, Smith, Howard & Smith, T. L. Winder*, and *Hutton & Swanwick*, for respondents.

HARRISON, J. Action for the rescission of an agreement for the purchase of certain real estate. The plaintiffs and the defendant made an agreement August 29, 1887, by which the defendant agreed to convey to the plaintiffs a tract of 100 acres of land in the county of Los Angeles for the sum of $80,000, of which the plaintiffs were to pay $20,000 on or before the expiration of six months, $20,000 on or before the expiration of one year, and $40,000 on or before the expiration of eighteen months from the date of the said agreement; and the plaintiffs executed to the defendants their several promissory notes for these amounts. The agreement also contained the following clause: "This contract is subject to an understanding and agreement between all the parties that the parties of the second part are to plat, subdivide, and place all the said land in the market within thirty days from and after the execution of these presents;" and it was also provided therein "that, as fast as any of said land is sold by the said second parties, said B. C. Lattin shall convey the land so sold to the purchasers, and all the moneys arising from such sales, or any sale, shall be paid to said Lattin, and applied by him on the aforesaid notes of said Wilcox and said Shaw in their orders of payment." Under this agreement the plaintiffs, within the 30 days therein specified, caused the land to be platted and subdivided in accordance with the terms of the agreement, and placed the land in the market, and made sales of portions thereof, amounting in value to about $25,000, for which the defendant executed deeds and contracts to the respective purchasers, and received the amounts for which the lands were sold, applying them upon the notes of the plaintiffs. In January, 1888, an adverse claim was made by certain parties to an undivided half of the entire tract, and an action was commenced by them in the superior court for the county of Los Angeles against the defendant and the plaintiffs for the purpose of establishing their claim; and on the 7th of June, 1888, judgment was rendered in said action, by which it was adjudged that they were the owners in fee-simple of an undivided half of said land. It is alleged in the complaint, and also found by the court, that "by reason of said defect in the title of the defendant, and the said adverse claim, the plaintiffs were absolutely prevented from making any further sales of the said lands." Upon the institution of that suit the defendant represented to the plaintiffs that there was nothing in the claim, and that he would establish his title in the suit; and, after the judgment had been rendered, he represented to them that he would appeal therefrom, and thus settle and establish his title. On the 12th of September, 1888, the plaintiffs notified the defendant that on account of the failure of title they rescinded the contract, and at the same time tendered him a deed of conveyance, conveying him all right, title, and interest in and to the said lands, and in and to all moneys and contracts of every character arising from sales made by them under said contract, and demanded a surrender to them of their notes. The defendant refused to accept the deed, or to consent to the rescission, or to surrender the notes. Thereupon the plaintiffs brought this action for the purpose of enforcing a rescission of the contract, and for a surrender of the notes. Judgment was rendered in their favor, from which, and from an order denying a new trial, defendant has appealed.

The agreement between the parties is not merely an executory agreement for the sale of land which is to be conveyed at a future day, designated in the agreement, in which the vendor would satisfy his obligation by being able to make the conveyance at the date fixed in the agreement. It is very evident from the terms of this contract that it was not contemplated by the parties that the vendor should be allowed until the expiration of 18 months from its date within which he might execute the conveyance. The provision therein that the plaintiffs should, within 30 days from its date, place the land on the market, and that, as fast as they should sell it, the defendant should convey the parcels so sold to the respective purchasers, and that he should receive the proceeds of such sales in part payment of the notes of the plaintiffs, clearly indicates an agreement on his part that he would make such conveyance upon the demand of the plaintiffs, and by necessary implication that such conveyance should transfer title to the land to be conveyed. The vendor in any executory agreement for the sale of land impliedly represents that he has a good title thereto as one of the considerations for inducing the vendee to enter into the contract, and that the conveyance therein agreed to be made by him will transfer such title. In the present case the court finds that the defendant made express representations to the plaintiffs that his title to the land was perfect, and that the plaintiffs, relying upon such representations, did not cause the title to be examined by any attorney. When the adverse claim to one-half of the land was made, it naturally had the effect to impair the ability of the plaintiffs to make immediate sales thereof, as was the purpose for which they had entered into the agreement; and the subsequent judgment, affirming the validity of such adverse claim, established the inability of the defendant to convey the title of any parcel they might sell; and the court finds that "by reason of said defect in the title of the defendant and the said adverse claim the plaintiffs were absolutely prevented from making any further sales of the said lands." The court also found that the plaintiffs entered into the contract for the sole purpose of immediately putting the land upon the market, and selling the same in small tracts, and that that purpose was well known to the defendant. In consideration of these facts it is manifest that the provision in the agreement that the defendant would make conveyance of the land as he should be requested by the plaintiffs was an essential part of the consideration upon which the plaintiffs entered into the agreement, and that the refusal or inability on the part of the defendant to make such conveyance was such a failure of consideration as to entitle the plaintiffs to a rescission of their agreement. Civil Code, § 1689, subd. 4.[1] The objection that this right of rescission was waived by the plaintiffs by their delay in asserting it cannot be maintained. They were at liberty to consider that the title of the defendant was as he had represented it until it was determined otherwise by the court. The mere assertion of an adverse claim by a stranger would not justify them in pronouncing the title bad, and thereupon rescinding their agreement. Even after the action had been brought upon the adverse claim, the defendant assured them that there was nothing in the claim, and that it would be soon disposed of by the judgment, and requested them not to make any further sales until he could ascertain what could be done; and after the judgment he made the same representations, and gave them to understand that he would appeal therefrom, and upon such appeal establish his title. The judgment was entered on the 7th of June, 1888, and on the 12th of September thereafter they gave the notice of rescission. We think that, under the circumstances shown, they used reasonable diligence in exercising their right of rescission. The objection that the plaintiffs did not, at the time of their rescission, offer to restore to the defendant everything of value which they had received from him, is not sustained by the facts of the case. The specific objection is that the conveyance which they tendered to the defendant did not include all of the land embraced in the agreement. But the defendant, in pursuance of the terms of the agreement, had himself executed the deeds by which portions of the land had been conveyed, and had himself received all of the consideration for which the conveyances had been made; so that there was nothing which the plaintiffs had received out of the agreement which they could restore to him. The tender of a deed by the defendant to the plaintiffs subsequent to the commencement of the action, even if such deed had been sufficient to transfer the title, did not revive the contract. By their rescission the contract had been "extinguished," (Civil Code, § 1688;[2]) and the judgment that the plaintiffs were entitled to exercise their right of rescission confirmed the extinguishment of the contract as of the date when the rescission was made. The judgment and order denying a new trial are affirmed.

We concur: McFarland, J.; Sharpstein, J.; Garoutte, J.; Paterson, J.; De Haven, J.

Lattin *et al.* v. Wilcox *et al.* (No. 14,529.)

(*Supreme Court of California.* March 11, 1892.)

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Lattin and others against Wilcox and another for specific performance. Judgment for defendants. Plaintiffs appeal. Affirmed.

Dooner & Burdette and *Anderson, Fitzgerald & Anderson*, for appellants. *A. M. Stephens, Smith, Howard & Smith, T. L. Winder*, and *Hutton & Swanwick*, for respondents.

Per Curiam. This action arises out of the same facts as are presented in the action of Wilcox v. Lattin, 29 Pac. Rep. 226, (No. 14,528,) and is an action to enforce a specific performance by the defendants of the contract of sale therein presented. The two actions were tried by the court below at the same time, and upon the same evidence, and the appeals therein have been presented together in this court. The judgment of the court below that the plaintiffs were entitled to enforce their rescission of the contract was necessarily followed by a judgment in this action denying the right of a specific performance of the contract; and the judgment of this court, affirming the judgment in Wilcox v. Lattin, requires us to affirm the judgment and order in the present case. This makes it unnecessary to pass upon the motion to dismiss the appeal. The judgment and order denying a new trial are affirmed.

93 Cal. 596

People v. Cowgill. (No. 20,874.)

(*Supreme Court of California.* March 11, 1892.)

Criminal Law—Instructions—Credibility of Witness.

1. On a trial for murder it is proper to exclude testimony as to the reputation for "truth, honesty, and integrity" of defendant, who was a witness in his own behalf, where those traits of character were not questioned by the prosecution.

2. Where special requests to charge are fully covered by the general instructions given, there is no error in refusing them.

3. On a trial for murder defendant testified in his own behalf, and then requested the court to charge that "defendant is a competent witness in this case, and it is the duty of the jury to weigh, examine, and take into consideration the testimony of defendant, and give it due consideration; the same as it does the testimony of all the other witnesses in the case. If consistent and convincing, act upon it. If it raises in the minds of the jury a reasonable doubt of defendant's guilt, he is entitled to the benefit of the doubt." The court gave the charge, after striking out the words, "the same as it does the testimony of all the other witnesses in the case." *Held*, that there was no error in thus modifying the charge.

4. In such case, an instruction that, "unless you disbelieve the testimony of defendant, the weight of the testimony tends to prove that the act of defendant was not criminal," was properly refused, as an instruction on the weight of evidence.

5. In such case, a request to charge stated that "the testimony shows that defendant and deceased were old and particular friends for many years," and then directed what weight this friendship should have with the jury. *Held*, that the request was properly refused, as the court had already charged the jury that, "if the evidence shows that defendant and deceased were warm, personal friends, this fact may be considered by you in connection with the other evidence in the case."

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[1] Civil Code, § 1689, subd. 4: "A party to a contract may rescind the same" where the "consideration, before it is rendered to him, fails in a material respect from any cause."

[2] Civil Code, § 1688: "A contract is extinguished by its rescission."

In bank. Appeal from superior court, Placer county; J. E. PREWITT, Judge.

Elisha Cowgill was convicted of murder in the second degree, and appeals. Affirmed.

Jo. Hamilton and *G. W. Hamilton*, for appellant. *A. K. Robinson* and *L. L. Chamberlain*, for the People.

McFARLAND, J. The appellant was convicted of murder in the second degree, and appeals from the judgment and from an order denying a new trial. One of the points made for reversal relates to a ruling made by the trial court with respect to the admissibility of certain evidence, and the others relate to instructions given and refused.

1. It appears from the statement that at a certain stage in the trial the appellant, "in the absence of the jury," offered to introduce before the jury, "upon their return into court," certain named witnesses, and "to prove by each of said witnesses that he is well acquainted with defendant, and has known him intimately for many years; that each of them is well acquainted with his reputation for truth, honesty, and integrity, and that it is good; that they would give him full faith and credit upon his oath in any case." The court, upon objection, "excluded said testimony, and refused to permit the jury to hear the same," and appellant excepted. Assuming that there was anything before the court to rule on, the ruling was clearly right. Appellant did not offer to prove good reputation for the traits of character involved in the crime charged. It is true that appellant was a witness in his own behalf; but evidence is not admissible to prove that the character of a witness for truthfulness is good, unless the opposite party has tried to impeach him by showing that his general reputation is bad.

2. The points made with respect to instructions to the jury all relate to instructions asked by defendant and refused or modified by the court. The instructions so asked, and numbered 2, 3, 4, and 16, deal with the subject of "reasonable doubt," and were refused because "given elsewhere;" and, upon turning to the general charge of the court to the jury, we find that it sufficiently covers that vexed subject, and contains all that is correct in the said instructions asked by appellant. It seems that the court, for some reason, struck out of said second instruction the word "entirely" before refusing it; but, as it was properly refused with that word either in or out, striking it out was of no consequence. The ninth instruction asked by appellant was as follows: "The defendant has offered himself in his own behalf. The court charges you that the defendant is a competent witness in this case, and it is the duty of the jury to weigh, examine, and take into consideration the testimony of the defendant, and give it due consideration; the same as it does the testimony of all the other witnesses in the case. If consistent and convincing, act upon it. If it raises in the minds of the jury a reasonable doubt of the defendant's guilt, he is entitled to the benefit of the reasonable doubt." The court struck out the words, "the same as it does the testimony of all the other witnesses in the case," and then gave the instruction as thus modified. We see no error in this for which the judgment should be reversed. The instruction as given is as favorable to appellant as he was entitled to have it. It has been held here frequently (and it is too late now to reopen the question) that it is not improper for the court to call the attention of the jury, as was done in this case, to the circumstances under which a defendant in a criminal case testifies,—the inducements, temptations, etc., which surround him; but nothing of that kind is suggested in the said instruction asked by appellant, and the words stricken out were inconsistent with the general charge on the subject, and would probably have tended towards leading the jury to believe that they were not to consider his surroundings, but were to receive his testimony as if he occupied exactly "the same" position as that of disinterested witnesses. The eleventh instruction asked was properly refused. It contains this clause: "The court instructs you that, unless you disbelieve the testimony of the defendant, the weight of the testimony tends to prove that the act of the defendant was not criminal;" and such an instruction would have been erroneous, for, under our system, it is not the province of the court to instruct about the weight of evidence. The thirteenth instruction asked was also properly refused. It contains a conclusion of the court that "the testimony in the case does show that the defendant and deceased were old and particular friends of many years;" and is thus objectionable as stating a result of evidence which it was the duty of the jury, and not of the court, to arrive at. It then directs the jury as to what "bearing on the case" this friendship should have,—that is, in effect, what weight it should have with the jury. Now, if this was a legitimate subject for instruction at all, the court, in its general charge, had already said all that was proper to be said on the subject in this language: "If the evidence shows that the defendant and the deceased were warm personal friends, this fact may be considered by you, in connection with the other evidence in the case, in deliberating on your verdict." But courts are to instruct only as to matters of law; and it is difficult to see how the questions whether a man is less likely to murder his friend than his enemy, or whether, on the other hand, it is more reprehensible to murder a friend than an enemy, etc., are questions of law.

The foregoing are all the points argued by appellant. We have examined the evidence, and find that it justified the verdict; and there are no reasons for disturbing the judgment. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; PATERSON, J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.

93 Cal. 586

KELLOGG *et al.* v. HOWES *et al.* (No. 14,543.)

(*Supreme Court of California.* March 11, 1892.)

REMOVAL OF CAUSES—BOND—ATTORNEY'S FEES COSTS—COLLECTION.

1. The *supersedeas* bond, on the removal by writ of error of a cause from the state supreme court to the United States supreme court, conditioned that appellant "shall prosecute his writ to effect, and answer all costs and damages if he shall fail to make good his plea," does not require the payment of appellee's attorney fee, where the writ was dismissed by the federal court for want of jurisdiction.

2. An action for the collection of costs will not lie before they have been taxed as such.

In bank. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Action on a bond by Levi M. Kellogg and others against F. C. Howes and others. Defendants had judgment, and plaintiffs appeal. Affirmed.

Johnston & Borden, for appellants. *Thomas Mitchell* and *M. T. Allen*, for respondents.

PATERSON, J. The judgment in the case of Kellogg v. Howes, (No. 13,324,) was affirmed here in November, 1889. 81 Cal. 170, 22 Pac. Rep. 509. Howes, the appellant therein, procured a writ of error to the supreme court of the United States, and gave a *supersedeas* bond in the sum of $8,000, with respondents Bonebrake and Bryson as sureties. The condition of the bond is that "if the above-named F. C. Howes shall prosecute his said writ of error with effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise," etc. A citation was issued requiring the defendants in error to show cause before the supreme court at Washington, on the second Monday in October, 1890, why the judgment should not be corrected. On May 22, 1890, said court, upon motion of defendants in error, dismissed the writ on the ground that the court had no jurisdiction of the action. The clerk of the supreme court of the United States attached to the mandate dismissing the writ a memorandum of costs, including the cost of printing the transcript, amounting to $160.50; and, as soon as the mandate was filed here, Howes paid the amount of the judgment, with interest thereon, and also paid the bill of costs attached to the mandate, but refused to pay other items of costs and damages claimed by plaintiff. Thereupon, and after demand was made upon the sureties, this action was commenced to recover the sum of $700.30, being the sum of the following items claimed by plaintiff as costs and damages: Certificate of clerk of the supreme court to transcript, $33; transmitting papers to Washington, $4.90; telegram giving notice of appearance, $3.40; printing briefs on motion to dismiss, $59; counsel fees in United States supreme court, $600. The court below gave judgment for defendants, and plaintiffs have appealed.

The condition of the bond quoted above is prescribed by rule 29 of the supreme court of the United States, and rules 23 and 24 of the court prescribe what damages and costs may be allowed. Curtis' Fed. St. Ann. 163. It is conceded that, if the bond had been given on appeal from a judgment of the circuit court of the United States, plaintiffs would not be entitled to recover attorney's fees. Supervisors v. Kennicott, 103 U. S. 554. We think the condition named in the bond should be given the same construction by this court that is placed upon it by the supreme court of the United States,—the court that framed it. The parties who executed the bond presumably entered into the undertaking with a knowledge of the construction which had been placed upon it by the national courts, and in the belief that their obligation would be measured by such construction. The fact that the supreme court held no federal question was involved cannot change the obligation of the sureties. A writ of error had been allowed by the chief justice of this court, a *supersedeas* bond was required, and the liability of the sureties depended upon the question whether Howes would be able to prosecute his writ "with effect" and "make good his plea;" it did not depend upon the reasons which might be given for holding the writ to be without effect. If the court had held that a federal question was involved, and had affirmed the judgment, the damages claimed could not have been recovered. The dismissal of the writ had the same effect as to costs and damages. By the dismissal the plaintiff in error simply failed to "prosecute his said writ of error with effect," or "to make good his plea." The cost of the clerk's certificate, printing briefs, sending transcript to Washington, and telegraphing the appearance of attorneys, if proper items of cost to be allowed at all, should have been taxed up as such. The term "costs" has a well-known meaning, and whatever costs are claimed and recovered must be taxed in the action in which they are allowed. Until taxed they cannot be recovered as damages in an independent action on the undertaking on appeal. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; SHARPSTEIN, J.; DE HAVEN, J.

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93 Cal. 569

HENRY v. SUPERIOR COURT OF NEVADA COUNTY. (No. 14,769.)

(*Supreme Court of California.* March 10, 1892.)

PROBATE PROCEEDINGS—COSTS.

1. An order allowing costs to counsel in a probate proceeding is void. Sharon v. Sharon, 16 Pac. Rep. 345, 75 Cal. 1, followed.

2. The superior court cannot empower a special administrator to defray the expenses of a probate proceeding unless expressly authorized to do so by statute.

3. Under Code Civil Proc. § 1720, providing that in probate proceedings the superior court may, in its discretion, order costs to be paid by any party to the proceeding, or out of the assets of the estate, as justice may require," the court has no power to appropriate the funds of the estate to aid either party until the will has been admitted to, or denied, probate.

In bank.

Certiorari to superior court, Nevada county, JOHN CALDWELL, Judge, to review an order to pay counsel fees to the attorneys of S. M. McKay, executor, under the will of Elle Ellen, deceased. Order annulled.

Thomas S. Ford, for petitioner. *J. M. Walling*, for respondent.

Paterson, J. On May 1, 1891, Elle Ellen died, leaving a will in which W. H. Kruger and S. M. McKay were named as executors. On May 9, 1891, P. Henry, petitioner herein, was appointed special administrator, and on the same day the persons named as executors filed a petition asking that the will be admitted to probate. The hearing of the petition was fixed for the 8th day of June, 1891, and due notice thereof was given. Before the day set for hearing, James Ellen Henry and Joseph Henry Saunders, grandsons of the decedent, filed an opposition, alleging that the will was executed under undue influence, and while the testator was wanting in capacity. Thereafter Kruger died, and on September 12, 1891, the court, on application of McKay, supported by affidavit, made an order that the special administrator pay to the attorneys of McKay, out of the funds of the estate in his hands, the sum of $600 for counsel fees, witness fees, and other expenses to be incurred in the trial of the issues pending. Thereupon the special administrator applied to the court for an order revoking the order referred to, on the grounds that it was made without notice, and that the court had no jurisdiction to appropriate the funds of the estate to such a purpose. The motion was denied, and the administrator has sued out this writ of review to annul the order.

1. In Re Aaron, 5 Dem. Sur. 362, the court held that costs in a probate proceeding could not be allowed to counsel; if allowed at all, they must be awarded directly to the parties themselves. And in Sharon v. Sharon, 75 Cal. 1, 16 Pac. Rep. 345, we held that "suit money" must be paid to the party for whose benefit it is awarded, and that an order directing payment to counsel who are not parties to the action is void.

2. Section 2557 of the New York Code of Civil Procedure provides that costs in probate proceedings "may be made payable by the party personally, or out of the estate or fund, as justice requires." The powers conferred upon special administrators in that state by the provisions of the Code are identical with those conferred upon special administrators in this state. In Re Aaron, supra, it was held that it was the duty of a special administrator simply to collect and preserve the estate; that he had no authority to pay debts; and that the court could not empower him to defray the expenses of a controversy over probate, unless expressly authorized to do so by the statute. In Re Parish, 29 Barb. 627, the court held that contestants, either for or against a will, have no claim for costs or expenses which can be paid out of the estate by the special administrator until after a decision has been made in the contest.

3. There are additional reasons, however, for declaring the order void; and we prefer to rest our decision upon other and broader grounds than those stated. The superior court, acting in probate proceedings, obtains its authority to award costs from the statute, and not by virtue of its general probate jurisdiction, as claimed by respondent. In re Parish, supra. Section 1720, Code Civil Proc., provides that the superior court "may, in its discretion, order costs to be paid by any party to the proceeding, or out of the assets of the estate, as justice may require. Execution for the costs may issue out of the superior court." If there is any authority upon which the order in question can be supported, it must be found in this section of the Code. The general rule is stated in section 1021, which provides that the compensation of attorneys is left to the agreement of the parties, but that parties to actions or proceedings are entitled to costs and disbursements, as provided in other sections of the Code. Even if it be conceded that counsel fees for services rendered the executor in probating the will may be regarded as "costs," within the meaning of section 1720, we do not think that they can be allowed, except as incident to some judgment or order of the court. The probate judge is clothed with discretion to order costs to be paid "by any party to the proceedings, or out of the assets of the estate, as justice may require." This discretion cannot be exercised until there is something upon which it may be based. In construing a similar provision conferring discretionary power upon the surrogate's court to award costs, the New York court of appeals said: "It means the party whose behavior in the circumstances provoking the litigation, whose situation in relation to the estate, or the particular subject in controversy is such as that it is equitable and just that he be remunerated for his expenses in the litigation. The surrogate may also charge the costs of one party upon another, or upon the estate." Noyes v. Aid Society, 70 N. Y. 484. It is impossible for the court to say from the mere allegations of a party, and before any evidence taken, whether he is acting in good faith or not, and whether it is just and equitable that he should be aided in prosecuting or defending his suit. All the provisions of the Code bearing upon the subject of probate contests indicate that good faith and reasonable cause are the things to be inquired into by the court in the exercise of its discretion. Hicox v. Graham, 6 Cal. 169; sections 1031, 1332, and 1509, Code Civil Proc. Until the court has heard the evidence of the parties, it is impossible for it to determine whether they or any of them have claims which are made in good faith, and which are based upon reasonable grounds. If the court has power, upon the initiation of contests, to make arbitrary allowances out of the estate to proponents and contestants, then disappointed next of kin and claimants without the shadow of a just cause may deprive the beneficiaries under the will, by prolonged and expensive litigation, of the property given to them by the testator. Unless the language of the statute imperatively demands such con-

struction, it should not be placed upon it. Some wholesome remarks as to the object and benefit of the statute, and the cases in which it should be applied by the court, will be found in Re Whelan, 2 N. Y. Supp. 635. It is no argument to say that because the constitution clothes the superior court with "original jurisdiction over matters at probate," and provides that "a judge of the superior court may at any time make and issue all necessary orders and writs, enforce the production of wills and the attendance of witnesses," the court of its own motion is bound to see that all necessary proceedings are taken, and witnesses called to probate every document filed and which is claimed to be a will. It is safe to assume that parties interested as devisees and legatees will always take the necessary steps, and provide necessary funds, to procure the attendance of witnesses to establish the validity of the will, if it is worthy of probate. Our conclusion is that until the will has been admitted to probate, or probate had been denied, the court has no power to appropriate the funds of the estate to aid either proponent or contestant. This view, we think, is supported by the principles laid down in Estate of Marrey, 65 Cal. 287, 3 Pac. Rep. 896; Estate of Parsons, 65 Cal. 240, 3 Pac. Rep. 817; and Estate of Jessup, 80 Cal. 625, 22 Pac. Rep. 260. The order of the court below is annulled.

We concur: Sharpstein, J.; McFarland, J.; De Haven, J.; Harrison, J.; Garoutte, J.

(93 Cal. 555)

Clausen v. Meister *et al.* (No. 14,538.)

(*Supreme Court of California.* March 10, 1892.)

Limitation of Actions—Relief against Fraud.

1. A complaint alleged that defendant, by fraudulent representations as to her ownership of certain land, induced plaintiff to loan her $4,000 on her note, secured by a mortgage on such land, and that plaintiff did not discover the fraud until within three years before suit; that defendant was executrix of an estate, and used the money to pay a claim against the estate. The complaint asked judgment against defendant for $4,000, with interest, and to be subrogated to the claim so paid. The action was commenced more than four years after the maturity of such note and mortgage. *Held*, that it came within Code Civil Proc. § 337, which provides that an action founded on a written instrument is barred, unless commenced within four years after the cause of action accrues.

2. The action was not one for relief on the ground of fraud, within the meaning of Code Civil Proc. § 338, which allows an action to be commenced within three years from the discovery of the facts constituting the fraud.

Department 2. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by Clausen against Fredericka Meister and others to recover on a note and mortgage. Judgment for defendant on demurrer to the complaint. Plaintiff appeals. Affirmed.

A. Morgenthal and *George Lamont*, for appellant. *J. L. Rogers*, for respondents.

De Haven, J. The court below sustained the demurrer to the complaint in this action, and thereupon rendered judgment in favor of defendants. The plaintiff appeals, and the question for decision is whether the ruling of the court upon the demurrer was correct. The material facts shown by the complaint are: On March 1, 1882, plaintiff was induced by representations of the defendant Fredericka Meister, to the effect that she was the owner of a certain unincumbered piece of land in Solano county, to loan her $4,000 upon her note, secured by a mortgage upon said land, which note and mortgage are fully set out. It is further alleged that these representations were false, and made in the presence and with the approval of the other defendants; that the land was at that time, and still is, part of the estate of one Millard Meister, deceased, and was not only subject to a prior mortgage of $4,500, but also to the payment of the debts of said estate, and expenses of administration; and the said defendant Fredericka Meister was and is entitled, upon the settlement and distribution of said estate, to only one-fourth thereof, and the other defendants to the remaining three-fourths. At the date of the execution of plaintiff's note and mortgage, the defendant Fredericka Meister was the executrix of said estate, and there had been presented and approved as a claim against said estate, a certain note, held by one Margaret Bolle, for the sum of $4,000, and interest, and the said defendant Fredericka Meister, as executrix of said estate, paid that claim with the money loaned to her by plaintiff. It is further alleged that the plaintiff did not discover the fraud practiced upon him, in inducing him to make said loan upon the security of the note and mortgage of the defendant Fredericka Meister, until within three years before the commencement of this action. The plaintiff further alleged that, upon discovery of the falsity of the representations by which he was induced to loan his money, he informed the defendants of the fact, "and offered said note and mortgage given him by Fredericka Meister, herein set forth, for cancellation, and requested them to subrogate him in place of Margaret Bolle, whose claim against the estate of said Millard Meister" had been paid with plaintiff's money, "or to give plaintiff a new note secured by their interest as heirs to the estate of Millard Meister; yet they refused, and still refuse to do so." The complaint also states "that said note and mortgage herein set forth are worthless, and plaintiff hereby offers the same to this court for cancellation."

The action was commenced more than four years after the maturity of plaintiff's note and mortgage, and the relief demanded in the complaint is "for judgment against the defendant for the sum of four thousand dollars, with legal interest thereon from the first day of September, 1885, and that said judgment be declared a valid claim against the estate of Millard Meister, deceased, and the plaintiff's claim be subrogated in place and stead of said claim of Margaret Bolle, * * * and that the note and mortgage herein set forth be canceled," and for general relief.

1. The defendants demurred to this com-

plaint upon the ground, among others, that the action is barred by section 337 of the Code of Civil Procedure, which provides that an action upon a contract founded on a written instrument is barred unless commenced within four years after the cause of action accrues. The demurrer was properly sustained. Plaintiff's right to recover upon the note and mortgage executed to him by the defendant Fredericka Meister was barred by this section of the Code at the date of the commencement of this action, and whatever equitable right he might otherwise have had to be subrogated to the position of Margaret Bolle, as a creditor of the estate of Millard Meister, and thus to enforce the payment of such note and mortgage, was lost to him when the bar of the statute attached to said note and mortgage.

This is not an action for relief upon the ground of fraud, within the meaning of subdivision 4 of section 338 of the Code of Civil Procedure, which gives to a party aggrieved three years after the discovery of the facts constituting the fraud within which to bring an action to obtain relief therefrom, but it is substantially one to compel the payment of the indebtedness which is evidenced by the note and mortgage executed by the defendant Fredericka Meister to the plaintiff; and the character of the action is not changed by the fact that the plaintiff asks the court, on account of the other matters stated in the complaint, to apply the equitable principle of subrogation, and, by this means, cause the defendants to satisfy, out of their property, the indebtedness, to secure which said note and mortgage was given to him. The real cause of action is for the recovery of the money loaned by plaintiff, and the other relief demanded is but incidental to this, and the time allowed by the statute within which to commence an action for the recovery of this money cannot be extended by alleging the discovery, within three years, of facts which in equity would have entitled him to look for its repayment to other security than the mortgage which accompanied the note received by him at the time of the loan.

Judgment affirmed.

We concur: McFarland, J.; Sharpstein, J.

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93 Cal. 551

Fresno Nat. Bank v. Hawkins. (No. 14,442.)

(*Supreme Court of California.* March 9, 1892.)

Fraud of Agent—Liability of Principal—Forged School Warrants.

In an action to recover the amount of certain orders forged by defendant's deputy and sold to plaintiff, the complaint alleged that defendant was the "county superintendent of schools," and that one B. was his deputy; that plaintiff purchased, at the instance and request of defendant, by B., his deputy, certain school warrants; that said warrants were purchased solely on the faith and credit of the indorsements thereon by defendant; that the warrants, except the indorsements of filing, were forged by said B., and were void. The "warrants" were orders on defendant, as county superintendent of schools, by the trustees of the various school-districts for requisitions to the county auditor; and the indorsements, alleged to have been genuine, and on the faith of which plaintiff purchased them, were the memoranda of the date of filing in defendant's office, as required by law. *Held*, that the only alleged act of B., in the line of his official duty, was the filing, and the filing of such orders is not a guaranty that the orders are genuine, or that they will be paid.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the Fresno National Bank against B. A. Hawkins to recover the amount of certain orders forged and sold to plaintiff by defendant's deputy. Defendant had judgment, and plaintiff appeals. Affirmed.

Church & Cory, for appellant. *W. D. Tupper, H. H. Welsh*, and *Webb & Strother*, for respondent.

Garoutte, J. This appeal is before us upon the judgment roll, and involves the sufficiency of the complaint. The complaint alleges that respondent was at all the times mentioned the county superintendent of schools of Fresno county, and that W. R. Bibby was the regularly appointed deputy of such superintendent; that appellant, as was its custom, purchased at the instance and request of respondent, by his deputy, certain school warrants; that said warrants were purchased solely on the faith and credit of the indorsements thereon by the respondent; that said warrants, except the indorsement of filing, were forged by the said Bibby, deputy, and were void and of no effect; and appellant claims to be damaged to the extent of the money paid out for such forged warrants. As appears by the exhibits attached to the complaint, these forged warrants were orders on the county superintendent, by the trustees of the various school-districts, for requisitions to the county auditor; and the word "warrants," as used in the complaint, is somewhat of a misnomer. The indorsement made upon these orders, which appellant alleges to be genuine, and upon the sole faith of which it expended its money, was the memorandum of the date of filing in the county superintendent's office. Neither the forgery of the orders by Bibby, nor his presentation and sale of them to the bank, created any liability against respondent; for in those matters he was not acting in the line of his official duty, and by virtue of his appointment as deputy was not clothed with any such power. Respondent could only clothe his deputy with such power as the statute conferred upon himself, and those powers were not conferred. The bank knew the measure of respondent's power, and the limitation of his official duties. If not, it should have known them, for all persons are held to know the law. It follows that the only act done by the deputy, in the line of his official duty, towards consummating the fraud alleged, was the indorsement of the date of filing upon the orders. The law requires these orders to be filed in the order in which they are presented, so that the requisitions upon the auditor will follow in the same order of time. The filing of the order in the office of the county superintendent is not a guaranty by such officer that such order is genuine and will be paid in due course of time. The filing marks do not warrant that it is not forged, but simply indicate to the world that such a paper was filed in the office at a time named. Manifestly, such fact can create no personal liability against respondent in favor of a purchaser of such orders. Appellant alleges that he purchased the orders on the sole faith and credit of the genuine indorsement thereon; but, as we have already seen, such indorsement neither gave them negotiability, validity, nor additional value, aside from fixing the date of their filing in the superintendent's office. Let the judgment be affirmed.

We concur: **Paterson, J.**; **Harrison, J.**

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93 Cal. 558

Stephenson v. Southern Pac. Co. (No. 14,373.)

(*Supreme Court of California.* March 10, 1892.)

Torts of Servant—Liability of Master.

In a suit for damages against defendant railroad, the court instructed the jury that if defendant's engineer, for the purpose of frightening the passengers in a street-car that was crossing defendant's track, unnecessarily and wantonly started his locomotive towards such street-car, thereby frightening the occupants, among which was plaintiff, who believed and had reason to believe that a collision was imminent, and, to save herself, jumped out and was injured, defendant was liable. *Held*, that the instruction was error, the alleged injury having resulted from an act of the engineer which was not within the scope of his employment.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Stephenson against the Southern Pacific Company. Judgment for plaintiff. Defendant appeals. Reversed.

John D. Bicknell, for appellant. *Wells, Monroe & Lee*, for respondent.

De Haven, J. The action is to recover damages for personal injuries alleged to have been sustained by plaintiff, through the negligence of defendant. The complaint alleges that the plaintiff was a passenger upon a street-car, in the city of Los Angeles, the track of which crosses that of defendant at or near its depot, and that, upon the occasion of the injury, the street-car approached the crossing, and stopped long enough to ascertain that a locomotive engine on the track of defendant, and within about 25 feet of the crossing, was not in motion, and then proceeded to cross the track; that when the street-car was about to cross the track of defendant, the engineer in charge of defendant's engine negligently and carelessly gave his engine steam, and commenced to back the said locomotive upon the track towards and upon the street-car in which plaintiff was riding, and that plaintiff, being in imminent danger of injury from the anticipated collision, jumped from the street-car, as did other passengers, and was injured. The answer contained a sufficient denial of any negligence upon the part of defendant and of its employes, and also charged that plaintiff was guilty of contributory negligence. The trial was by jury, and a verdict rendered in favor of plaintiff for $5,000. The defendant appeals.

The evidence tended to show that the street-car was stopped before attempting to cross the track of defendant, as alleged in the complaint; that the locomotive was not then in motion, but proceeded to back down towards the crossing as the street-car was crossing the track, but did not, in fact, come in collision with the street-car. The locomotive engine was upon the depot grounds, for the purpose of being used in switching cars. The court, at the request of plaintiff, gave to the jury the following, among other, instructions: "If the jury believe, from the evidence, that the defendant's engineer, with intent to frighten and scare the passengers riding upon said street-car upon which plaintiff was a passenger, while the said horse-car was in close proximity on the track of said defendant, unnecessarily and wantonly let the engine take steam, and started said locomotive to move towards and upon said street-car, with the intention thereby to frighten the said passengers, of which plaintiff was one, and did thereby frighten said passengers and plaintiff, so that she, seeing said engine, and believing and having reasonable cause to believe that the same was about to collide with said street-car, in order to save herself from accident, jumped off of said car, and thereby the plaintiff was injured, then the defendant is guilty of negligence, and the jury should find for the plaintiff." In giving this instruction the court committed an error. The rule is, of course, well settled that the master is civilly liable for the wrongful or negligent act of the servant, committed while in his service, and within the scope of his employment,—that is, in the transaction of the master's business; and the converse of the rule is equally well settled, that when a servant acts without any reference to the service for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible in that case for either the act or omission of the servant. Mott v. Ice Co., 73 N. Y. 543; Rounds v. Railroad Co., 64 N. Y. 129; Aycrigg v. Railroad Co., 30 N. J. Law, 460; Snyder v. Railroad Co., 60 Mo. 413; Cosgrove v. Ogden, 49 N. Y. 257; Howe v. Newmarch, 12 Allen, 49; Railroad Co. v. Wetmore, 19 Ohio St. 110. "The test of the master's responsibility for the act of the servant," said Grover, J., in delivering the opinion of the court in Cosgrove v. Ogden, supra, "is not whether such act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do." In Howe v. Newmarch, supra, as the final conclusion of an elaborate opinion, in which many cases bearing upon the subject are considered, the test of the master's responsibility for the act of his servant is thus stated: "And in an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by his servant is done without his authority, and not for the purpose of executing his orders, or doing his work; so that if the servant, wholly for a purpose of his own, disregarding the object for which he was employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable; but if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."

The instruction given by the court below, and now under consideration, is in conflict with the rule of law as above stated. The engineer was not acting within the scope of his employment, as assumed in this instruction, if his object in moving the engine was simply to frighten the passengers in the street-car. Such an act, done for such a purpose, was entirely foreign to the objects of his employment. The work which the engineer was to perform for defendant was to manage the engine while it was engaged in switching cars, and if he started the engine, not for the purpose of employing it in the service of the defendant, but to accomplish an independent purpose of his own, of the character stated in the instruction, the relation of master and servant, as to that particular act, did not exist, and the defendant would not be liable for any damage resulting therefrom, and it is immaterial that he used the engine of defendant in order to accomplish his unlawful purpose. Whart. Neg. § 168; Railroad Co. v. Wetmore, 19 Ohio St. 110. It would not be contended that one who employs another to sprinkle his garden, and places in his hands a hose to be used for that purpose, would be civilly responsible in damages if, stepping aside from that employment, the servant should, either in sport or from malice, turn the same upon a person quietly passing along the street. In the commission of such an assault the servant would not be acting within the scope of his employment, nor would the hose be used in the transaction of the business of his employer; and yet the act of the servant in the illustration just given would not be more foreign to the purpose of his employment than was that of the engineer in this case, if committed under the circumstances stated in the instruction. The rule of law which makes the master liable to respond in damages for the act or omission of the "servant implies that the master will not, in any case, be liable for wrongs committed by the servant while not acting within the scope of his authority. This rule is so reasonable that the grounds on which it rests need scarcely be suggested. In all the affairs of life men are constantly obliged to act by others; but no one could venture to so act if the mere circumstance that he employed another to act for him about any general or particular business made him an insurer against all wrongs which such persons might possibly commit during the period of such employment. * * * In other words, if the servant steps aside from his master's business, for how short a time soever, to commit a wrong not connected with such business, the relation of master and servant will be for the time suspended." 2 Thomp. Neg. pp. 885, 886.

The evidence in this case tending to show the facts referred to in the instruction under consideration is very slight, and that part of it consisting of the opinion of one of the witnesses that the intention of the engineer was only to frighten the passengers on the street-car is not competent for the purpose of proving such fact. The case was, however, tried upon the theory that there was sufficient evidence upon which to base the instruction, and we are not able to say that there was such an entire want of evidence upon that point that the instruction was without prejudice to the defendant.

Judgment and order reversed.

We concur: SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.

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93 Cal. 614

LEACH v. PIERCE, Judge. (No. 14,930.)

(*Supreme Court of California.* March 12, 1892.)

ALLOWANCE TO WIDOW—NEW TRIAL—BILL OF EXCEPTIONS—SETTLEMENT—LACHES.

1. Where, on a widow's petition for an allowance, written objections were filed, and after a hearing the allowance was granted, the Code does not authorize a new trial.

2. Where the petitioner's proposed bill of exceptions on the motion for a new trial was accompanied by a general notice that the bill was intended to be used in the matter of the widow's claim for allowance, "filed by her in the matter of said estate," petitioner was entitled to have the bill settled as a bill of exceptions to be used on appeal from the order granting such allowance.

3. Ten days was a reasonable time within which to file such bill of exceptions after the entry of an order granting such allowance; and where the court, within such 10 days, granted petitioner 20 days' extension of time to serve the bill, service during those 20 days was in time.

4. Where the respondent's answer to a petition for a writ of mandate to compel him to settle a bill of exceptions alleged facts showing that petitioner had actual notice of the granting of the order for such allowance, and for more than 10 days thereafter neglected to present her bill of exceptions, but did not show that she had notice of the entry of such order, the answer failed to present a material issue.

5. The petitioner served her bill of exceptions on February 10, 1891. March 10th the administrator procured an order extending his time to serve objections and proposed amendments. The appeal was taken March 12th, and on the 14th the proposed bill and amendments were presented to the clerk. April 11th the matter of the settlement of the bill was heard. On June 10th her application was made for a writ of mandate to compel A., who was then judge, to settle her bill of exceptions; and no decision was reached till October 12th, when the petition was dismissed by the supreme court because A.'s term of office had expired. October 17th the application to settle the bill was made to P., A.'s successor in office, and his decision was not made until November 11th. *Held*, that she had not been guilty of laches in the settlement of the bill.

In bank.

Petition of Maggie Leach for a writ of mandate to compel W. L. Pierce, judge of the superior court of San Diego county, to settle a bill of exceptions. Writ granted.

Wellborn, Parker & Stevens and *Haines & Ward,* for petitioner. *Luce & McDonald* and *Works, Gibson & Titus,* for respondent.

PATERSON, J. This is an application for a writ of mandate to compel respondent to consider petitioner's proposed bill of exceptions and the proposed amendments thereto attached, and to settle the same. An alternative writ was issued, and the respondent has appeared and objected to the sufficiency of the petition; has orally demurred to it on the ground that it does not state facts sufficient to entitle petitioner to the relief sought by her.

The facts alleged, and upon which the petitioner claims the right to have a bill of exceptions settled, are as follows: In November, 1886, Maria A. Burton, widow of H. S. Burton, deceased, filed a petition asking for an allowance of $250 a month out of the funds of the estate. The petitioner, who is interested in the estate of Burton, filed written objections to the granting of said petition. The issues were tried by Judge AITKEN, who at that time was presiding judge of the superior court in which the matter of said estate was pending; and on January 3, 1891, he made and filed findings of fact and conclusions of law in favor of Mrs. Burton. But it is alleged that the order granting family allowance was not entered until some time after January 5, and prior to February 10, 1891. No notice was ever given petitioner of the entry of the order, but on March 2, 1891, she appealed to the supreme court, and the appeal is still pending. On January 12, 1891, the petitioner served upon the administrator, Mrs. Burton, and others a notice of intention to move for a new trial. On January 21st the court made an order granting the petitioner herein 20 days from that date to serve and file affidavits and a bill of exceptions. The proposed bill of exceptions was served February 10th. Within due time thereafter the administrator served upon the attorneys for petitioner written objections to the settlement of the bill, and at the same time proposed certain amendments, not waiving his right to insist upon the objections made. On March 14th the bill and the proposed amendments and objections were presented to the clerk. On April 11, 1891, the matter of the settlement of the bill came on for hearing before Judge AITKEN, and he refused to settle the bill; but his reasons therefor do not appear. On June 10, 1891, petitioner herein applied to this court for a writ of mandate to compel Judge AITKEN to settle the bill. The judge appeared and filed a demurrer to the petition, which on October 12th was sustained, and the petition was dismissed, on the ground that the respondent therein, being no longer in office, could not be compelled to settle the bill. Leach v. Aitken, 28 Pac. Rep. 777. On June 26, 1891, the petitioner applied to Judge PIERCE, who had succeeded Judge AITKEN, for a settlement of the bill, and caused notice to be given to the parties interested. The matter came on for hearing on July 17th, and the judge declined to settle the bill on the ground that an application for a writ of mandate to compel Judge AITKEN was at that time pending in the supreme court. The order was made without prejudice to a renewal of the application. On October 17, 1891, the petitioner renewed her application to Judge PIERCE to settle the bill, and the same came on regularly for hearing on November 11th, when the judge made an order refusing to settle the bill on the ground "that the question was *res judicata* by reason of the action of Ex-Judge AITKEN." The order recites that "the other grounds of objection were not argued or passed upon."

1. It is claimed by counsel for respondent that, the latter having exercised his discretion and passed upon the objections made to the settlement of the bill, *mandamus* will not lie to review his action. Of course, the exercise of respondent's discretion cannot be controlled or reviewed in this proceeding. He cannot be compelled to settle any particular bill, or to insert or exclude any particular facts; but, if the petitioner is entitled to move for a new trial, and has taken the proper steps within time, or if she has tendered a bill of exceptions to be used on appeal from the order within the time allowed by law, respondent cannot refuse to settle and sign a bill containing a record of the proceedings. It is an act which the law requires him to perform,—a duty resulting from his office, (Landers v. Landers, 82 Cal. 481, 23 Pac. Rep. 126;) and the remedy by appeal, if it exist, is inadequate, (Careaga v. Fernald, 66 Cal. 351, 5 Pac. Rep. 615; In re Herteman, 73 Cal. 547, 15 Pac. Rep. 121.)

2. Does the Code authorize a motion for a new trial in a proceeding of this kind? Prior to the adoption of the Code, issues of fact were authorized in nearly every probate proceeding, and there was a general provision that either party might move for a new trial on account of any error committed by the probate court in settling or determining issues of fact. It is now provided that only those provisions of the Code relative to new trials and appeals, which are consistent with the provisions of the probate act, shall apply to probate proceedings. It was evidently the intention of those who framed and adopted the provisions of the Code, relative to probate proceedings, to curtail dilatory proceedings in the settlement of estates. Section 1714, Code Civil Proc. It is the duty of the superior court, when a person dies, leaving a widow or minor children, to make "such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate." Id. § 1466. No notice of the application is required. The court may make the order "on its own motion, or on petition therefor." Id. § 1465. There is no provision for the framing of issues with respect to the matter of family allowance. It is made the duty of the court, with or without a petition, to set

apart sufficient property for the support of the widow and children. "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referees." Id. § 656. "Issues arise upon the pleadings when a act or conclusion of law is maintained by the one party, and is controverted by the other." Id. § 588. "The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes," etc. Id. § 657. These provisions clearly do not apply to every order which may be made *ex parte*, or by the court on its own motion, simply because the court has permitted written objections to be filed. In Re Moore it was suggested that the operation of these sections should be confined "to those cases in which the Code has expressly authorized issues of fact to be framed." 72 Cal. 340, 13 Pac. Rep. 880. See, also, In re Herteman, supra. It is not necessary, however, in this case, to lay down a rule of universal application; and all we decide is that, in the matter before us, proceedings for a new trial were not authorized. It is better, perhaps, to follow the suggestion of Mr. Justice MILLER in Davidson v. New Orleans, 96 U. S. 104, to ascertain the intent and proper application of the provisions bearing upon the subject "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require." The proceeding in Re Estate of Bauquier, 88 Cal. 302, 26 Pac. Rep. 178, 532, cited by petitioner, was a contest based upon written objections to the application for letters testamentary of the person named as executrix in the will. In such a proceeding the Code provides for notice and for the framing of issues of fact. It expressly provides what facts the petition must show, and that the objections thereto must be stated in writing. Sections 1299, 1300, 1303, 1351, Code Civil Proc. The views expressed by the court in that case are entirely in harmony with the views expressed herein. It is unnecessary to refer to other cases cited by petitioner, further than to say that in none of them was the exact question we are considering involved. Some of the cases referred to were cases involving motions for new trial in matters of probate homesteads; but the question whether a motion for a new trial was proper was not raised or considered, and we are not called upon now to say whether or not proceedings for a new trial are authorized in homestead matters.

3. It is claimed by petitioner that she is entitled to have the bill settled as a bill of exceptions to be used on appeal from the order. Counsel for respondent contend that the judge properly refused to settle the bill for that purpose on the grounds: (1) Because it was proposed as a bill of exceptions to be used on the motion for a new trial, and can be used, if at all, only for that purpose; and (2) because it was not presented in time. We do not think that either of these objections is well taken. The proposed bill was accompanied by a general notice to the attorneys for the objectors that the bill was intended to be used as a bill of exceptions "in the matter of the petition of Maria A. Burton for maintenance, filed by her in the matter of said estate;" and objections were made to the settlement of the bill upon the grounds that "it had not been served in time to entitle it to settlement as a bill of exceptions to the original order granting such allowance, and upon the further ground that a motion for a new trial in respect of a widow's allowance during the administration of an estate was not a proper or admissible proceeding." Notwithstanding the references in the notices and objections to the proceedings for a new trial, we think the bill was one which the petitioner was entitled to use on direct appeal from the order. Was the bill presented within the time allowed by law? Our rule provides that in cases of appeal from orders like the one under consideration the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law. Prior to the adoption of this rule, there was nothing in the law or the rules of this court requiring a bill of exceptions on appeal from such orders, and no rule has been made prescribing the time. The Code does not prescribe the time within which a bill of exceptions to an order of family allowance must be prepared and served. Section 650 provides that a party desiring to have exceptions taken at a trial settled in a bill of exceptions must prepare and serve the same within 10 days after entry of the judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury. But this provision is inapplicable to the case before us. Section 1715, Code Civil Proc., provides that the appeal must be taken within 60 days after entry of the order. As stated before, no notice of the application for a family allowance is required. The court may make the order on its own motion. Any person interested, whether he has had actual notice of the entry of the order or not, may appeal at any time within 60 days. Those who have had only constructive notice certainly should have a reasonable time within which to prepare and serve their bill of exceptions. What is a reasonable time is a question to be determined by the judge upon all the facts and circumstances. As to those who have been parties to the contest, we think it safe and right to hold, following the analogies found in provisions of the Code relating to civil actions, that they are entitled to actual notice of the entry of the order, and that the time within which to move for a new trial, when proceedings therefor are proper, or to prepare and serve a bill of exceptions to be used on appeal from the order, does not begin to run until such notice has been given. Where the written claims or objections of interested parties are filed, the prevailing party will have no difficulty in knowing whom to serve, and the notice will set running the time within which the adverse party must move. Applying this construction of the statute and rule

to the proceeding before us, we think that the bill was prepared in time, and should have been settled. Admitting that petitioner had actual notice of the entry of the order on January 12, 1891, her bill was presented in time, because within 10 days thereafter the court made an order granting her 20 days from January 21st to prepare and serve affidavits and a bill of exceptions. The bill was served on February 10th.

Respondent has filed an answer to the petition, setting forth in substance that the petitioner and her attorneys were in court on the 3d day of January, 1891, when the court filed its decision and made the order referred to, and had actual knowledge of the delivery of said decision and the rendition of said order by the court; that there was some doubt entertained by all the parties as to whether Judge AITKEN would have jurisdiction in the premises on the next judicial day of the court, which was Monday, the 5th day of January, that being the first Monday of January next succeeding the election and qualification of his successor; and, to avoid all question of jurisdiction, it was agreed by and between all of the attorneys that the decisions and orders made on that day should be given and made on the afternoon of Saturday, the said 3d day of January, 1891; that, in pursuance of such agreement, all parties appeared in court, and the decisions and orders in the Estate of Burton were then made and signed by Judge AITKEN, and delivered to the clerk for filing and record; that, after the findings and orders were filed, an order was made and entered by the court, directing that all the costs of the hearing and determination of the matters should be charged against and paid by the estate, and the respective parties should file their cost bills in the usual form and manner; that, on the 8th day of January, petitioner served and filed a verified statement of her costs and disbursements in resisting the application of Mrs. Burton for widow's allowance; that Judge AITKEN refused to settle the bill because it had not been served in time to entitle it to settlement as a bill of exceptions to the order, and because a motion for a new trial in the matter of the widow's allowance was not a proper proceeding, and that consequently no bill of exceptions in support of such a motion could be allowed. The issues thus raised by the answer are immaterial. They show that the petitioner had full notice of the decision, and that an order had been made, but do not show that she had notice of the entry of the order; and that is the material matter. An appeal may be taken at any time with 60 days after the order is entered. Section 1713, Code Civil Proc. The time fixed by section 650, Id., in which to prepare and serve a bill of exceptions, is 10 days after notice of the entry of the judgment. The reasons stated as the grounds upon which Judge AITKEN refused to settle the bill are not sound; and, if his term of office had not expired, the writ of mandate applied for would have been granted. We do not think that the petitioner can be charged with laches in the matter of the settlement of her proposed bill. The bill was served on February 10th. On March 10th the administrator procured an order extending his time to serve objections and proposed amendments. The appeal was taken on March 12th, and on March 14th the proposed bill and amendments were presented to the clerk. On April 11th the matter of the settlement of the bill came on regularly for hearing. On June 10th her application was made to this court for a writ of mandate, and no decision was reached until October 12th following. Five days thereafter, petitioner renewed her application to Judge PIERCE to settle the bill, and his decision was not rendered until November 11th. It appears, therefore, that the petitioner has done all in her power to secure a settlement of the bill, and that the delay has been occasioned by the objections of the administrator, and the rulings of the respondent and Judge AITKEN in sustaining the same. The objections to the sufficiency of the petition are overruled, the objections to the sufficiency of the answer are sustained, and it is ordered that a writ issue, directing respondent to consider the proposed bill and the amendments proposed thereto, and to settle the same in accordance with the facts.

We concur: HARRISON, J.; McFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; SHARPSTEIN, J.

BEATTY, C. J., (*concurring.*) I concur in the judgment. In my opinion the petitioner was entitled to a settlement of her bill of exceptions, without respect to her right to move for a new trial in the matter of the decree for a family allowance. As the question is immaterial to the determination of this proceeding, I do not desire to express any opinion as to the right to move for a new trial in such cases.

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93 Cal. 624

LEACH v. PIERCE, Judge. (No. 14,931.)

(*Supreme Court of California.* March 12, 1892.)

BILL OF EXCEPTIONS—REFUSAL TO SETTLE—MANDAMUS—SALE OF DECEDENT'S ESTATE—NEW TRIAL.

1. A petition for *mandamus* to compel P., a judge, to settle a bill of exceptions, alleged that the administrator of an estate, on September 6, 1889, applied to A., then judge, for an order for the sale of a portion of the estate; that petitioner filed objections; that on January 3, 1891, the order was granted; that no notice of the decision or entry of judgment was given the petitioner, but on March 2, 1891, she appealed from the judgment; that on January 12, 1891, she served a notice of intention to move for a new trial; that A. granted 20 days from January 21st in which to serve her bill of exceptions to be used on the motion for a new trial; that the proposed bill was served on February 10, 1891; that the administrator filed objections and proposed amendments to said bill, which were given to the clerk of the court on March 14th; that A. heard the matter on April 11th, and refused to settle the bill; that on June 10th she applied to the supreme court to compel A. to settle the bill; that the application was dismissed because the respondent was no longer in office; that on June 26, 1891, she applied to P., his successor, for a settlement of the bill; that P. refused to settle the bill because the application for the writ to A. was at that time pending in

the supreme court; that the order was made without prejudice to a renewal of the application; that on October 17th she renewed her application, when P. refused to settle the bill on the ground that the question was *res adjudicata* by reason of A.'s action. *Held*, that she was entitled to have had the bill settled by A., and *mandamus* would issue to P.

2. Under the Code, which provides that "any person interested in the estate may file his written objections, which must be heard and determined," the motion for a new trial was proper to review the decision of the court.

In bank.

Petition of Maggie Leach for a writ of mandate to compel W. L. Pierce, judge of the superior court of San Diego county, to settle a bill of exceptions. Writ granted.

Wellborn, Parker & Stevens and *Haines & Ward*, for petitioner. *Luce & McDonald* and *Works, Gibson & Titus*, for respondent.

PATERSON, J. This is an application for a writ of mandate to compel the respondent to settle a bill of exceptions. The petitioner alleges that the administrator of the estate of Henry Burton, deceased, filed a petition in the superior court on September 6, 1889, praying for an order for the sale of a portion of the estate of said decedent; that petitioner in due time filed written objections to the granting of said petition; that the issues were tried without a jury by Judge AITKEN, who on the 3d day of January filed findings of fact and conclusions of law, and entered a judgment thereon granting the petition of the administrator; that no notice of the decision or entry of the judgment was ever given to the petitioner, but on March 2, 1891, she appealed from the judgment to the supreme court, and the appeal is still pending; that on January 12, 1891, petitioner served upon the administrator a notice of intention in due form to move for a new trial; that the court granted the petitioner 20 days from January 21st in which to prepare and serve affidavits and a bill of exceptions to be used on the motion for a new trial; that the proposed bill was served on February 10, 1891; that in due time the administrator served a document containing objections and proposed amendments to said proposed bill of exceptions; that the proposed bill, and the objections and proposed amendments, were given to the clerk on March 14th; that Judge AITKEN heard the parties in the matter of the settlement of said bill on April 11th, and refused to settle any bill. The petition then goes on to allege various matters which occurred thereafter, and which are in all respects the same as the facts stated in Leach v. Pierce, (No. 14,930,) 29 Pac. Rep. 235, this day filed, relating to an application to this court for a writ of mandate, its order thereon, and an application to Judge PIERCE for a settlement of the proposed bill, and his action thereon.

The provisions of the Code for the sale and conveyance of real estate of decedents require all petitions for orders to be in writing, setting forth the facts showing the sale to be necessary, and upon the hearing "any person interested in the estate may file his written objections, which must be heard and determined." Issues of fact, therefore, are expressly authorized by the Code, and a motion for a new trial is proper to review the decision of the court. Estate of Bauquier, 88 Cal. 478, 26 Pac. Rep. 373; Leach v. Pierce, 29 Pac. Rep. 235, (No. 14,930.) The decision of the court was filed on January 3, 1891, and within 10 days thereafter notice of intention to move for a new trial was given, and a bill of exceptions was prepared and served within the time allowed by the statute and the order of the court. The refusal of the respondent to settle the bill because Judge AITKEN had refused to settle it is not based upon tenable ground. Upon the facts stated, the petitioner was entitled to a bill of exceptions; but this court could not compel Judge AITKEN to settle one because his term of office had expired, and for that reason only the application made by the petitioner for a writ of mandate was denied. The petitioner is entitled to have a bill of exceptions settled showing a correct record of the proceedings, if the facts be as stated in her petition. The objections to the petition are therefore overruled. Let the writ be made peremptory.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; HARRISON, J.; DE HAVEN, J.; GAROUTTE, J.

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93 Cal. 627

LEACH v. PIERCE, Judge. (No. 14,929.)

(*Supreme Court of California.* March 12, 1892.)

ADMINISTRATION OF ESTATES—ATTORNEY'S FEES—NOTICE—FILING BILL OF EXCEPTIONS.

1. Code Civil Proc. § 1718, provides that the court may appoint an attorney to represent the devisees, legatees, heirs, or creditors of the decedent, who are minors and have no general guardian, or who are non-residents, and all others who are unrepresented; that the attorney may receive a fee, to be fixed by the court, payable out of the funds of the estate which on distribution may be charged to the party represented by the attorney. *Held*, that an order to pay such fees to an attorney may be made *ex parte*, and no notice of the entry thereof is required.

2. Where petitioner was interested in an estate, and objected to an order allowing fees to an attorney, and the court granted an extension of 20 days' time in which to file a bill of exceptions, this was an adjudication that 20 days was a reasonable time within which to perform; and filing the bill within that time entitled her to have it settled.

In bank.

Application of Maggie Leach for a writ of mandate to compel W. L. Pierce, judge of the superior court of San Diego county, to settle a bill of exceptions. Writ allowed.

Welborn, Parker & Stevens and *Haines & Ward*, for petitioner. *Luce & McDonald* and *Works, Gibson & Titus*, for respondent.

PATERSON, J. The petitioner alleges that on the 13th day of November, 1890, in the superior court of the county of San Diego, in Re Estate of Henry S. Burton, deceased, Jim S. Callen, an attorney, in representing Elizabeth Cochrane and Richard Lull by appointment of the court, asked the court to allow him $3,000 fees in said matter as necessary expenses of administration; that on January 3d Judge

AITKEN allowed Callen $2,500, and directed the administrator to pay the same out of the funds of the estate, and upon distribution to be charged to the interest of Elizabeth Cochrane and Richard Lull; that no notice of the entry of the order was ever given to petitioner; that on February 10th petitioner served her bill of exceptions, to which no objections or amendments were ever served by Callen; that in due time petitioner delivered the proposed bill to Judge AITKEN; that at the time set for the settlement of the bill by the judge, namely, April 11, 1891, said judge refused to settle the bill. The petitioner then proceeds to allege matters similar to those contained in her petition filed in No. 14,930, (29 Pac. Rep. 235,) relating to her application to this court for a writ of mandate to compel Judge AITKEN to settle a bill of exceptions, the action of this court, her subsequent application to Judge PIERCE, and his refusal to settle the bill.

The question as to whether a new trial is a proper proceeding in a matter of this kind is not involved, there being no allegation that steps for a new trial were taken. The order is appealable, (Stuttmeister v. Superior Court, 72 Cal. 487, 14 Pac. Rep. 35;) and if the bill of exceptions was presented in time the petitioner is entitled to have it settled. Section 1718, Civil Code Proc., provides that the court may in its discretion appoint some competent attorney at law to represent in certain enumerated proceedings the devisees, legatees, heirs, or creditors of the decedent who are minors, and have no general guardian, or who are non-residents, and all others who are unrepresented. "The attorney may receive a fee, to be fixed by the court, for his services, which must be paid out of the funds of the estate, as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney." The order may be made *ex parte*, and no notice of the entry thereof is required.

It is not alleged in the petition that any objections were filed by petitioner to the granting of the application of Callen, but it is immaterial whether objections were filed or not. If written objections were filed, the petitioner was entitled to notice of the entry of the order; and, if the order was made without notice to petitioner, she was entitled to a reasonable time within which to prepare and serve her bill of exceptions. It appears that on January 25th the court granted the petitioner an extension of 20 days' time in which to serve the bill. This was an adjudication by the court that 20 days from January 25th was a reasonable time within which to perform the act required; and, as the bill was prepared and served within the 20 days allowed, petitioner was entitled to have it settled. The objections to the sufficiency of the petition are overruled. Let the writ be made peremptory.

We concur: BEATTY, C. J.; HARRISON, J.; DE HAVEN, J.; MCFARLAND J.; GAROUTTE, J.; SHARPSTEIN, J.

93 Cal. 564

PEOPLE v. WRIGHT. (No. 20,853.)

(*Supreme Court of California.* March 10, 1892.)

MAYHEM—PROOF OF MALICE—EVIDENCE—INSTRUCTIONS.

1. Pen. Code, § 203, provides that "every person who unlawfully and maliciously" disables or disfigures a member of a human being's body is guilty of mayhem. Section 7, subd. 4, provides that "the words 'malice' and 'maliciously' import a wish to * * * injure another, * * * or intent to do a wrongful act established either by proof or presumption of law." Section 20 provides that in every crime there must be a concurrence of act and intent, or criminal negligence. Section 188 limits "malice," as therein defined, to those cases (not including mayhem) wherein "malice aforethought" is made an essential element. *Held*, that "malice aforethought," or "malice," as defined in section 188, is not an essential element in the crime of mayhem, and proof of premeditation and deliberation is not required.

2. To show mayhem, the statutes are fully met by proof of the commission of the act, from which the law will presume, though it be done in pursuance of an intent formed during the conflict, that it was done unlawfully and maliciously, unless the evidence shows the contrary.

3. The prosecuting witness, who was friendly to defendant, while the latter engaged in a fight with another person, took hold of the combatants, tried to separate them, and urged them to quit fighting. Defendant thereupon threw his arm around the neck of the prosecuting witness, and bit off his ear. *Held*, that the atrocity of the act is presumptive of the intent to commit it.

4. The excuse that the act was done while engaged in a fight suddenly brought on by the interference of the prosecuting witness, and under the belief that such interference was hostile to defendant, is no defense.

5. Where the evidence showed that defendant was guilty of the crime charged or no offense, it was proper to charge the jury to convict of such crime or acquit.

6. The court properly disallowed a question to a witness by defendant, asking his opinion as to whether the interference of the prosecuting witness was such as to induce the defendant to think it was friendly, or likely to mislead defendant as to its object, such matter being within the peculiar province of the jury to determine.

Commissioners' decision. In bank. Appeal from superior court, Nevada county, JOHN CALDWELL, Judge.

Frank Wright was convicted of mayhem and appeals. Affirmed.

J. M. Walling, for appellant. *Atty. Gen. Hart*, for the People.

FITZGERALD, C. The defendant was convicted of the crime of mayhem, and sentenced to imprisonment in the state-prison for the term of three years. From the judgment of conviction, and the order denying his motion for a new trial, this appeal is taken.

Section 203 of the Penal Code, upon which the information herein was founded, reads as follows: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem." The evidence upon which he was convicted is, in substance, as follow: Defendant, while drinking in a saloon with several others, became involved in a quarrel with one of the party, named Crall, who challenged him for a fight, which he declined. Crall then left the saloon, and immediately thereafter defendant "threw off his overcoat," and walked up to one of the party named Trood, who, it appears, was very drunk, and addressing him in an angry manner, said: "Any one who says Crall was in this is a d—— liar." Trood responded, "I said it, and I am not a d—— liar." Defendant then struck at Trood, and they at once engaged in a fight. The prosecuting witness, Fuller, whose relations with the defendant were friendly, but not intimate, and who had taken no part in any of the previous quarrels referred to, was standing near by when the altercation occurred, and when the combatants clinched he stepped in between them, and, taking hold of both parties, separated them, telling them, in effect, as he did so, to quit fighting. Defendant thereupon, and while Fuller had hold of him, threw his arm around Fuller's neck, and, seizing his ear with his teeth, bit a part of it off. It is claimed by appellant that the evidence is insufficient to justify the verdict, because there was no proof of premeditation or deliberation. "Malice," as defined by section 188 of the Penal Code[1] is expressly limited in its application to those cases in which malice aforethought is made an essential element, and is therefore not applicable to the case under consideration, as the definition of the word "maliciously," as herein employed, is to be found in subdivision 4 of section 7 of the Penal Code, and reads as follows: "The words 'malice' and 'maliciously' import a wish to * * * injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." And section 20 of the same Code provides that "in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence." It will thus be seen that a concurrence of act and intent or criminal negligence are the only elements essential to constitute a crime or public offense within the meaning of this section, the only exception being in those cases where malice aforethought is made by section 188, referred to, a necessary and additional element. It therefore follows that, as malice aforethought is not an essential element in the crime of mayhem, proof of premeditation or deliberation is not required. But the requirements of the statute in such cases will be fully met by proof of the commission of the act, from which the law will presume, though it be done in pursuance of an intent formed during the conflict, that it was done unlawfully and maliciously, that is, "with a wish to * * * injure another person, or an intent to do a wrongful act," unless the evidence tends to show to the contrary; that is, that it was done in necessary self-defense, and under circumstances that were at the time unavoidable, in order to prevent the infliction, or attempted infliction, of some great bodily harm by the party injured. The cases of Godfrey v. People, 63 N. Y. 207, and Tully v. People, 67 N. Y. 15, cited by counsel for appellant, and relied on as authority, are founded on a statute which requires that the maiming must result from "a premeditated design, evinced by lying in wait," etc.; and the court, in construing this statute in Godfrey v. People, supra, and reaffirmed in Tully v. People, supra, held the design must precede the conflict, and not originate with or grow out of it. The reasoning of the court in these decisons upon the New York statute, which, as will be seen, is dissimilar to our own, can have no application to cases of mayhem arising under our Code. And under the views herein expressed it follows that the case of State v. Cody, 18 Or. 506, 23 Pac. Rep. 891, and 24 Pac. Rep. 895, also cited by appellant, is not authority.

A careful examination of numerous reported cases show that the crime of mayhem is generally committed in the midst of sudden altercations, without premeditation or deliberation, in view of which we are satisfied that the object of the legislature in the enactment of section 203 of the Penal Code was to suppress such shocking brutality in personal rencounters; and, if proof of premeditation or deliberation was required, as contended for by appellant, the statute would be unavailable for the accomplishment of the very purpose for which it was plainly intended. In the case before us the atrocity of the act itself creates the presumption that it was intended; and, as it does not appear to have been done under circumstances constituting a valid defense under the law, it follows that the defendant was properly convicted of the crime charged. The excuse that the act was done while engaged in a fight suddenly brought on by the interference of Fuller, and under the belief by defendant that such interference was hostile to him, constitutes no defense.

It is claimed that the court erred in charging the jury "that, if you find the defendant guilty, it must be of the offense charged in the information, and that you cannot find him guilty of any less offense. And if you do not believe him guilty of that charge,—the charge of mayhem,—then you should find him not guilty." Where a lesser offense is necessarily included in that which is charged, the jury may find the defendant guilty of such lesser offense. See section 1155, Pen. Code. But where, as is the case here, "the evidence tended to show that he was guilty of the crime charged or of no offense at all," People v. Barry, 90 Cal. 41, 27 Pac. Rep. 62, (People v. Madden, 76 Cal. 521, 18 Pac. Rep. 402;) such charge was entirely proper. The contention that the court erred in its modification of defendant's instructions numbered 1 and 8, and by its refusal to give them as requested, is not well founded, for the reason that the subject-matter of the instructions, as modified, is in accord with the views herein expressed, and correctly states the law. With reference to the charge of the court and the instructions, considered as a whole, it is sufficient to say that they are far more favorable to the defendant than he was entitled to under the law. It is lastly insisted that the court erred in sustaining the objection of the district attorney to the following question: "Was it such an interference [referring to the interference of Fuller when he stepped in to separate defendant and Trood while they were engaged in fighting] as would carry the information to the defendant that this party was only interfering as a friend, or would it be likely to mislead the party as to his object?" The objection to this question was properly sustained, for the reason that it called for the opinion of the witness in relation to a matter which it was the peculiar province of the jury to determine, and of which they were the exclusive judges. We are of the opinion that the judgment and order should be affirmed, and we so advise.

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[1] Pen. Code, § 187: "Murder is the unlawful killing of a human being, with malice aforethought." Section 188: "Such malice is express or implied." Express when there is a deliberate intention to take life. Implied when no considerable provocation appears, or when the circumstances of the killing show an abandoned or malignant heart.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

94 Cal. 59

MERRILL v. FIRST NAT. BANK OF SAN DIEGO *et al.* (No. 14,352.)

(*Supreme Court of California.* March 26, 1892.)

RELIEF AGAINST JUDGMENT—SURETY ON NOTE—RELEASE AND SETTLEMENT BY PRINCIPAL.

Plaintiff, the apparent maker of a note, was in fact the surety for H., the payee named therein, who indorsed it to defendant bank, receiving its face value therefor. After maturity H. conveyed to defendant property "in full payment of all claims and demands" against him and of his indebtedness for all money borrowed from said bank, and took a release reciting that all such claims were fully paid. Thereafter defendant recovered judgment on said note against H. and plaintiff, the former making default, and the latter being ignorant of the conveyance and release previously executed. Defendant had no knowledge that plaintiff was an accommodation maker, and always looked upon him as the principal, never having accepted H. as primarily liable. *Held,* that plaintiff was entitled to relief from the judgment, the settlement made by H. extinguishing all liability on the note.

In bank. Appeal from superior court, San Diego county; W. L. LEACH, Judge.

Action by Merrill against the First National Bank of San Diego and another. Judgment for defendants. Plaintiff appeals. Reversed.

Luce & McDonald and *David L. Withington,* for appellant. *Conklin & Hughes,* for respondents.

DE HAVEN, J. The plaintiff seeks in this action to have declared satisfied, so far as he is concerned, a certain judgment obtained by the defendant national bank against plaintiff and one O. S. Hubbell, upon a non-negotiable note. The court finds that the plaintiff was the apparent maker of the note referred to, but was in fact the surety of Hubbell, the payee named therein; that the note was made for the accommodation of Hubbell; and it is alleged in the complaint, and not denied in the answer, that Hubbell, on the day of its execution, borrowed from the defendant national bank upon said note the full amount called for by it, and indorsed the same to said bank. It is further found that after the maturity of said note the defendant Hubbell and his wife conveyed to the defendant McClure "a large amount of real estate and personal property * * * for the benefit of said First National Bank, which property was received by said bank in full payment of all claims and demands held by said bank against O. S. Hubbell, and particularly in full settlement of his indebtedness for all sums of money borrowed from said bank;" and thereupon said bank executed to said Hubbell a release from all said claims and demands, which release recited that the same were fully paid. The property so conveyed was, in substance, the entire estate of said Hubbell and wife. Thereafter the defendant national bank commenced an action against the plaintiff and the said Hubbell upon the note above referred to, and recovered the judgment which the plaintiff now seeks to have declared satisfied. In said action Hubbell made default, and in this connection the court found that "the said First National Bank and said O. S. Hubbell did not inform the plaintiff that said release had been given, or that said property had been conveyed in payment of said indebtedness, and he was in ignorance thereof at the time of the rendition of the judgment against him." The findings further show that at the time of the execution of said note the defendant national bank had no knowledge of the fact that the plaintiff was an accommodation maker, but looked to him as the principal, and never received or accepted him as only a surety thereon, and never accepted or recognized Hubbell as the person primarily liable on said note. Upon these findings, and others not necessary to be here stated, the court below gave its judgment for the defendants, and the plaintiff appeals. There is no bill of exceptions in the record, and the questions presented by this appeal arise upon the pleadings and findings of the court.

1. As before stated, the pleadings admit that the defendant national bank loaned to Hubbell, upon the note above referred to, money equal to its face value, and that the note was thereupon indorsed by him to said bank. This being so, the finding of the court that after the maturity of the note Hubbell conveyed property to the defendant bank, which was accepted by it "in full payment of all claims and demands held by said bank against said O. S. Hubbell, and particularly in full settlement of his indebtedness for all money borrowed from said bank," must be construed with reference to this admission, and is equivalent to a finding that Hubbell fully settled with and satisfied the bank for the money which he had theretofore borrowed from it on the security of this note. Upon the facts stated in this and the other findings before referred to, the court erred in rendering judgment in favor of the defendant. The payment of the indebtedness represented by said note, or, rather, Hubbell's satis-

faction of such indebtedness by the transfer of property accepted by its holder for that purpose, extinguished the obligation of the note, and would have been for plaintiff a complete defense to the action subsequently brought to recover upon the note thus fully satisfied; and, as the plaintiff was, without any negligence on his part, ignorant of the facts constituting such defense at the time of the rendition of the judgment against him, he may in this form of action obtain relief from the effect of such judgment. Wales v. Bank, Har. (Mich.) 308; Reed v. Harvey, 23 Ark. 44. The fact that the national bank did not know at the time of the execution of the note that Hubbell was the principal debtor, and that it looked solely to plaintiff as the principal, does not affect the question we are now considering. If, in point of fact, the note was paid or satisfied, the defendant national bank was not entitled to the judgment which it subsequently recovered thereon against the plaintiff. While it may be true that, if the bank did not consent to deal with plaintiff otherwise than as a principal upon said note, the mere release of Hubbell would not, of itself, operate as a release of plaintiff, still if, in order to secure such release, Hubbell paid anything upon said note, or delivered to the defendant national bank any property to secure its payment, the plaintiff is entitled to the benefit of such payment or security.

2. The evidence upon which the case was based is not in the record before us, and, as finding No. 11 leaves it somewhat doubtful whether the court below gave to its finding in regard to the settlement made by Hubbell with the respondent bank the same construction we have, and which we think it must bear, we deem it proper, under the rule declared in Schroeder v. Versicherungs Gesellschaft, 60 Cal. 467, to order a retrial, rather than to direct the entry of a judgment for the plaintiff upon the findings as they are. Judgment reversed, and cause remanded for a new trial.

We concur: HARRISON, J.; McFARLAND, J.; PATERSON, J.; GAROUTTE, J.; SHARPSTEIN, J.

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93 Cal. 658

PEOPLE v. McNUTT. (No. 20,858.)

(*Supreme Court of California.* March 24, 1892.)

CRIMINAL LAW—INSTRUCTIONS—FAILURE TO REQUEST—ASSAULT WITH INTENT TO KILL—CONVICTION OF LESSER OFFENSE.

1. A person who is charged with an assault with intent to murder cannot complain of a failure to give instructions in regard to his good character for peace and quiet, or the right to convict as for simple assault, unless such instructions are specially requested.

2. Where the evidence of the prosecution, upon an information for an assault with intent to murder, discloses an assault with a pocket-knife, the blade of which is 3 or 3½ inches in length, and the defendant denies any assault, the court is justified in refusing an instruction that a conviction could be had as for a simple assault, under Pen. Code, § 1159, allowing a conviction for any offense which is included in the offense charged, since the said section contemplates a conviction for such an offense only when the evidence is insufficient to justify a conviction for the greater offense.

PATERSON, J., dissenting.

In bank. Appeal from superior court, Alameda county; JOHN ELLSWORTH, Judge.

Information against H. H. McNutt for assault with a deadly weapon with intent to commit murder. From a judgment of conviction defendant appeals. Affirmed.

Thomas F. Graber and *E. M. Gibson*, for appellant. *W. H. H. Hart*, Atty. Gen., and *Geo. W. Reed*, Dist. Atty., for the People.

PER CURIAM. Appellant was charged with the offense of an assault with a deadly weapon, with intent to commit murder, and was convicted of the lesser offense of an assault with a deadly weapon. For a reversal of the judgment he insists that the court erred in not instructing the jury upon the question of his good character for peace and quiet, he having introduced evidence to that point. It would be unfair and unjust to the people and the court to reverse a judgment and order a new trial because the court did not instruct the jury upon every conceivable phase or principle of law directly or indirectly involved in the case. We have so often held that, if a defendant desired an instruction as to the law upon any special branch of the case, he should direct the court's attention to the particular matter, and request an instruction to that effect, that a citation of authorities is not demanded. Appellant complains that the jury were not instructed that under the information they could convict him of a simple assault. As already suggested, he should have requested such an instruction to be given to the jury, if he desired the benefit of it. The evidence of the prosecution disclosed an assault upon the prosecutrix, with an open pocket-knife, the blade thereof being 3 or 3½ inches in length. The defendant denied any assault. Under the evidence he was either guilty of an offense more serious than a simple assault, or he was not guilty. The facts disclosed by the record would seem to justify a refusal by the court to give an instruction as to simple assault, even if it had been requested by the defendant. People v. Madden, 76 Cal. 521, 18 Pac. Rep. 402; People v. Scott, (Cal.) 27 Pac. Rep. 931. These decisions of the court are not in conflict with section 1159 of the Penal Code;[1] for that section contemplates the conviction of a defendant for the lesser offense, when the evidence is insufficient to justify a conviction for the greater offense charged. The instructions given correctly state the law. Let the judgment and order be affirmed.

PATERSON, J., (*dissenting.*) I am unable to concur with the majority in this case. The defendant testified that he made no assault with a knife; had no intention of doing so. The jury, therefore, if properly instructed, might have found him guilty of a simple assault. It is said that the defendant ought to have asked for an instruction on the subject if he desired one given to the jury. I think, however, that it is the duty of the court without request to tell the jury what verdicts may be rendered in cases like the one on trial, if warranted by evidence. "In charging the jury the court must state to them all matters of law necessary for their information." Section 1127, Pen. Code. The instructions, taken in connection with the fact that the court gave to the jury three forms of verdict,—one for not guilty, one for guilty of assault with a deadly weapon, and one for guilty as charged,—in effect told the jury that no other verdict could be rendered.

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[1] This section provides that the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged.

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93 Cal. 576

In re Kingsley's Estate. (No. 14,729.)

(*Supreme Court of California.* March 11, 1892.)

Allowance to Widow—Review on Appeal.

To justify the reversal of the opinion of the probate court fixing a family allowance, the appellant must show an erroneous ruling of such court, and not merely bad reasoning or mistaken views of the law.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; John F. Ellinson, Judge.

Appeal by Henry Kingsley, brother and residuary legatee of George L. Kingsley, deceased, from an order refusing to reduce the family allowance as fixed by the probate court. Affirmed.

L. V. Hitchcock, for appellant. *N. P. Chipman*, for respondent.

Temple, C. This appeal is taken by Henry Kingsley, brother and residuary legatee of the testator, from an order refusing to reduce the family allowance theretofore fixed by the court. The bill of exceptions states certain facts, but evidently nothing which would justify our interference with the discretion of the probate court, which in such cases must necessarily be nearly conclusive. In the bill of exceptions is what purports to be an opinion of the court, in which are recited many other matters which the judge assumed to be facts. But the bill of exceptions, as to this opinion, only settles the fact that such opinion was rendered and filed. It cannot be regarded as determining that the recitals contained in it are true. If they had been signed as findings, the respondent might have objected to them as not sustained by the evidence. The opinion might perhaps have been regarded as the findings of fact, but it does not seem to have been so considered by the parties, and the appellant asserts no such claim here. With the process of reasoning by which the court reached its conclusion, we have nothing to do. That may have been erroneous, and the ruling correct. To justify a reversal, it is incumbent upon the appellant to show an erroneous ruling, and not merely bad reasoning or mistaken views of the law. Had there been findings showing that $250 per month was a sufficient allowance, perhaps the question might have been raised here. It certainly could have been, had the ruling of the court been the other way. On this record we do not feel called upon to criticise the case of the Estate of Stevens, 83 Cal. 322, 23 Pac. Rep. 379, or to say whether the intimation that an order of allowance is final can be sustained. Under the circumstances, the order appealed from should be affirmed.

We concur: Foote, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the order is affirmed.

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3 Cal. Unrep. 484

Cross v. Reed. (No. 14,522.)

(*Supreme Court of California.* March 12, 1892.)

Conflicting Evidence—Review on Appeal.

An appellate court will not disturb the judgment of a trial court, where the plaintiff and defendant were the principal witnesses at the trial, and their testimony was conflicting.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by John Cross against F. C. Reed. From a judgment for defendant, and from an order refusing a new trial, plaintiff appeals. Affirmed.

Gibbon & Creighton and *Wilcoxon & Bouldin*, for appellant. *W. H. Spencer*, for respondent.

Belcher, C. This is an appeal from a judgment and order refusing a new trial, and the only ground urged for a reversal is that some of the material findings were not justified by the evidence. The action was brought to recover the sum of $8,000, with interest, and it was alleged that the money was furnished by plaintiff to defendant for investment on plaintiff's account in real property, and invested by defendant in a manner which was unauthorized and fraudulent. The plaintiff and defendant were the principal witnesses at the trial, and their testimony upon the material issues was substantially conflicting. No brief has been filed on behalf of respondent, but, after carefully reading all the evidence brought up in the record, we think it must be held, under the well-settled rule of this court, that the action of the trial court cannot be disturbed for the reason urged. We therefore advise that the judgment and order be affirmed.

We concur: Temple, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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93 Cal. 611

In re Dorris' Estate. (No. 14,520.)

(*Supreme Court of California.* March 12, 1892.)

Appointment of Administrator—Recommendation by Non-Resident Widow.

1. Code Civil Proc. § 1365, provides that administration must be granted first to the surviving husband or wife, or some competent person whom he or she may request. Section 1369 provides that a non-resident is not competent to serve as administrator. *Held*, that a non-resident wife may select a competent person to adminis-

ter. Estate of Stevenson, 13 Pac. Rep. 404, 72 Cal. 164, followed.

2. Code Civil Proc. § 1379, providing that administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court, is not inconsistent with the foregoing construction of sections 1365, 1369.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceeding for the appointment of an administrator of the estate of Cornelius Dorris, deceased. From an order appointing the nominee of a non-resident widow, the public administrator appeals. Order affirmed.

J. D. Sullivan, for appellant. *A. Comte, Jr.*, for respondent.

Temple, C. This appeal is taken by the public administrator from an order granting letters of administration to the nominee of the non-resident widow of the deceased. The only question involved is as to the construction of sections 1365 and 1369 of the Code of Civil Procedure; and appellant contends that this question "has never been squarely presented to the supreme court, and that, therefore, Estate of Cotter, 54 Cal. 215, which has been the authority for the ruling of our courts, and upon which authority the supreme court has rendered its decision in Estate of Stevenson, in 72 Cal. 164, 13 Pac. Rep. 404, do not determine the abstract question of construction of provisions of the Code." If the question was not squarely presented in those cases, it is difficult to imagine how it could be so presented. In Estate of Cotter, no other question was involved; and it was discussed fully by the court, and squarely decided. The same is true as to the case of Estate of Stevenson. The first case was decided more than 12 years ago, and has been accepted and acted upon as correct ever since. It is not shown that it violates any principle of law or works injustice. Under such circumstances, we should not now feel at liberty to reverse the ruling, even if led to doubt its correctness. So far is this from being the case, however, that a careful reading of appellant's brief confirms us in the former view. We see no inconsistency between the provisions of the sections involved. If the person nominated by the surviving husband or wife be incompetent under section 1369, he should not be appointed. If the surviving husband or wife labor under any of the disabilities mentioned in that section they could not act; but it would not follow that they might not nominate a person who could.

Nor is section 1379[1] inconsistent with this construction. A surviving husband or wife is always interested in the estate, and generally immediately dependent upon it, and the policy of the law, plainly is that he or she shall have the administrative control, if desired. Therefore, such person, or his nominee, if a fit person, and not incompetent, has the absolute right. In general, there is not the same reason for favoring the other persons entitled to administer in certain cases. Some of them may not even be interested in the estate. Hence they are only entitled to nominate when they are the persons entitled to administer, and then the nomination is submitted to the discretion of the court, which may, if there is good reason for so doing, refuse to confirm the nominee, and appoint the person next entitled. We advise that the order be affirmed.

We concur: Belcher, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is affirmed.

People v. Burdick. (No. 20,857.)

(*Supreme Court of California.* March 11, 1892.)

New Trial—Cumulative Evidence.

Where the alleged newly-discovered evidence is cumulative, and it is apparent that if introduced on the former trial it would not have changed the result, the judgment and order denying a new trial will not be disturbed.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

F. B. Burdick was convicted of concealment of his property to defraud his creditors, and appeals. Affirmed.

J. C. Black, for appellant. *Atty. Gen. Hart*, for the People.

Per Curiam. Appellant was convicted of the crime of fraudulent concealment of his property to defraud his creditors. The only points made on the appeal are insufficiency of the evidence to justify the verdict and newly-discovered evidence. No objection was made to the evidence offered by the prosecution, or to any ruling of the court, and it would be idle to say that the evidence introduced affords no warrant for the verdict. The alleged newly-discovered evidence is cumulative; and, moreover, it is quite apparent that, if it had been introduced at the trial, it would not have changed the result. Judgment and order denying a new trial affirmed.

In re Read's Estate. (No. 14,983.)

(*Supreme Court of California.* March 17, 1892.)

Dismissal of Appeal—Failure to File Record.

Where the transcript on appeal has not been filed within the time prescribed by the supreme court rules, the appeal will be dismissed.

In bank. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of N. C. Read, deceased. On motion to dismiss an appeal from an order confirming a sale of real estate. Motion granted.

T. Z. Blakeman, for appellant. *A. F. Morrison* and *C. E. A. Forrester*, for respondent.

Per Curiam. This is a motion to dismiss an appeal from an order confirming

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[1] Code Civil Proc. § 1379: "Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court."

a sale of real estate, upon the ground that no transcript has been filed within the time prescribed by the rules of this court. The record before us discloses such to be the fact. Let the appeal be dismissed.

93 Cal. 641

PEOPLE v. GOSSET. (No. 20,869.)

(*Supreme Court of California.* March 22, 1892.)

GAMING—FARO—INDICTMENT—INSTRUCTIONS—WITNESS—EVIDENCE.

1. An indictment charging that defendant "did deal, play, carry on, and conduct" the game of faro charges but one offense; Pen. Code, § 330, inflicting a penalty on "every person who deals, plays, or carries on, * * * or who conducts, * * * any game of faro," etc.

2. On trial for dealing, playing, etc., the game of faro, the court below properly refused to charge that "faro is a game played with a full deck of 52 cards."

3. It was error for the trial court, after charging that a mere preponderance of evidence was not sufficient to convict defendant, to add that "it is not required that the inculpatory facts shall be incompatible with the innocence of the accused," since, in order to convict an accused person, the facts proven must be inconsistent with any reasonable hypothesis of his innocence.

4. Where a witness, who saw defendant playing cards, testified that, before that time, he never saw the game of faro, and did not then know what the game was, and that all his knowledge on the subject was afterwards acquired from another person, it was error to permit him to testify that defendant was playing faro.

5. The book called "Modern Pocket Hoyle" is inadmissible as evidence of what constitutes the game of faro.

6. Dealing or conducting faro being forbidden by the Code, whether a banking game or not, an indictment therefor need not state that faro is a banking game.

In bank. Appeal from superior court, Tehama county; JOHN F. ELLINSON, Judge.

A. O. Gosset was convicted of dealing, playing, etc., the game of faro, and appeals. Reversed.

L. V. Hitchcock, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

MCFARLAND, J. Appellant was convicted of dealing, playing, etc., the game of faro, and appeals from the judgment and from an order denying a new trial.

1. We do not think that the indictment charges more than one offense because it uses the words "did deal, play, carry on, and conduct" the said game.[1] "When a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all of such acts may be charged in a single count; for the reason that notwithstanding each act may, by itself, constitute the offense, all of them can do no more, and likewise constitute but one and the same offense." People v. Harrold, 84 Cal. 567, 24 Pac. Rep. 106; People v. Frank, 28 Cal. 513; Ex parte McCarthy, 72 Cal. 384, 14 Pac. Rep. 96.

2. There was no error, under the circumstances of this case, in the refusal of the court to instruct the jury, at appellant's request, that "faro is a game played with a full deck of fifty-two cards." In the first place, there was no evidence that the game alleged to have been conducted by appellant was played with less than 52 cards; and therefore there was nothing in the case upon which to base the instruction. And, in the second place, when a prohibited game is played in all other respects in the usual way, and according to its established rules, the purpose of the law cannot be thwarted by the simple device of playing it with one or two cards less than the number usually employed. Otherwise no statute against a particular game would be of any value.

3. We see no objection to the instructions of the court to the jury except on the subject of reasonable doubt. The charge on that subject was generally correct and sufficient, because it employed language that has been repeatedly approved; but in one part of it the court, after telling the jury that a mere preponderance of evidence was not sufficient, said: "And, on the other hand, it is not required that the inculpatory facts shall be incompatible with the innocence of the accused." This was clearly erroneous. If the facts proven were compatible with the appellant's innocence, he should have been acquitted. It is a recognized principle of English and American law that, in order to convict a defendant, the facts proven must not only be consistent with the hypothesis of his guilt, but inconsistent with any reasonable hypothesis of his innocence. The only shadow of authority for the language used in the instruction which has been called to our attention is to be found in People v. Murray, 41 Cal. 66. In that case no such instruction had been given; but a very extreme instruction on the subject had been asked by the defendant, and had been refused, and the refusal was held not to have been erroneous. The instruction asked included the words "absolutely incompatible;" and the court seemed to think that these words "require proof of his guilt beyond the possibility of a doubt." The court says, however, in its opinion, that "the law requires that the facts shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion;" and it is difficult to see the difference between that language and the instruction asked by the defendant in that case, unless we view the court as attaching large significance to the word "absolutely." The opinion refers approvingly to People v. Cronin, 34 Cal. 201, and People v. Dick, 32 Cal. 215; but in the Cronin Case only the general rule is expressed that the evidence must be "not only consistent with the guilt of the appellant, but inconsistent with any other rational conclusion;" and in the Dick Case the judgment was reversed because the trial court had refused to give instructions the exact opposite of the one given in the case at bar. With respect to instructions on this subject there is no substantial difference between "incompatible" and "inconsistent."

4. Stevenson, a witness for the prosecution, after having testified that he saw the defendant dealing a game of cards, was asked by the district attorney, "What

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[1] Pen. Code, § 330, inflicts a penalty on "every person who deals, plays, or carries on, * * * or who conducts, * * * any game of faro," etc.

game was that?" Defendant's counsel asked that he be instructed not to answer unless he knew the game played, and the court denied the request. He was then asked "if at this time you know what game the defendant was then dealing;" and the defendant's objection having been overruled, and an exception taken, the witness answered, "He was playing faro." On the cross-examination the witness testified that at the time he saw the defendant playing he did not know what the game was, and that the only knowledge which he afterwards acquired on the subject had been gained from what a man told him. Thereupon appellant moved to strike out his testimony "upon the point of what game was being played, upon the ground that it was hearsay." The motion was denied, and appellant excepted. We think that the court erred in denying the motion. It appeared, further, that the witness had never seen faro played before the occasion referred to, and had never played it since. Leaving other considerations out of the question for the present, the testimony was pure hearsay, and there was nothing to make it an exception to the rule that hearsay testimony is not admissible. As the case, however, may be tried again, it is necessary to say something more as to the character of evidence admissible in this class of cases. We think that if a witness, of his own knowledge, knows what faro is, and saw a defendant dealing or conducting it, he may testify to the fact that he saw the defendant dealing faro,—leaving his knowledge on the subject to be tested by cross-examination. And, if he does not know what faro is, he may testify as to the acts which he saw defendant doing. But it is not admissible to allow one witness to testify that the acts testified to by another witness constituted the dealing or playing of faro. Nor can a witness be called for the sole purpose of defining or describing faro. If the jury are to be instructed as to what constitutes the crime charged, the instruction must come from the court. Of course, when a witness testifies that he saw a defendant playing faro, upon cross-examination his notion as to what faro is may be incidentally drawn out; but it is for the court to instruct the jury what constitutes the game charged to have been conducted. In People v. Carroll, 80 Cal. 154, 22 Pac. Rep. 129,—the latest authority upon the subject,—this court says: "We do not concur in the view, however, that one witness can describe the game, and another be allowed to testify that, from that description, the game was a banking game, or any other. We think a person who knows the game may testify, in general, what the game he witnessed was. If not familiar with the game he may describe it, and the court should instruct the jury as to what constitutes the game charged to have been played, the jury to determine whether the game played was the one charged or not. To leave the question open to be proved in every case by experts would lead to great uncertainty in the administration of justice." In that case the offense charged was that of conducting a "banking game;" and, although a witness had been allowed to describe a banking game, this court judicially determined that his description was correct, and should have been given by the court as an instruction to the jury, and thereupon held that it "could have done the appellant no harm;" but it also held that the question was "one of law for the court."

5. Appellant's objections to the regularity of the formation of the grand jury were not sufficient basis for his motion to set aside the indictment or to strike it from the files.

6. The book called "Modern Pocket Hoyle" was not admissible in evidence; but, as we understand it, a page of that book, containing a pictorial representation of faro, was merely used as a diagram by which a witness illustrated his testimony. If that was clearly the only purpose for which it was used, there was probably no error committed; but no part of the book can be used as evidence, in itself, for what constitutes the game of faro. We see no other points requiring special notice. It may be remarked that the averment in the indictment that faro is a "banking game" was unnecessary. Faro, no doubt, is a banking game; but dealing or conducting it is an offense under the Code, whether a banking game or not. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

(93 Cal. 490)

PEOPLE *ex rel.* CHANDLER v. SMITH. (No. 14,072.)

(*Supreme Court of California.* March 22, 1892.)

On petition for rehearing. For former report, see 29 Pac. Rep. 57.

PER CURIAM. The order of this court in the above-entitled cause is hereby modified to read as follows: "Upon the authority of People v. Holladay, 29 Pac. Rep. 54, the judgment and order are reversed as to that portion of the realty described in defendant's plea of estoppel as set forth in his answer in this action, and to that extent the cause is remanded, with directions to the court below to enter judgment for defendant; in all other respects let the judgment and order be affirmed." The petition for rehearing is denied.

(93 Cal. 1)

HYDE v. BOYLE *et al.* (No. 14,190.)

(*Supreme Court of California.* Jan. 18, 1892.)

EJECTMENT—PARTIAL NONSUIT—RESTITUTION—VACATION OF ORDERS.

In ejectment against G. and the tenants of his grantee, T., plaintiff was nonsuited as to all but G., against whom there was judgment by default. Over seven years thereafter execution issued thereon without notice, and the sheriff, finding no one on the premises, formally delivered them to plaintiff. Thereafter, on an order requiring T.'s tenants to show cause, they, after being defended by T. as his tenants, were adjudged in contempt for re-entering, and an *alias* writ of restitution issued. *Held* that, it appearing that at the commencement of the action of ejectment T. was in possession, claiming under a deed from G., and there being no evidence of collusion between G. and T., the order granting execution should be set aside on application, and with it the order adjudging defendants in contempt, and granting an *alias* writ, the hearing on the matter of contempt being no bar to such application.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Ejectment by Henry C. Hyde, assignee of William Ford, in bankruptcy, against Robert Boyle and others. Plaintiff was nonsuited by all the defendants except Benjamin S. Green, and against him judgment was entered by default. Seven years later a writ of restitution was issued, and subsequently an *alias* writ was issued, and certain of defendants fined for contempt. Defendants appeal from an order overruling their motion to vacate the previous orders issuing the writs and fining certain of them for contempt. Order reversed.

Geo. H. Buck, for appellants. *T. S. Osmont*, for respondent.

Temple, C. In effect this case has already been before this court three times. The first—83 Cal. 83, 23 Pac. Rep. 126—was a petition asking this court to settle exceptions on the ground that the judge of the trial court refused to do so. This court held, after argument, that the defendants had the right to be heard on appeal, but they must compel the trial court to settle the statement if it refused, and could not ask this court to do so. The second time—86 Cal. 352, 24 Pac. Rep. 1059—was an application for leave to prove an exception, which, under the circumstances, this court declined to do. The last—89 Cal. 590, 26 Pac. Rep. 1092—was a motion to correct the bill of exceptions by striking out certain matters which appellants contended were not heard or considered in the court below. The court also refused this relief, but said: "We do not wish to be understood as holding that everything that is contained in a bill of exceptions is always to be considered by this court in reviewing the action of the court below. It may frequently happen that irrelevant matters are incorporated into the bill, and the bill itself may show upon its face that the matters therein recited were not presented to the court at the time it made its rulings, or could not have any weight in determining the correctness of such ruling. This court will consider only such matters as by the bill of exceptions itself purport to be pertinent, and to have been considered by the court below."

This appeal is from an order refusing to vacate two previous orders of the superior court; one made November 21, 1888, allowing a writ of restitution on a judgment in favor of Hyde as assignee of Ford v. Boyle et al., and one made March 11, 1889, adjudging certain of the defendants to be in contempt, and awarding an *alias* writ. The bill of exceptions, after giving a brief history of the case, proceeds to relate the facts in regard to the proceedings had in the matter of the contempt. It recites that proper affidavits were filed; that all of the parties appeared; that Thornton, who now claims to have been the owner, was a witness; and then proceeds to state what "the evidence adduced in said proceeding and upon said hearing showed," narrating the facts at considerable length, but not setting out the evidence from which the conclusions are drawn. It does not appear that any witnesses were sworn or testified at the hearing of the motion, from the refusal to grant which this appeal is taken, nor that the papers of proceedings in the contempt case were put in evidence, read, or in any way referred to. Rejecting that portion of the bill of exceptions which sets out facts not shown at the hearing or properly considered by the court in determining the motion, the case is greatly simplified. Most of the alleged facts upon which respondent relies disappear from the case. It then appears that on August 12, 1873, William Ford brought suit to recover the land in question against Robert Boyle, Benjamin S. Green, and five others. That all answered, through Tully R. Wise, as their attorney. That Henry C. Hyde, assignee in bankruptcy, was substituted for Ford as plaintiff. That prior to the commencement of the action Thornton had become the owner of the property through a conveyance from Green, and Ford, the plaintiff, knew that fact. That the defendants other than Green were tenants of Thornton, who, although not appearing as a party, defended the action in the name of his tenants. That upon the trial of the case Thornton succeeded in nonsuiting the plaintiff as to all his tenants. Upon the record it seems that the trial was between the plaintiff and all the defendants, but the nonsuit was not granted as to Green, but the trial then seems to have stopped. A few days after, upon suggestion that Green had not answered, judgment by default was rendered against him. This was August 22, 1881. November 21, 1881, on motion of Osmont, as plaintiff's attorney, although he was not the attorney of record, the court ordered an execution to issue on the judgment against Green. This order was made without notice to any one. The sheriff went upon the premises with the execution, and, finding no one there, and no personal property, formally delivered the same to Osmont. That one C. P. Robinson had acquired plaintiff's title to the property before the issuance of the execution, and Osmont acted in the matter as his representative. That on the 18th of January, 1889, upon the application of Robinson, claiming to be the successor in interest of plaintiff, supported by proper affidavits, an order was made requiring appellants, other than Thornton, to show cause why they should not be punished for contempt for wrongfully re-entering upon the premises after having been dispossessed by the sheriff, and an *alias* writ of restitution issued. That upon the hearing under that order appellant Thornton was a witness, and defended the other appellants as his tenants. That, after a full hearing, the court adjudged said parties to be guilty of a contempt in re-entering upon the premises, and awarded an *alias* writ.

It may be that respondent made a fatal mistake in not formally putting in evidence, upon the hearing of this motion, the same proofs which were heard in the matter of the contempt. Such evidence was not read or referred to, and, if it had been, it should have been brought up instead of the judge's conclusions from it. In re Moore, 78 Cal. 242, 20 Pac. Rep. 558; Hyde v. Boyle, 89 Cal. 590, 26 Pac. Rep. 1092. As the record stands, the orders must be reversed if the appeal is well taken, as seems to have been held in Hyde v. Thornton, 83 Cal. 83, 23 Pac. Rep. 126. Respondent contends that the proper remedy of appellants, if improperly ejected, would have been to ask the court to restore them to the possession. In this case appellants deny that they have been dispossessed under the writ, and on that point the proof was conflicting. The issues upon such an application would have been precisely the same, in all respects, as upon the motion actually made. We cannot see how respondent has been injured by the course adopted. It was a motion to set aside an order allowing an execution upon a judgment more than seven years after its rendition, made without notice to any one. Upon the hearing the court might properly consider such matters as should have been examined into before the original order was made. It is true the statute does not expressly require notice, but the court may, and generally should, require notice to the parties in possession before reviving an old judgment. The hearing upon the matter of the contempt is not a bar to the appellants' right to make this application. The court having found that the writ had been served, and that the appellants afterwards re-entered, properly adjudged them guilty of contempt, and this order for the *alias* writ followed as matter of course. If upon this application it should be determined that the first writ was improperly issued, all the consequences of that act should be corrected so far as possible. There is no real conflict upon the question whether Thornton was in possession at the time of the commencement of the action of ejectment. Osmont's affidavit shows upon its face that it purports to be hearsay testimony, and therefore not competent, while Thornton swears positively that he was in the exclusive, open, notorious, and peaceable possession, claiming the same in his own right, adversely to the whole world. That he had been the absolute owner and in possession since August 17, 1872. And the original plaintiff in the action of ejectment, after he brought that suit, and the defendants had appeared, but before the trial, to-wit, June 8, 1874, in a sworn complaint in an action brought against Thornton, states that Thornton, through his tenants, had been since August 2, 1872, in possession, receiving the rents, issues, and profits, and refused to deliver or surrender possession to him, Ford. From this complaint it appears that Green had been a pre-emptioner upon this land, and had purchased from the government, and had received a patent; that, intermediate the purchase and the patent, an execution had been levied upon the land, and plaintiff, Ford, claimed title under a sale made under this levy; that afterwards, upon the issuance of a patent, Green conveyed to Thornton, who had since been in possession. It here appears that Thornton has been claiming to own these lands. There may be collusion between himself and Green. The learned judge below, drawing upon his memory of the evidence in the matter of the contempt, so held; but there was no evidence of such collusion upon the hearing of this motion. We think the order appealed from should be reversed, and the court below directed to vacate and set aside the previous orders referred to in appellants' motion.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the court below is directed to vacate and set aside the previous orders referred to in appellants' motion.

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3 Cal. Unrep. 485

In re SWEET'S ESTATE. (No. 15,000.)

(*Supreme Court of California.* March 17, 1892.)

DISMISSAL OF APPEAL—SUFFICIENCY OF MOTION.

A motion to dismiss an appeal, on the ground that the transcript has not been filed within the time prescribed by the supreme court rules, will be denied, where the certificate of the clerk of the trial court on which such motion is based does not conform to supreme court rule 4.

In bank. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of Taatemi Sweet, deceased. On motion to dismiss an appeal from a decree of distribution. Motion denied.

Dunne & McPike, for appellant. Timothy J. Lyons and W. A. Stuart, for respondent.

PER CURIAM. This is a motion to dismiss an appeal from a decree of distribution, upon the ground that the transcript has not been filed within the time prescribed by the rules of this court. A motion to dismiss an appeal upon this ground must be based upon a certificate of the clerk of the trial court, certifying the facts required by rule 4 of this court.[1] The certificate relied upon in this case does not meet the requirements of the rule. Let the motion to dismiss the appeal be denied without prejudice.

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[1] Rule 4 requires the certificate to show the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the date of service thereof on the adverse party, and the character of the evidence by which such service appears; the fact and date of filing and undertaking on appeal, and that the same is in due form; the fact and the time of the settlement of the bill of exceptions and the statement on appeal, if there be any; and also that the appellant has received a duly-certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record, or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

93 Cal. 128

Patterson v. Munyan. (No. 13,631.)

(Supreme Court of California. Feb. 1, 1892.)

Highways—Removing Encroaching Fence—Trespass—Estoppel.

1. In trespass for removing plaintiff's fence, defendant justified on the ground that he was acting as road overseer, and that the fence encroached on the highway. Defendant did not deny that plaintiff's land adjoined the road, wherever it was, but the location of the road was disputed. It appeared that the road, as opened by the proper authorities, and laid out on the ground so as to exhibit its actual locality as used by the public, and allowed to be so used for a number of years by the original owners, was always the same. It further appeared that this road, which was, at all events, by dedication and user, a public road, whether the proceedings by the authorities were legal or not, was the actual road, which plaintiff acknowledged as such, and along which he built the fence so as not to encroach. *Held*, that plaintiff showed that the fence was on his land, and not in the road.

2. Where the owners of land make no objection to its use for a public road, and it is used and traveled as such by the public for more than 10 years, the presumption is that it has been abandoned to the public, and it becomes a public highway, under Pol. Code, § 2618, which defines a public highway to be a road, etc., erected or laid out as such by the public, or, if laid out or erected by others, dedicated or abandoned to the public.

3. Under Pol. Code, § 2619, which provides that a road thus created shall continue to exist until vacated by the board of supervisors, or by operation of law or a judgment of a court of competent jurisdiction, the line of a road being once established, even mistakenly, and the road thus located abandoned to the public, a road overseer cannot correct such mistake by taking down a fence built on the line so established.

4. Where a road is shown to be a public highway by dedication and user, it is not error to reject evidence as to what was done by the board of supervisors in attempting to establish it.

5. By receiving damages for opening a road a person is not estopped to consider the road as located the true public road, and to establish his fence accordingly, and hold the land inside it.

Watkins v. Lynch, 11 Pac. Rep. 808, 71 Cal. 26, distinguished.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by one Patterson against one Munyan to recover damages for a trespass in taking down plaintiff's fence. Judgment for plaintiff. New trial denied. Defendant appeals. Affirmed.

T. C. Huxley, *S. P. Hall*, and *Geo. W. Read*, for appellant. *H. W. Philbrook*, for respondent.

Foote, C. This action was brought to recover damages for an alleged trespass upon the land claimed by the plaintiff to be owned by him and in his possession. The plaintiff obtained judgment for one dollar and costs, from which, and an order refusing a new trial, defendant has appealed.

The first contention urged by appellant for the reversal of the judgment and order is that the burden of proof showing the location of the north-westerly line of a certain highway, (No. 520,) which was the boundary between the plaintiff's land and the highway, was thrown upon the plaintiff, and that he failed to make sufficient proof of that fact, and a nonsuit should have been granted, instead of being refused. Even if it be conceded, without deciding, that the burden of proving this boundary line was thrown upon the plaintiff, we think he has done so, and the nonsuit was properly denied. The wrongful act complained of was that the defendant had entered upon the plaintiff's premises, and had removed and destroyed a part of his fence. The defendant admitted that, as a road overseer, he had removed the fence, but justified his act on the ground that he was in the performance of an official duty in removing an obstruction which encroached upon a public highway. The vital question involved in the controversy is whether the land upon which the fence stood is within the public road, or without its limits. The evidence showed, as we think, sufficiently, that the road, as opened by the proper authorities of the county, and laid out on the ground so as to exhibit its actual locality as used by the public, and allowed so to be used for a great number of years by the original owners thereof, was always the same. It further appeared that this road, which was, at all events, by dedication and user, a public road, whether the proceedings had by the supervisors of the county to make it such were legal or not, was the actual road, which the plaintiff acknowledged as such, and built his fence so as not to encroach upon it. So that the claim made in the complaint that the plaintiff's land, in his possession, was intruded upon, is true. And that it is not in the road as laid out and used by the public is also true according to the evidence. And the allegation of the answer that the alleged trespass, as committed, was not on the plaintiff's premises, but in the road, was not proved. It is not denied by the defendant that the title of the plaintiff, and his rightful possession of the land set out in the complaint, existed as to all land which was not in the public road, and that his land came up to and adjoined this public road, wherever it was, upon the side thereof from which the fence was taken. So that if the proof showed that the land invaded was adjoining the public road, but not in or on it, as dedicated to and used by the public, no right existed, by means of which the defendant was justified in removing and destroying the fence. And the plaintiff, when he showed, as he did, where the public road was actually located on the ground, and dedicated and used as such without reference to any proceedings by the board of supervisors to locate and bound it, demonstrated, also, where the true boundary of the true road was, which carried with it the proof of the boundary of his land by that road.

No objections have ever been made by the owners of the land over which the road runs to the public use, and as it has been used and traveled by the public for more than 10 years the legal presumption is that the owners abandoned possession of the land for the road, and therefore the road established upon the land is the public highway. "Public highways," as defined by the Code, are "roads, streets, alleys, lanes, * * * laid out or erected as such by the public, or, if laid out or erected by others, dedicated or abandoned to the public." Pol. Code, § 2618. "A highway thus created continues to exist until it is vacated or abandoned by order of the board of supervisors of the county in which it is situated, or by operation of law or judgment of a court of competent jurisdiction." Babcock v. Welsh, 71 Cal. 402, 12 Pac. Rep. 337; Pol. Code, §§ 2619–2621. The line being once established, even through mistake, and the road thus located having been abandoned to and used by the public until it became the true public road, the board of supervisors had no authority, nor could the defendant correct that mistake in the way he endeavored to do, (Babcock v. Welsh, 71 Cal. 403, 12 Pac. Rep. 337,) and he became guilty of the trespass complained of. It makes no difference in this case whether the attempted establishment of the road by the board of supervisors, in the steps taken by the viewers and the surveyor under the act of 1862, (page 78,) were proper or not, although it seems to us that they were so irregular as to give the board no jurisdiction to establish it. Therefore, there was no error on the part of the trial court in refusing the admission of evidence as to what was done in the matter.

There was no need to find whether the plaintiff was estopped to deny the boundaries of the road as intended by the board of supervisors, by his receiving damages for the opening of the road. The road was opened and used, and became a public road where located on the ground, and it was no fault of his that the mistake was made in locating it. He was not estopped to consider the public road as located and used the true public road, and to establish his fence accordingly, and hold the land inside it. The evidence supported the findings, and the findings, as made, rendered any others unnecessary.

The facts of this case do not bring it within the rule laid down in Watkins v. Lynch, 71 Cal. 26, 11 Pac. Rep. 808. That was not a case where it was attempted to claim under the statute of limitations land outside of a road established by the user. It was a case where it was claimed that land inside of the dedicated line of the road, as used, might be claimed under the statute of limitations as being abandoned by the public. Nor is it attempted here to claim the land trespassed upon under that statute as having been abandoned; for it never was used by the public, but the road was established, dedicated, and used outside of its limits. By preference the public had used land as the road which did not include the plaintiff's land. As was said in Hayward v. Manzer, 70 Cal. 481, 13 Pac. Rep. 141: "Any right the public or the defendants may have had to use the land in dispute * * * was never availed of." The effort of the plaintiff here is not to claim any portion of the land which ever became a part of the public road. It is to obtain damages for a trespass on land in his rightful possession, which has never been dedicated, used, or established as part of the public road. The effort to devote this land to a public use, and the trespass committed, were unauthorized.

The answer of the defendant, as we read it, admitted the trespass if the land in dispute was not a part of the public road, and we have seen that it was not. Therefore, no evidence was necessary to establish the trespass, except that the plaintiff's land was the place from whence the fence was torn down, and not the public road. And, if evidence was improperly admitted as to any other part of the plaintiff's fences, it could have worked no prejudice, under the facts, findings, and judgment. We perceive no prejudicial error in the record, and advise that the judgment and order refusing a new trial be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order refusing a new trial are affirmed.

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93 Cal. 633

Ex parte LIDDELL. (No. 20,887.)

(*Supreme Court of California.* March 19, 1892.)

CONSTITUTIONAL LAW—REFORM SCHOOL—TITLE OF ACT—VALIDITY—HABEAS CORPUS.

1. Act March 11, 1889, entitled "An act to establish a state reform school for juvenile offenders, and to make an appropriation therefor," and providing (section 16) for the committal to such school of "any boy or girl between the ages of ten and sixteen years who has been convicted of an offense punishable by imprisonment in the county jail or penitentiary," and, in cases of offense punishable by imprisonment in the county jail, giving the court discretion to commit the offender to the jail, does not violate Const. art. 4, § 24, providing that "every act shall embrace but one subject, which subject shall be expressed in its title."

2. Act March 11, 1889, § 19, gives to the person accused the right to a private examination on the question whether he ought to be committed to the reform school, unless his parents demand a public trial. *Held*, where a boy of 15, having been convicted of petit larceny and sentenced to the reform school, sued out a writ of *habeas corpus*, and alleged in his petition therefor that he did not demand a public trial or waive a private examination, but did not state that he demanded a private examination, and it appeared that the trial court, after a plea of guilty was entered by the petitioner, heard testimony, and found that the petitioner was a suitable person to be committed to the reform school, that such adjudication was conclusive, as far as the proceeding on the writ of *habeas corpus* was concerned.

3. Although Act March 11, 1889, § 16, could have been enacted as an amendment to the Penal Code, the fact that it was not does not render it void.

4. The fact that an offender may be detained in the reform school for a longer period than he would be if sent to the penitentiary or county jail does not make the act unconstitutional.

In bank.

One Liddell, having been sent to the state reform school, sued out a writ of *habeas corpus*. Writ discharged, and petitioner remanded to the reform school.

M. W. Conkling, for petitioner. *W. H. H. Hart*, Atty. Gen., for respondent.

PATERSON, J. The petitioner, a boy of 15 years of age, was charged in the justices' court of Los Angeles City township with the crime of petit larceny, and, upon being arraigned, entered a plea of guilty as charged. Thereupon the court sentenced him to serve a term of one year in the Whittier reform school. It is claimed that the judgment is void—*First*, because the act upon which it is based is unconstitutional, the legislature having failed to express the subject of the act in the title thereof; and, *second*, because petitioner was not given a private examination on the question as to whether he ought to be committed to the reform school.

Section 24, art. 4, of the constitution, provides that "every act shall embrace but one subject, which subject shall be expressed in its title." The act in question is entitled "An act to establish a state reform school for juvenile offenders, and to make an appropriation therefor."[1] Section 16 provides that any boy or girl between the ages of 10 and 16 years, who has been convicted of an offense punishable by imprisonment in the county jail or penitentiary, may be committed to the state reform shool for a term not less than one, nor more than five years; provided, however, that, if the crime be one punishable by imprisonment in the county jail, the court may, in its discretion, commit the offender to the county jail for the time authorized by law for the punishment of the offense.

1. It is not claimed that the act embraces more than one subject, but it is contended that the title of the act does not fully express the subject-matter. If we bear in mind the part which the titles of acts have played in the history of legislation, it will not be difficult to understand the purpose of the constitutional inhibition and mandate quoted above. In olden times legislative titles were unknown; bills were drawn in the form of petitions, which were entered upon the parliament rolls. At the end of each parliament the judges put them in the form of a statute, and in that form they were entered on the statute rolls. It was not until the reign of Henry VI. that bills in the form of acts, according to modern customs, were first introduced. When titles were first introduced there was a general one for all the acts passed in the session, but in the first year of Henry VIII. distinct titles were introduced for each chapter. Until a comparatively recent date, the title of an act in this country was regarded as no part of it; but, if the language of the act was ambiguous, the title might be considered in determining the intent of the legislators. At the present time, however, the constitutions of many states contain provisions similar to that quoted above. The object of the provision is to prevent legislative abuse; to prevent the passage of acts bearing deceitful and misleading titles. It is intended to protect the members of the legislature, as well as the public, against fraud; to guard against the passage of bills the titles of which give no intimation to the members of the legislature, or to the people, of the matters contained therein. Cooley, Const. Lim. (6th Ed.) 169. At the time the provision referred to was incorporated into our constitution, similar language in the constitutions of other states had received judicial interpretation. If there were any discordance of judgment as to the meaning of the language, we might be justified in discussing the matter as an original proposition; but, as the courts have been practically unanimous in their views, it would be idle to go beyond the mere statement of what we understand to be the *consensus* of judicial opinion at the time the provision referred to was adopted in this state, for the legal presumption arises that the language was used with reference to the interpretation put upon it by the courts in other states. There was a similar provision in the constitution of 1863, and it was held here that it was merely directory, and did not nullify laws passed in violation of it; but the provisions of the constitution of 1879 "are mandatory and prohibitory, unless by express words they are declared to be otherwise."

In Abeel v. Clark, 84 Cal. 229, 24 Pac. Rep. 383, we held it was not necessary that the title of the act should embrace an abstract of its contents. The cases cited therein show that such is the view taken by the courts of other states; and, on reflection, it must appear that this conclusion is based upon the soundest principles of constitutional construction. It certainly was not intended that the title should be a repetition of the provisions found in the body of the bill; the object was to prevent deception by the inclusion of matters incongruous with the subject specified in the title. If the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain. It has always been the custom to state the subject of a bill in general terms, and with the fewest words, and the framers of the constitution doubtless intended the legislature to conform to that custom. Mills v. Charleton, 29 Wis. 409; Bright v. McCullough, 27 Ind. 226; People v. Mahaney, 13 Mich. 494. Numerous provisions, having one general object fairly indicated by the title, may be united. Montclair v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. Rep. 391. When the general purpose of the act is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents. So an act to incorporate a fireman's benevolent association may include provisions for levying a tax upon the income of a foreign insurance company for the benefit of the corporation, (Association v. Lounsbury, 21 Ill. 511;) and it is held in many cases that an act entitled, in general terms, an act to incorporate a certain town, may lawfully provide all means necessary for the government of the town, including taxation, courts, definition of misdemeanors, punishment of offenders, municipal improvements, etc. State v. Town of Union, 33 N. J. Law, 350; Cooley, Const. Lim. p. 172, note 1.

In applying these principles to the case before us, we find no ground for declaring the act unconstitutional. The title declares the act to be one for the establishment of a state reform school for juvenile offenders, and to make an appropriation therefor. It is not an act to erect a building in which a reform school is to be hereafter conducted, but it is an act to establish a school. There can be no school without pupils. It is not simply an act to establish a school, but a school for juvenile offenders. This is a clear indication of an intention to provide for an institution for a certain class of criminals, —children who have offended against the laws of the state. No one can be condemned without a hearing. The title of the act necessarily implies, therefore, that some officer or tribunal shall hear and determine the question whether certain persons charged with crime shall be committed to a reform school, or treated as ordinary juvenile offenders are treated under the penal laws of the state. Any person of ordinary intelligence, reading the title of the act in question, would naturally be led to the inquiry, what juvenile offenders may be sent to this school, under what circumstances may they be committed to this institution, and who is to determine whether or not they should be sent there?

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[1] Act March 11, 1889, (St. 1889, p. 111.)

The title of the act clearly shows what the legislature intended to accomplish, and the provisions referred to simply conduce to that object; they are auxiliary to and promotive of the main purpose of the act, and have a "necessary and natural connection" therewith. They are germane to the subject stated in the title of the act; there is no attempt to conceal the purpose or scope of the act, and no attempt in the act itself to blend diverse and independent subjects. It is admitted that the constitutional provision under consideration has always been given a liberal construction; and this must be so, because the constitution itself does not define the degree of particularity with which a title shall specify the subject of a bill. The matter must therefore be left largely to legislative discretion. Mills v. Carleton, supra; Hannibal v. Marion Co., 69 Mo. 576; State v. Ranson, 73 Mo. 86; People v. Parks, 58 Cal. 635; San Francisco & N. P. R. Co. v. State Board, 60 Cal 12. While it is the duty of the court to place such a construction upon this constitutional provision as will prevent mischievous and vicious legislation, we should guard against such a rigorous interpretation of the language as will impale upon its sharp points the good with the bad. The cases cited by the petitioner do not support his contention. The Colorado case, upon which he places his chief reliance, is clearly distinguishable from the case before us. The title of the act under consideration in that case stated that it was an act "to provide for the maintenance, government, and police of the penitentiary, also the mode of appointing officers, and fixing the salary of the same, and to repeal several acts relating thereto," while the act itself made "certain offenses felonies punishable by confinement in the penitentiary, that otherwise would be considered and punished as misdemeanors." The court properly held that the act dealt with a subject not expressed in the title. At the time of the passage of the act the penitentiary was in existence, and a reading of the title at once induces the conclusion that the various provisions of the act relate alone to the preservation of the building, management of the institution, and the pay of the officers. Brooks v. People, (Colo. Sup.) 24 Pac. Rep. 553.

2. Section 19 of the act gives to the person accused the right to a private examination on the question whether he ought to be committed to the reform school, unless his parent demands a public trial. The matters to be inquired into are collateral to the main issue of guilt or innocence. Either before or after conviction the court may inquire as to the habits and disposition of the defendant, and determine whether he is a fit person to be committed to the school. The inquiry can be made before conviction only with the consent of the accused, (section 18;) but after conviction it is the duty of the court to hear testimony upon the question, (St. 1889, p. 116.) It does not follow, however, that a failure to give the defendant a private examination or public trial will render the judgment void. It is mere error which can be corrected on appeal. The petitioner alleges that he did not demand a public trial and did not waive a private examination, but it is not alleged that he demanded a private examination. It appears upon the face of the judgment, however, that the court did hear testimony after the defendant had entered his plea of guilty, and found that the petitioner was "a suitable person to be committed to the instruction and discipline of the reform school for juvenile offenders at Whittier," and this adjudication is conclusive so far as this proceeding is concerned.

3. We think there is no merit in the contention that section 16 is void, because not made a part of the Penal Code. It is true it could have been enacted as an amendment to the Code, and perhaps it would have been more consistent with our system of codification if it had been, but we know of no provision which requires penal statutes to be made a part of the Code.

4. Counsel for petitioner cites section 1388 of the Penal Code, but it does not clearly appear for what purpose it is cited. If there be any conflict between that section and the act under consideration, the latter must prevail. There can be no question as to the power of the legislature to provide for the detention and education of juvenile offenders, as it has done in this act; and the provisions of the act are not obnoxious to the criticism that it prescribes unjust or unequal penalties. It is true the term of detention at the reform school may be made greater by the judgment of the court than the term of imprisonment in the county jail or in the state-prison for the same offense would be, but it cannot be said that the punishment inflicted is greater than could be put upon an adult for the same offense. The object of the act is not punishment, but reformation, discipline, and education. Section 12. While detained for a longer period, perhaps, than he would be if sent to state-prison or the county jail, the conditions surrounding the child are

vastly different. He is given the opportunity and instruction to learn a trade, and qualify himself for the duties of citizenship, so that at the end of his term he will go out prepared to take care of himself, and those dependent upon him, without the odium which attaches to an ex-convict. There is no doubt of the power of the state to make and enforce provisions for the compulsory education of all children within the state; and it is equally clear that the state may arrest the downward tendency of those who have offended against its laws, and manifested a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education, and discipline necessary to prepare them for honorable citizenship. The records of the penal institutions of this state show that a large majority of their inmates are young men,—many of them juveniles. The legislature, in its wisdom, has endeavored to provide a place for children manifesting criminal traits, where they can be cared for without being thrown under the baneful influence of veterans in crime. We think the policy of the act a wise one, and we see no constitutional grounds for declaring it invalid. It is ordered, therefore, that the writ be discharged, and that the petitioner be remanded to the custody of the officers of the reform school.

We concur: BEATTY, C. J.; DE HAVEN, J.; McFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.; GAROUTTE, J.

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93 Cal. 647

BRONZAN v. DROBAZ. (No. 13,547.)

(*Supreme Court of California.* March 23, 1892.)

ACTION ON JUDGMENT—PLEADING—JURISDICTION—EVIDENCE—RES JUDICATA.

1. In an action on a judgment, a complaint stating that such judgment was duly "given and made," and that no part of it has been paid, is sufficient.

2. Where the judgment roll offered in evidence shows that the action was commenced against a corporation; that defendant was there required, in proceedings supplementary to execution, to appear before a referee, and answer concerning property in his possession belonging to the corporation, which defendant did; that the referee found that he was indebted to the corporation in a certain sum; and that the court confirmed the report, and adjudged that the money be paid to plaintiff,—it does not appear on the face of the roll that the court did not have jurisdiction.

3. Though defendant was not a party to the orginal action against the corporation, the fact that copies of the order requiring him to appear before the referee, and of the affidavit on which it was based, were served on him, and in obedience thereto he appeared and was examined, sufficiently shows that the court had jurisdiction of defendant's person in the supplementary proceedings.

4. The report of the referee that defendan owed the corporation a certain sum, and the con firmation thereof by the court, constitutes a judgment which cannot be assailed collaterally.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by John Bronzan against Matteo Drobaz to recover the amount of a judgment. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

J. D. Sullivan and *Herbert Choynski*, for appellant. *A. F. Morrison* and *O'Brien & Daingerfield*, for respondent.

BELCHER, C. On the 27th day of October, 1887, the plaintiff herein recovered a judgment in the superior court of the city and county of San Francisco against the Gold Lead Gold & Silver Mining Company, a corporation, for the sum of $1,271.95, and $18 costs of suit. On this judgment an execution was issued, and returned unsatisfied. The return states that the execution was duly levied upon "all moneys, goods, credits, effects, debts due or owing, or any other personal property in possession or under control of Matteo Drobaz, belonging to the defendant named in said writ." Thereafter, under and in pursuance of the provisions of section 717 of the Code of Civil Procedure, an order was made by the judge of the court requiring Drobaz to appear, at a specified time and place, before a referee appointed for the purpose, to answer concerning the property in his possession belonging to the defendant. At the time and place named Drobaz appeared, with his attorney, before the referee and was examined. As the result of the examination the referee found and reported to the court that Drobaz had in his possession $217.26, which he admitted was the property of the defendant corporation, and also that he had in his possession $128 and $55, moneys of the corporation, which he claimed had been paid out and expended for the corporation, but that this claim was sham, and not made in good faith. Wherefore it was ordered that Drobaz apply $400.26—the aggregate of the said sums—towards the satisfaction of the plaintiff's judgment in the action. Subsequently an order was made by the court requiring Drobaz to appear at its courtroom at a time named, "to show cause, if any he have, why said report and order should not be confirmed and approved by the court; and also why he should not pay plaintiff's costs, amounting to $58.60, incurred in these proceedings." At the time appointed the parties appeared by their attorneys, and, after argument and consideration, it was by the court, on March 9, 1888, "ordered and adjudged that said report and order of said referee, as filed in this court on the 24th day of January, 1888, be, and the same are hereby, confirmed and approved in all respects, and that the said Matteo Drobaz do pay to the said plaintiff the sum of $400.26, to be applied towards the satisfaction of plaintiff's judgment herein, as ordered by said referee. It is also ordered that the application of plaintiff, as regards the payment of said costs by said defendant, be denied." On June 7, 1888, the plaintiff commenced this action, and in his complaint averred that, by the proceedings supplementary to the execution in the action before mentioned, "a judgment was duly given and made in favor of plaintiff, and against said Matteo Drobaz, defendant herein, for four hundred ($400) dollars principal, and fifty-eight and fifty hundredths ($58.50) dollars costs, and that no part of said judgment has ever been paid." Wherefore he prayed judgment against the defendant Drobaz for $458.50, with interest and costs. The defendant interposed a general demurrer to the complaint, which was overruled, and then answered by a general denial. At the trial the plaintiff was permitted against the objections of defendant to introduce in evidence the judgment roll in his action against the Gold Lead Gold & Silver Mining Company, the execution issued on the judgment and the sheriff's return thereon, and all the proceedings supplementary to the execution. And when the plaintiff rested the defendant moved for a nonsuit on the ground that, "upon the face of the judgment roll offered in evidence, it appears that the court had no jurisdiction to make any order, and, in particular, that Drobaz was not indebted to the corporation in the sum of $400.26." The motion was denied, and an exception reserved. The defendant was then called as a witness in his own behalf, and was asked by his counsel: "Now, at the time that you were examined as a garnishee, as a man that owed some money, or was said to owe some money, to this Gold Lead Mining Company, did you owe the company anything, Mr. Drobaz?" And also· "Did you ever get a summons and complaint, or any papers in the other case?" Both questions were objected to as irrelevant and immaterial, and the objections were sustained, and exceptions taken. The case was then submitted, and the court made its findings, and entered judgment in favor of the plaintiff for the amount claimed. From this judgment and an order denying him a new trial, the defendant appeals.

1. Appellant contends that the complaint did not state facts sufficient to constitute a cause of action, and that the court, therefore, erred in overruling his demurrer. We think the complaint sufficient and the ruling proper. The complaint stated that the judgment sued upon was "duly given and made," and that no part of it had been paid. It was not necessary to state that no appeal had been taken from the judgment, nor that the plaintiff was authorized by an order of court to institute the action.

2. Appellant also contends that his motion for nonsuit should have been granted, because the proofs introduced were wholly insufficient to authorize a decision in favor of the plaintiff. The only ground on which this ruling can be reviewed is that specifically stated when the motion was made. Other grounds cannot now be considered. Raimond v. Eldridge, 43 Cal. 508; Coffey v. Greenfield, 62 Cal. 608; Loring v. Stuart, 79 Cal. 201, 21 Pac. Rep. 651; Miller v. Luco, 80 Cal. 261, 22 Pac. Rep. 195. We do not think it appears on the face of the judgment roll offered in evidence that the court had no jurisdiction to make any order, nor that Drobaz was not indebted to the corporation in the sum of $400.26. The referee found that Drobaz was indebted to the corporation in the sum named, and the court approved and confirmed the report, and adjudged that the money be paid over to the plaintiff. Surely the court had jurisdiction to make the order, and the most that can be said of its action is that it was erroneous. The order was the final determination of the rights of the parties in the proceeding, and it, in effect, constituted a judgment, (section 577, Code Civil Proc.,) on which an execution might have been issued, (section 1007, Id.,) and from which an appeal might have been taken, (section 963, Id.)

3. It is further contended that the evidence was insufficient to justify the findings, and that a new trial should have been granted for that reason. The specifications as to the insufficiency of the evidence are as follows: "(1) The evidence shows that the court had no jurisdiction of the person of the defendant, Drobaz, in the action of Bronzan v. Gold Lead Gold & Silver Min. Co., and proceedings thereto supplementary to execution. (2) There is no evidence to show that Drobaz was indebted to said corporation in the sum of $400.26, or any sum whatever. (3) There is no evidence to show that Drobaz was ever served with any process whatever to give the court jurisdiction in the case of Bronzan v. Gold Lead Gold & Silver Min. Co." The appellant was not a party to the original action against the mining company, and it was not necessary that any process issued therein be served on him. It was shown, however, that copies of the order, and of the affidavit on which it was based, requiring appellant to appear for examination before the referee, were duly served upon him, and that in obedience thereto he did appear and was examined. This was certainly sufficient to show that the court had jurisdiction of his person in the supplementary proceedings. There was also evidence to show that appellant was indebted to the corporation in the sum of $400.26; for, as we have seen, the report of the referee, and the confirmation thereof by the court, amounted to a final determination that such indebtedness existed, and, in effect, constituted a judgment, which cannot be assailed here collaterally. The finding, however, of the court below was that the referee "made and filed his report on said order of examination, and regularly ordered defendant to apply to the satisfaction of the aforesaid judgment against said corporation the sum of $458.50, which sum was found by said referee to be owing from said defendant to said corporation, and that "said report was regularly confirmed in all respects by an order duly given and made by this court in said action." This finding as to the $58.50, which was claimed as costs, was evidently not justified by the evidence; for the reason that the plaintiff's application to be allowed that sum for costs incurred in the proceedings was denied by the court in its order of confirmation. It is objected for respondent that the specification is not sufficient to raise this point, but we think it is.

4. The point is made that the plaintiff's evidence was all irrelevant and immaterial, and that the court erred in admitting it. We see no error in the rulings complained of. It is further suggested that the findings do not cover all the issues raised by the pleadings, but we think them suffi-

cient in that respect. It follows, in our opinion, that the judgment should be modified by striking therefrom the sum of $58.50, and as thus modified it should be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment will be modified as therein indicated, and as so modified will stand affirmed.

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93 Cal. 664

FAIVRE v. DALEY. (No. 14,400.)

(*Supreme Court of California.* March 24, 1892.)

CONVEYANCE OF HOMESTEAD—CONSTRUCTION OF DEED—CONSTRUCTION OF CONTRACT—EVIDENCE.

1. A quitclaim deed is a "grant," within the meaning of Civil Code, § 1243, providing that a homestead can be abandoned only by a declaration of abandonment or a "grant" thereof, executed by the husband and wife.

2. A grant, bargain, and sale deed of certain land contained the following clause: "This conveyance is intended to reconvey and release only such title as the parties of the first part obtained to such premises by virtue of a deed from the parties of the second part to the parties of the first part." *Held*, that such clause should not be construed to be repugnant to the grant, and therefore void, as the manifest intention of the parties would thereby be defeated.

3. A husband and wife conveyed by a quitclaim deed the land in which they had a homestead estate to plaintiff, who conveyed his right of title and interest in such land to defendant under an agreement that the latter should protect plaintiff's title, perfect it if necessary, and sell the land for plaintiff. Thereafter defendant procured a grant, bargain, and sale deed of the land to himself from plaintiff's grantors, and then sold the land. *Held* that, in an action to recover the proceeds of the sale in the hands of defendant, testimony by the grantees of defendant that they relied on the deed to defendant from plaintiff's grantors was immaterial.

4. In such case, plaintiff testified as follows: "He [defendant] agreed to give me one-half. I told him I would give him one-half what he got." And defendant testified that he agreed to give plaintiff one-half of whatever he recovered under the deed, that plaintiff was to give him the land, and that he was to divide the receipts with plaintiff. *Held*, that such evidence was sufficient to support a finding that defendant was to pay all costs incurred in the recovery, sale, or disposal of the land.

In bank. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by Faivre against Daley for money had and received. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Hunsaker, Britt & Goodrich, for appellant. *John M. Lucas*, (*Johnstone Jones* and *J. E. Deakin*, of counsel,) for respondent.

PATERSON, J. George D. Carleton, a married man, became the owner of the property referred to in the complaint on January 11, 1868, and on July 7, 1868, he filed a homestead thereon. On April 8, 1870, Carleton executed and delivered to A. E. Horton a deed of conveyance of the property; and thereafter Horton's interest, if he acquired any, passed through mesne conveyances to S. S. Clark. The trustees of Clark's estate executed and delivered a deed of the land—grant, bargain, and sale in form—to plaintiff, on June 22, 1885; the consideration named being $7,087. On July 8, 1885, Carleton and wife executed and delivered to plaintiff and Pauly a quitclaim deed of the property. On March 1, 1886, plaintiff and Pauly executed and delivered to the Clark trustees a grant, bargain, and sale deed of the land, but the deed contained the following clause: "This conveyance is intended to reconvey and release only such title as the parties of the first part obtained to said premises by virtue of a deed from the parties of the second part to the parties of the first part." On March 18, 1886, plaintiff and defendant entered into an agreement by the terms of which, it is alleged and found, defendant was to "sell and dispose of any part or all of the interest of the plaintiff in and to said lands and premises, and if necessary, at his own cost and expense, to bring suits in law or equity to recover any part or all of said interest which the said plaintiff had in the said lands, * * * and to do and cause to be done whatever he, the said Thomas J. Daley, should deem just and proper for the purpose of selling or disposing of said interest of plaintiff as aforesaid; * * * the said defendant to pay all costs and expenses which might be incurred in or about the recovery, sale, or disposal of said lands," and was to receive one-half of all moneys obtained from the sale, the other half to be paid to plaintiff. Notwithstanding the conveyance to plaintiff and Pauly of July 8th, Carleton and wife executed and delivered a grant, bargain, and sale deed of the premises to the defendant on June 30, 1886. On October 5, 1886, the Clark trustees also executed and delivered a deed of the land to one Hensley. Hensley afterwards conveyed certain interests to Platt, Morrill, Bates, and Parrish. The defendant on February 7, 1887, quitclaimed the larger part of the land to Platt, who took the conveyance, however, for the benefit of himself and the other persons last named. On April 2, 1887, defendant conveyed another portion of the land to McLaren. The remaining portion he sold to Wilde and Frink.

This action was commenced on April 30, 1888, to recover one-half of the sums of money received by defendant,—$5,450. Although the evidence is undisputed that defendant received from Platt the sum of $10,000 for the deed of February 7th, and $400 for the deed to McLaren of April 2d, the court found that the defendant had sold plaintiff's interest in that portion of the land purchased by Platt for the sum of $5,000, and his interest in that portion sold to McLaren for the sum of $400. It is a singular fact, too, that although the court found defendant was "at his own cost and expense to bring suits, * * * and to pay all costs and expenses which might be incurred in or about the recovery, sale, or disposal of said lands," and that all money obtained from the sale was to be equally divided between plaintiff and defendant, $562.50 was allowed the defendant as costs incurred by him in making the sale and conveyance. Plaintiff was given judgment for only $2,418.75, (that being one-half of the balance remaining after deducting $562.50 from $5,400,) and interest at 7 per cent. from August 2, 1887. Defendant moved for a new trial, and the motion was denied. From this order and the judgment, he has appealed. The court made no finding as to the interest purchased by Wilde and Frink, but the evidence shows that the plaintiff had parted with his interest in the land sold to them before he made the deed to defendant.

It is claimed by appellant that plaintiff acquired no interest in the land through the quitclaim deed received from Carleton and wife, and, if he did, such interest was conveyed by him to the Clark trustees by the deed of March 1, 1886, and therefore the defendant took nothing by the plaintiff's deed of March 18, 1886. Conceding that the defendant, although his contract with plaintiff has not been rescinded, is not estopped from setting up these defenses, we think there is no merit in either contention. Section 1243, Civil Code, upon which appellant relies, provides that a homestead can be abandoned only by a declaration of abandonment or a grant thereof, executed and acknowledged by the husband and wife, but the word "grant" is here used in its generic, not its technical, sense, and as so used is a term applicable to all transfers of real estate. Section 1053, Civil Code, says that "a transfer in writing is called a 'grant,' or 'conveyance,' or 'bill of sale.'" Washburn says that "though the word 'grant' was originally made use of in treating of conveyances of interests in lands, to denote a transfer by deed of that which could not be passed by livery, and, of course, was applied only to incorporeal hereditaments, it has now become a generic term, applicable to the transfers of all classes of real property, and will be used in that broad sense in speaking of the formal transfer of titles to lands. * * * Wood, in his treatise on Conveyancing, says: 'The word "grant," taken largely, is where anything is granted or passed from one to another; and in this sense it comprehends feoffments, bargains, and sales, gifts, leases in writing or by deed, and sometimes by word without writing.'" 3 Washb. Real Prop. (5th Ed.) pp. 193, 375. A statute of New Jersey provided that it should be lawful for any married female to receive, "by gift, grant, devise, or bequest, and hold to her sole and separate use, as if she were a single female, real and personal property;" and the court held that the legislature did not intend to use the terms "gift" or "grant" in their technical sense, but to embrace within the meaning of the terms used all the modes of acquiring property, except perhaps by descent. The court said: "The Vermont statute provides that any rights in real estate which a *feme covert* may acquire by gift, grant, devise, or inheritance, during coverture, shall not be liable for the debts of the husband. These words, 'gift' or 'grant,' came up for construction in the case of Peck v. Walton, 26 Vt. 85, wherein REDFIELD, C. J., in delivering the opinion of the court, says: 'It is very apparent that the statute was intended to embrace all rights in real estate which the wife shall acquire during coverture. It would be a very nice, and, as it appears to me, a very unintelligible, construction of this statute, to limit the word "grant" to its narrowest technical import. It evidently was intended to apply to all conveyances by deed which were not gifts.' In our statute, by the term 'grant,' the legislature intended all the ordinary modes of acquiring property by deed, whether operating by force of the statute of uses or not, that by long usage such had become not only the popular but also the technical meaning of the term." Ross v. Adams, 28 N. J. Law, 165. In Durant v. Ritchie, 4 Mason, 69, the court said: "The word 'grant' is *nomen generalissimum*. It includes all sorts of conveyances." In Wisconsin the statute provides that a married woman "may receive by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, real and personal property." It was claimed in McVey v. Railroad Co., that the statute did not permit a wife to acquire real estate by deed of bargain and sale, and hold the same as her separate property. Mr. Justice LYON, speaking for the court, said: "But the word 'grant' has also a larger meaning in the law. It is said in Shepard's Touchstone that 'this word is taken largely where anything is granted or passes from one to another. And in this sense it doth comprehend feoffments, bargains and sales, gifts, leases, charges, and the like; for he that doth give or sell doth grant also.' * * * Hence, in any view we can take of the question, we are impelled to the conclusion that the word 'grant,' as used in the statute, includes deeds of bargain and sale." 42 Wis. 536. It is admitted that Carleton was the owner of the property at the time the declaration of homestead was filed; and, as a quitclaim deed in this state passes all the title which the grantor has, (Lawrence v. Ballou, 37 Cal. 518,) we think the deed from Carleton and wife to plaintiff was a grant, within the meaning of section 1243, Civil Code, which operated as an abandonment of their homestead right, and that it conveyed to plaintiff all the interest they had in the property.

The other point made by appellant is equally untenable. There is no doubt that, where the language in the *habendum* is irreconcilable with that used in the premises, the premises will prevail; but, like the words in a contract, all the words employed in the deed should be given some effect, if possible, and if consistent with the evident purpose and operation of the deed. Havens v. Dale, 18 Cal. 366. There can be no possible question as to what the parties to the deed of March 1st intended. The word 'grant,' as used in deeds, has a well-known signification; but the parties may limit or qualify its meaning, and if they choose to do so the court should not hesitate to carry out their expressed intention. Morrison v. Wilson, 30 Cal. 344; Castro v. Tennent, 44 Cal. 253 The language used in the deed is so plain and unambiguous that the intention of the parties appears upon the face of the instrument; but, if the circumstances surrounding the transaction can be considered, their intention becomes still more obvious. The Clark trustees were dissatisfied, and had commenced, or threatened to commence, an action to set aside their conveyance to the plaintiff. The grounds of their dissatisfaction do not appear, but plaintiff testified: "They didn't think we paid enough. We deeded it back to them, and they gave us our money back. We rescinded the contract." They doubtless believed that the plaintiff and Pauly had no title to the property at the time he attempted to convey to them. Plaintiff had paid them $7,087. This sum they repaid to him, and agreed that they (plaintiff and Pauly) should reconvey to them only such interest in the property as they had acquired through the deed of June 22, 1885. All of the parties to the deed evidently desired to be placed in exactly the same position they held with respect to the property before the Clark trustees conveyed to plaintiff and Pauly. If we hold that the clause quoted above is repugnant to the grant, and therefore void, we defeat the manifest intention of all the parties; and this can be done only by the application of "subtle and unsubstantial definitions, and technical and arbitrary rules." Eldridge v. See Yup Co., 17 Cal. 51. It is impossible to lay down an invariable and universal rule of construction. The tendency of modern decisions is to uphold conveyances, and give effect to the intention of the parties, regardless of technical rules of construction. As illustrating this tendency, Mr. Devlin cites and quotes from many cases. 2 Dev. Deeds, § 855. If our views of the case thus far expressed are correct, the remaining topics discussed in the briefs require no extended consideration.

The court did not err in refusing to consider the testimony of Platt and others to the effect that they purchased, relying upon the title which defendant had acquired through his grant from Carleton and wife. Defendant entered into the contract with plaintiff, and took as a thing of value what title the latter held with full knowledge of all the facts. Upon the strength of his agreement to protect the title of the plaintiff, and to perfect it if necessary, the plaintiff conveyed to him all his right, title, and interest in the property, and went to Europe, trusting in the defendant to carry out his agreement in good faith. It was the duty of the defendant to protect the title which he had acquired, and make the most out of it. As a matter of fact, he paid Carleton and his wife only $50 for their deed. That deed conveyed to him no interest whatever; but, if it had, the defendant would have been bound to account to the plaintiff for it. Hardenbergh v. Bacon, 33 Cal. 377. It is immaterial what the purchasers thought they were buying. The material question is, what did the defendant convey? The only title he acquired from any source was that which he derived through the deed from plaintiff, and that is what he conveyed. The fact that Pauly gave his interest away has no bearing upon the question.

It is claimed by appellant that there is no evidence to support the second and third findings of the court,—nothing to show, at least, that he agreed with plaintiff to pay all costs and expenses which might be incurred in or about the recovery, sale, or disposal of the lands,—and that the court erred, therefore, in not deducting from the amount received by defendant the sum of $1,000 paid to an attorney for advice and assistance. The advice and assistance referred to consisted in an attempt to show that the plaintiff had no interest whatsoever in the land. We do not know upon what theory the court below deducted the sum of $562.50, and refused to allow the defendant anything on account of the attorney fee, unless it was that plaintiff ought not to be charged for advice which was adverse to his title. We think the finding as to costs is supported by evidence. The plaintiff testified as follows: "He agreed to give me one-half. * * * I told him I would give him one-half what he got. He was to get half, and I was to get half. * * * He first told me in San Francisco,—he said, 'You have made $10,000 out of that transaction.'" This last statement the defendant did not deny. The defendant testified as follows: "I agreed to give him one-half of whatever I recovered under that deed. * * * Question. He agreed to give it to you, and you were to divide the receipts, wasn't it? Answer. I think it was." The fact that plaintiff was willing to allow the defendant 50 per cent. of the amount recovered should be considered, also, in determining the question as to whether the defendant agreed to pay the costs and expenses. It is true the defendant testified that the plaintiff agreed to pay one-half of the expenses, but the evidence was conflicting. The court found in favor of the plaintiff, and that finding cannot be disturbed here. But, whether the finding is supported by the evidence or not, the failure of the court to allow defendant $1,000 on account of attorneys' fees was immaterial, in view of the evidence as to the total amount received by defendant. It is undisputed that the defendant received $10,400 for the two deeds. Assuming, therefore, that appellant is right in his contention as to costs, $1,562.50 should have been deducted from that sum, and the balance divided equally between the plaintiff and the defendant. This would have given the plaintiff a judgment for $4,418.75, instead of $2,418.75. As stated before, the only interest which the defendant held was that which he acquired from the plaintiff, and that is what he sold. The judgment was clearly for less than the plaintiff was entitled to recover, and the defendant was not prejudiced by the failure of the court to deduct the $1,000 paid his attorney, conceding that he was entitled to a credit on that account. We think the court below properly computed interest on the amount found due from August 2, 1887. Plaintiff testified that on August 2, 1887, he went to the defendant's office, and inquired about the $20,000; that the defendant said: "Ain't $10,000 enough? I will pay you the money next week." But, whether interest was allowable or not, for the reasons stated in the last paragraph the defendant was not prejudiced by the amount of interest included in the judgment.

It is claimed by appellant that the present action for money had and received will not lie, an accounting being necessary between the parties. The complaint, however, sets forth all the facts upon which the plaintiff relies, and it is apparent from the evidence that no accounting was necessary. If an accounting had been necessary, the court below, doubtless, would have ordered it taken.

There is no merit in the appellant's claim that the transaction was between Faivre and the firm of which the defendant was a member. The other members of the firm testified that they had no interest whatever in the contract,—that the firm had nothing whatever to do with it,—and plaintiff testified that the defendant gave him no information that Gassen & Reed were concerned in the matter until after the sale was made. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; HARRISON, J.; McFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.

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93 Cal. 660

MOULTON v. McDERMOTT. (No. 13,930.)

(*Supreme Court of California.* March 24, 1892.)

INJUNCTION—RESTRAINING WRIT OF POSSESSION AGAINST THIRD PARTIES.

Where plaintiff in ejectment had judgment on the ground that defendant, who was then tenant under one E., entered into possession as tenant under plaintiff, and was therefore estopped to deny plaintiff's title, a writ of possession against E. on the judgment will be restrained; E.'s title not having been adjudicated.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Ejectment by Mary S. Moulton against Mary Ann McDermott. Plaintiff had judgment, and Fanny McElhinny obtained an order restraining the execution of the judgment, claiming a superior title to the premises, which was not concluded by plaintiff's judgment. From the restraining order, plaintiff appeals. Affirmed.

H. A. Powell, *J. G. Maguire*, and *J. D. Sullivan*, for appellant. *Geo. D. Collins*, for respondent.

FOOTE, C. The appeal taken herein is from an order perpetually restraining the sheriff from executing a writ of possession issuing under a judgment in ejectment. The action was for the purpose of recovering possession of certain premises from Mary Ann McDermott and certain defendants. Judgment was given in favor of the plaintiff, but when the writ of possession involved here was issued the defendant in the action was dead, and Fanny McElhinny, who was not a party to the original action in ejectment, was in possession, by her tenant, of the premises, and upon her application the court below enjoined the sheriff from interfering with her under the writ. The plaintiff in the action above alluded to contends that Mrs. McElhinny was so connected with the original action, although not a formal party thereto, that she ought to be held concluded by the judgment therein rendered, and therefore subject to be removed from possession of the premises under the present writ of possession. The defendant Mrs. McDermott set up in her answer in the original suit that she was the tenant in possession of John McElhinny, the husband of the party now in possession, Mrs. McElhinny, who now claims to be the owner of the property in dispute, and seised in fee thereof, and that her grantor was one John McElhinny.

The plaintiff failed to show any title in herself as declared by the court, but under the instructions of that tribunal the jury returned a verdict for the plaintiff, because of the fact that Mrs. McDermott, the defendant, having entered under the plaintiff as tenant, was estopped to deny the plaintiff's title, under whose license the defendant entered. In the same connection the court charged that, if this question of estoppel was out of the way, the plaintiff's title would be of no avail as against the right or title of Mrs. McElhinny, under whom also the defendant claimed. So, in effect, the case went off on the question of estoppel, and did not determine anything adverse to the right of possession of Mrs. McElhinny, the party in whose favor the court below made its restraining order. In other words, Mrs. McElhinny, although endeavoring to have the defendant prevail, as her tenant, under a title superior to that of the plaintiff, did not have the advantage of this superior right or title, because the jury, under the instructions of the court, were bound to find that Mrs. McDermott had entered under the plaintiff, and was estopped to defend her possession under the superior right of Mrs. McElhinny. As the case stands, this individual, although not an actual party to the record, is sought to be put out of possession by one having an inferior title to hers, because it is claimed that Mrs. McElhinny, by assisting the defendant in the action, is concluded by the judgment. She is concluded, as we think, only so far that she cannot say that Mrs. McDermott was her tenant; but she, being now in possession in her own right and adverse to the plaintiff, is not concluded from setting up as a shield her superior title, which has never been passed upon. To say otherwise would be to pervert a just rule which the plaintiff and appellant invokes. The plaintiff below contended, and prevailed in the contention, that Mrs. McDermott was not the tenant of Mrs. McElhinny. If we understand her position now, it is that Mrs. McElhinny claimed possession under her tenant, Mrs. McDermott, when the action was brought, and is therefore liable to be turned out. But the plaintiff must stand on the position she took and maintained, that Mrs. McDermott was her tenant, not that of Mrs. McElhinny, and must give back possession as such tenant, and is estopped to set up any superior title of Mrs. McElhinny. But we do not think that Mrs. McElhinny, who has been adjudged not to be the landlady of Mrs. McDermott, should be cut off from defending her possession under a superior title, which has never been judicially passed upon as between her or her tenant and the plaintiff. The authorities cited by the appellant do not go so far as to conclude one's superior title, when no opportunity has been had to have it passed on, and where the court has actually told the jury that, if the tenant is not estopped to set it up, it is the better title and should prevail. Mrs. McElhinny has a right in this proceeding to show that her possession is not under Mrs. McDermott, but in virtue of a paramount title, as it was declared she had by the trial court in the original action. See Long v. Morton, 2 A. K. Marsh. 39, cited in Sampson v. Ohleyer, 22 Cal. 207. Mrs. McElhinny is not the assignee in any way of Mrs. McDermott, who is dead. She is holding for herself by virtue of an independent, adverse, and paramount title to that of the plaintiff, whose tenant is dead. The judgment was based upon the fact that Mrs. McDermott was not the tenant of Mrs. McElhinny or her grantor, Mr. McElhinny, but that she was the tenant of the plaintiff. If that is so, then the possession of Mrs. McElhinny, upon the plaintiff's theory and contention, must be independent of the tenant, Mrs. McDermott, and her landlady, the plaintiff, and, as the record shows, under a superior right to that of the plaintiff.

Under the circumstances of this case, we think the trial court is not shown to be guilty of an abuse of discretion, and was justified in its ruling, as the distinct title of Mrs. McElhinny has not been tried in the action of ejectment. See Hickman v. Dale, 7 Yerg. 148, cited in Sampson v. Ohleyer, 22 Cal. 207. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(94 Cal. 137)

Kendrick *et al.* v. Diamond Creek Consolidated Gold Min. Co. *et al.* (No. 14,479.)

(*Supreme Court of California.* March 29, 1892.)

Action against Association—Change of Venue.

An "association," though not invested with corporate powers, is within Const. art. 12, § 16, which provides that a "corporation or association" may be sued in the county where the cause of action accrues; and in an action brought against a mining company in the county where the alleged injury occurred, it is no objection to the venue that the complaint does not show that the company has corporate powers.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by James Kendrick and Alice Kendrick against the Diamond Creek Consolidated Gold Mining Company and Oscar Newhouse. From an order denying a change of venue defendants appeal. Affirmed.

Niles Searls and *Fred Searls*, for appellants. *G. D. Buckley* and *C. W. Cross*, (*W. D. Long*, of counsel,) for respondents.

Foote, C. This appeal is from an order of the court below refusing to change the place of trial of the cause from Nevada county to the city and county of San Francisco. It appears from the complaint that the Diamond Creek Consolidated Gold Mining Company is an association of numerous persons joined together for the purpose of opening, developing, and working gold mines in the county of Nevada, state of California; that the injury complained of was inflicted in Nevada county, and was occasioned by their neglect in that county, while engaged in their business there. After demurrer filed to the complaint, the court below refused to change the place of trial, on the ground "that the defendants are shown by the complaint to be an association, and engaged in business as such in the county of Nevada, where the alleged cause of action accrued, and, as appears by the complaint herein, the alleged injury was inflicted; and that as such association they were, under section 16 of article 12 of the constitution of the state of California, liable to be sued in the county of Nevada, where the cause of action accrued." The only argument made against this ruling seems to be that the complaint does not make it evident that the association mentioned possessed any of "the powers or privileges of a corporation," and that the word "association," as used in the section of the constitution supra, was intended to mean such an association as did possess such powers and privileges; and that, unless such allegation descriptive of the character of the association did appear in the complaint, it would not appear therefrom that such an association was meant as that to which the constitutional provision had reference. The language of that section of the constitution is: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs," etc. It is evident that the words "corporation or association" do not convey the idea that the association meant was to have any "corporate powers or privileges," and there is nothing else in the section itself which gives color or makes a suggestion that the word "association" is intended to signify anything else than that word, standing alone, would ordinarily be taken to mean. We think the court below was right, and that its order should be affirmed, and so advise.

We concur: Vanclief, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(93 Cal. 674)

Brill v. Shively *et al.* (No. 14,558.)

(*Supreme Court of California.* March 25, 1892.)

Res Judicata.

In an action to foreclose a mortgage, a subsequent mortgagee was made a party defendant, and answered, praying that the surplus, if any should remain after paying the prior mortgage, should be applied to the payment of the subsequent mortgage. *Held*, that the judgment in such action was not a bar to an action to foreclose the subsequent mortgage, which covered two distinct tracts of land, one of which was not involved in the previous action.

In bank. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Brill against Shively and others to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Affirmed.

Henry Bleecher, *W. I. Foley*, and *Geo. I. Cochran*, for appellants. *Bicknel & Denis* and *D. P. Hatch*, for respondent.

Sharpstein, J. This appeal is from a judgment and order denying defendants' motion for a new trial in an action to foreclose a mortgage executed by defendants to plaintiff. The mortgage embraces two distinct tracts of land, which, for convenience, we shall designate as tracts 1 and 2. Upon tract 2 there was a mortgage prior to plaintiff's, which was foreclosed before this action was commenced. In that action plaintiff was made a party, as claiming some interest subsequent to and subject to the lien of the plaintiff in that action. The plaintiff herein filed an answer in that action, in which he set out the mortgage which he held upon said tracts 1 and 2, and prayed that, if any surplus should remain after applying the same to the amounts due on said prior mortgage, the same be applied to the payment of the mortgage of the plaintiff herein, defendant in said action, to foreclose said prior mortgage. It nowhere appears that tract 1 was in any way involved in the action to foreclose the mortgage prior to the plaintiff's on said tract 2, but appellants contend that the judgment in that case is a bar to this action, and that the court below erred in holding that it is not. It is sufficiently clear to us that the judgment in that case did not and could not affect any land or interest outside of the tract involved in that action. The plaintiff's mortgage embraced two tracts, one of which only was involved in that action. The other was as much outside of that action as if it had been mortgaged to the plaintiff in a separate mortgage. It could not be foreclosed in an action brought to foreclose a mortgage upon another and separate tract of land. No bar to this action is shown, and, no other defense appearing in the record, the judgment and order must be affirmed.

We concur: McFarland, J.; Harrison, J.; Paterson, J.; Garoutte, J.; De Haven, J.

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93 Cal. 676

Harris *et al.* v. Harrison *et al.* (No. 14,374.)

(*Supreme Court of California.* March 25, 1892.)

Water and Water-Courses—Quieting Title—Evidence—Pleading—Judgment—Apportionment.

1. Where a witness in an action to quiet title to the right to use certain water, alleged to flow naturally through a specified stream, testified that he had measured the water in such stream, and gave the result of his measurement, and defendants sought to show that there was more than the average amount of water in the creek at the time of such measurement, the trial court properly sustained objections to questions put to such witness as to the comparative amount of water in other streams at points not stated; nothing being shown as to their length, etc.

2. Where the complaint alleged a right to use the water, and "also the right to divert from its natural channel, and to use for irrigating and domestic purposes, all the waters" of the stream, the words "also the right to divert," etc., are mere surplusage, and do not vitiate the complaint.

3. Where plaintiffs alleged that they were entitled to all the water of the stream, and defendants denied that they were entitled to any of it, and the court found that plaintiffs were entitled to a portion of the water only, and that, to make the water available for irrigating purposes, it was "necessary that the full flow of the stream be used at once," there was no error in the decree apportioning to plaintiffs the full flow of the water every 3½ days out of 7, and to defendants such flow the other 3½ days.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by William P. Harris and others against A. Harrison and others. From the judgment of the superior court, defendants appeal. Affirmed.

Willis, Cole & Craig, for appellants. *Barclay & Wilson*, for respondents.

McFarland, J. This action was brought to quiet plaintiffs' title to the right to the use of certain water, alleged to flow naturally through a stream called "Harrison Canon." Judgment was rendered for plaintiffs, and defendants appeal.

Plaintiffs and defendants are the owners of adjoining land; defendants' land lying on Harrison canon, above and to the north of the land of plaintiffs. The real merits of the case, underlying incidental points of pleading and practice, rest upon the issue whether or not there is any water-course in Harrison canon. Defendants undertook to maintain by their evidence that the general character of Harrison canon was that of a dry, sandy gulch, with practically no running water in it, except during great and unusual rain-storms, when temporary torrents bring down large masses of sand and *debris*, which fill up the gulch and so change it that it could not be said to have any well-defined bed or banks; that ordinarily there was no water in the canon, except a little that oozed out of two springs on defendants' land, in quantities too small to form a current strong enough to flow down to plaintiffs' land; and that defendants, by digging into said springs and removing obstructions, developed a small stream, which they use to irrigate their land. Plaintiffs introduced evidence tending to show the contrary of defendants' contention; and tending to prove that there always has been, and is, a natural stream of water running down said canon to and upon plaintiffs' land, independent of said unusual storms. The judge of the court, with counsel for both parties, and a civil engineer, (Finkle,) visited the premises, and observed the various points alluded to in the testimony. The evidence was certainly very conflicting; and, without reviewing it here in detail, it is sufficient to say that its character is such that the finding of the lower court that there was a water-course, as claimed by plaintiffs, must be taken as final.

We do not think that the court erred in sustaining the objections to two certain questions asked by appellants of the witness Finkle. The witness had testified that he had measured the water in Harrison canon when he visited it with the judge of the court, as above stated, and had given the result of his measurement; and appellants' counsel then asked him this question: "What, if any, comparison does a flow of water out of streams or springs bear this year to that of the preceding year?" And the witness, having stated that he had "this year" also measured certain other named streams coming from the mountains into the San Bernardino valley, was then asked this question: "Now, then, what, if any, is the increase or decrease of any of the streams that you have mentioned,—City creek, Plunge creek, or the other streams you have mentioned,—on the north side of the San Bernardino range, this year as compared with the preceding years?" Objections to these two questions were sustained, and, we think, correctly. Appellants had the right to show, if they could, by appropriate evidence, that there was more than the average amount of water in Harrison canon at the time Finkle measured it. This they might have done by the direct testimony of witnesses who knew the fact, if there were such, or by proof of such circumstances as an unusual rain-fall that year at the place, etc. But the comparative amount of water in other streams, at points not stated, in a range of mountains, nothing being shown as to their length, water-sheds, etc., is too general and remote to be proper evidence of the fact sought to be proven.

2. There is some foundation for appellants' criticism of the complaint; but we think it must be held as sufficient, at least in the absence of a special demurrer. The averments are not as direct, and are not as well connected in logical sequence, as they should have been, but it sufficiently appears therefrom that plaintiffs were the owners of certain land; that there was a stream of water naturally flowing to and upon said land; and that, by their riparian ownership of the land, they were entitled to have the use of said water upon said land. We do not think that, as contended by appellants, the complaint merely declares on a right acquired by appropriation. The complaint contains this language: "Also the right to divert from its natural channel, and to use for irrigating and domestic purposes, all the waters of that certain stream," etc. So far as the sufficiency of the statement of the cause of action is concerned, the use of the words "right to divert" and "for irrigation" are unnecessary. If plaintiffs, by virtue of their ownership of the land, had the right to have the natural flow of the water, they, of course, had the right to divert and use it for irrigating their land, at least as against the defendants, who were upper riparian proprietors; but the use of these words does not vitiate the statement of the cause of action. So far as this point is involved, they may be treated as surplusage, although some importance may perhaps be attached to them when considering the relative rights of the two sets of riparian proprietors to the use of the water of the stream for irrigating their respective lands.

3. The most important question of law involved in the case, (although not much argued in the briefs,) arises out of the form of the judgment. The court found "that, in order that the water of said stream may be made available for the purposes of irrigation to advantage, it is necessary that the full flow of the stream be used at once;" and it was decreed in the judgment that plaintiffs are the owners of, and entitled to the full flow of, the water, every 3½ days out of every 7 days, and that defendants are entitled to such flow for 3½ days out of every 7, and plaintiffs' title to such flow is quieted. Appellants contend that the above finding and the judgment are outside of the issues made by the pleadings. Plaintiffs alleged in their complaint that they were entitled to the flow of "all the waters" flowing in Harrison canon; and defendants, in their answer, denied that plaintiffs were entitled to the flow of any of said waters. The court found and decreed, substantially, that plaintiffs were entitled to the flow of some of said waters, but not of all, and that their right to have the waters of said creek flow down to and upon their land was subject to the use of said waters by defendants as upper riparian proprietors. Now a plaintiff in an action to quiet title, or in an action of ejectment, does not lose his case by a failure to establish his title to the whole of the property described in his complaint. He may recover, upon sufficient proof, either a segregated part of the premises sued for, or an undivided interest therein. And so, if the judgment in the case at bar had been for a certain part of the continuous flow of the stream, as, for instance, one-half thereof, or a certain number of inches, there could have been no objection to its form. In that event, plaintiff would have simply recovered, in the ordinary way, a part of the property for which he sued. But could the court apportion the use of the water between the parties, as was attempted to be done by the judgment?

According to the common-law doctrine of riparian ownership, as generally declared in England and in most of the American states, upon the facts in the case at bar, the plaintiffs would be entitled to have the waters of Harrison canon continue to flow to and upon their land as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity. But in some of the western and southwestern states and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified, or rather enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor; and this must be taken to be the established rule in California, at least where irrigation is thus necessary. Lux v. Haggin, 69 Cal. 394, 10 Pac. Rep. 674. Of course, there will be great difficulty in many cases to determine what is such reasonable use; and "what is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case." Lux v. Haggin, supra. The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case, the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each,—all these and many other considerations must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream, so as to allow none to flow down to his neighbor. In the case at bar only the rights of two riparian proprietors are to be considered. None other are involved. And the amount of water in the stream is so small that it is apparent that defendants could not use it for any useful irrigation without practically absorbing it all, and leaving none to flow down to plaintiffs' land. There was sufficient evidence to warrant the finding of the court that in order to irrigate, "it is necessary that the full flow of the stream be used at once." But defendants, as well as plaintiffs, were entitled to a reasonable use of the water for irrigation; and the rights of either could be declared or preserved by an attempted division of the flow of the water without reference to time. The only way, therefore, to preserve those rights, and to render them beneficial, was to decree to the parties the use of the full flow of the stream during alternate periods of time; and we do not see why the court could not decree a division of the use of the water according to that method, when there was no other method by which it could be done. And that the division was a just one, and not erroneously determined upon, seems clear. The evidence showed that the arable and irrigable land of each party was about equal in area; and there is no contention that the division was not equitable, provided that all the other facts were correctly found by the court.

We see no difficulty in the point that the pleadings do not support the judgment. We see no reason why a court of equity, in a case like this, could not decree such an adjustment of disputed water-rights as was decreed in this case upon the ordinary pleadings in an action to quiet title. Under such pleadings the rights of the parties to and in the property involved are at issue, and the court has jurisdiction to definitely and finally determine them. The pleadings in this case, however, set up the rights of the parties to irrigate their respective lands by the use of the water-right in litigation; and it is difficult to see what further pleadings were necessary.

There was some contradictory evidence as to whether plaintiffs' ditch or flume extends upon the land of defendants, and there is something on that subject in the briefs; but it is sufficient to say, on this point, that the judgment does not give plaintiffs any right to maintain a ditch on defendant's land, or to go on it for any purpose. Judgment and order affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.

94 Cal. 1

STOLL *et al.* v. BEECHER *et al.* (No. 14,462.)

(*Supreme Court of California.* March 25, 1892.)

BOUNDARIES—MONUMENTS—COURSES AND DISTANCES—CONFLICT.

Where, in an action to recover possession of land, the evidence is conflicting as to the true location of a station, which is described as a natural monument, and is located in a different place by the courses and distances, the natural monument will control.

In bank. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Action by Stoll and others against Beecher and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

A. J. King and *R. Dunnigan*, for appellants. *D. L. Russell* and *W. S. Waters*, for respondents.

PATERSON, J. This is an action to recover possession of a tract of land in Los Angeles county. It is described in the complaint and in the judgment as follows: "All that certain tract of land in said county, lying between Promenade avenue on the east, and the line of ordinary high-water mark of the Pacific ocean on the west, and between the lines of Ocean avenue on the south and Front street on the north, according to the map of South Santa Monica, made by Rumble & Gaertner, surveyors, * * * to which map reference is made for further description and certainty. The lines of said Ocean avenue and of said Front street being considered, however, as extended westerly to the said line of ordinary high-water mark on the Pacific ocean." Judgment was entered in favor of the plaintiffs, and the defendants have appealed from the judgment, and from an order denying their motion for a new trial.

The only point made by appellants is that the findings are contrary to the evidence. There are no specifications in the statement as to the insufficiency of the evidence, but, as no objection has been made on that ground, we proceed to consider the merits of appellants' contention. It is claimed by appellants that neither the patent of the Rancho la Ballona nor the deed of Nancy T. Lucas includes in its description any of the land in controversy. Whether this contention be sound or not depends upon the question as to the proper location of station 31 of the Ballona rancho. Appellants contend that it is located in an arroyo on the bluff above the sea-shore. The question was one of fact to be determined by the court on all the evidence in the case. In finding that plaintiffs were the owners of the land in controversy, the court necessarily found that the station was not on the bluff, but on the sea-shore; and we think the finding is supported by the evidence. The north-west corner of the Ballona rancho is identical with the south-east corner of the Rancho Santa Monica y San Vicente. The description of the land in the patent of the Santa Monica rancho commences with the words: "Beginning on the sea-shore, at station number thirty-one of the 'Ballona' rancho." The decree of confirmation recited in the patent of the Ballona rancho describes the land as "a certain tract of land in Los Angeles county, west of the city of Los Angeles about three leagues, and bordering on the sea-shore, called the 'Ballona.'" The plat referred to in the patent shows that the north-west corner of the rancho is on the sea-shore, as stated in the patent of the Santa Monica y San Vicente, and all of the agreements, decrees, and conveyances through which plaintiffs deraign title tend to establish the same fact. Wright, a witness for plaintiffs, testified that he was a surveyor, and had surveyed the land; that the west line of the rancho, as shown in the patent, survey, and map, was not the same as it was shown to be in the survey and map of South Santa Monica; that "the west line of the patent includes the land in controversy." Fisher, a surveyor called on behalf of defendants, testified on cross-examination that "the boundaries, as called for in the title-deeds of plaintiffs, (which are here now shown,) embrace and include the land in controversy. The west line, as called for in said title, being the Pacific ocean, and the lands in controversy being east of and above the line of ordinary high-water mark of said Pacific ocean. If the entire west line from the point where the southern boundary of the La Ballona intersects or touches the Pacific ocean was run in accordance with the calls, courses, and distances as called for in the patent and survey of said La Ballona rancho, to station thirty-one, its north-west corner, then, in that case, the land in controversy would lie east of and above said line so run." All the witnesses testified that, if station No. 31 were located at ordinary high-water mark on the sea-shore, as called for in the survey and patent, and the west line of the rancho were run according to the calls, courses, and distances given in the survey, all of the land in controversy would be east of and above said west line; and that, if the lines of Ocean avenue and Front street were extended westerly to the line of ordinary high-water mark, all the land in controversy would lie between the lines of said Ocean avenue and Front street, so extended, and above and east of the line of ordinary high-water mark. It is true, four of the five witnesses testified that station 31, according to the courses and distances given in the survey is located in the arroyo on the bluff; but the most that can be said is that there is a conflict in the evidence. Where there is a conflict as to the true location of a station, which is described as a natural monument, and is located in a different place by the courses and distances, the natural monument will control. It is claimed by appellant that the deed from Andres and Rafael Machado to Nancy T. Lucas did not embrace the land described in the complaint. This contention also is based upon the assumption that the south-east corner of the Santa Monica y San Vicente, and the north-west corner of the Ballona is in the arroyo, and not on the sea-shore. The deed and the decree correcting the same, (entered long prior to the commencement of this action,) in describing the land, both say, "Commencing at a point on the sea-shore of the Pacific ocean," etc. The description of the land sought to be recovered was properly amended. The assumed extension of the lines of the streets fixed with certainty the exterior boundaries of the tract, and rendered it unnecessary to locate them by courses and distances. The affidavits set out in the transcript are not authenticated, as required by our rule, and need not be considered. A glance, however, is sufficient to show that they allege matters clearly incompetent.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; HARRISON, J.; McFARLAND, J.; GAROUTTE, J.

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94 Cal. 54

WESTERN LUMBER CO. v. PHILLIPS *et al.*
(No. 14,452.)

(*Supreme Court of California.* March 26, 1892.)

MINOR—APPEARANCE BY GENERAL GUARDIAN—SPECIAL ANSWER—FINDINGS OF FACT—WAIVER.

1. Under Code Civil Proc. § 372, an infant defendant may appear by his general guardian in an action to enforce a lien for materials furnished for a certain building.

2. Where infant defendants have no special or separate defense, no separate answer is necessary, but joinder in the general answer of defendants is sufficient.

3. Code Civil Proc. § 634, providing that "findings of fact may be waived by the several parties to an issue of fact," applies to infants as well as to adults.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by the Western Lumber Company against Emma A. Phillips and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Thomas J. Curran, for appellants. *Wilson & Bulla*, for respondent.

BELCHER, C. This is an action to enforce a lien for materials furnished for and used in the construction of a building on land owned by the defendant Emma A. Phillips. The defendant Gifford was the contractor to erect the building, and under contract with him, as the duly-authorized agent of the owner, the materials were furnished by plaintiff. The other defendants were made parties to the action, because they claimed to have some interest in the land sought to be subjected to the lien. Gifford failed to appear, and his default was duly entered. Two of the other defendants were minors who were regularly served with summons, and appeared and answered by their general guardian. The defendants joined in the same answer, and the only issues tendered thereby were as to the furnishing and use of the materials, and as to the sum which would constitute a reasonable attorney's fee. At the trial witnesses were sworn and examined on both sides, and at the conclusion of the testimony findings were waived, and the case submitted. Thereafter the court made and entered its decree, whereby, after stating that it appeared to the court that all the allegations of the complaint were true, except as to the amount which should be allowed as attorney's fee, and that judgment should be entered in favor of the plaintiff for the sums named, aggregating $759.37, and that the same was a lien on the premises described, it was ordered, adjudged, and decreed that the said premises, or so much thereof as might be necessary to raise the amount due the plaintiff, be sold, etc., and that out of the proceeds of the sale the sheriff, after deducting his costs and commission, pay to the plaintiff the amount found due him, with interest thereon from the date of the decree; and that if the proceeds should be insufficient to pay the whole amount found due, with interest, costs, and expenses of sale, then that the clerk of the court, on the coming in of the return, docket a judgment against Gifford for the amount of the deficiency. From this judgment all of the defendants, except Gifford, appeal on the judgment roll.

The only points made for a reversal are: (1) That no guardian *ad litem* was appointed for the minors; (2) that the general guardian did not answer specially for the minors, but joined in a common answer with the other defendants; (3) that the minors could not waive findings of fact; (4) that there was no personal judgment against the contractor, Gifford. We see no merit in either of these points. When an infant is a party to an action, he may appear by his general guardian. Section 372, Code Civil Proc. A general guardian is authorized—indeed, it is his duty—to appear for his ward. Gronfier v. Puymirol, 19 Cal. 629; Smith v. McDonald, 42 Cal. 484. And the appearance of a general guardian is sufficient to give the court jurisdiction of the persons of the infant defendants. Richardson v. Loupe, 80 Cal. 499, 22 Pac. Rep. 227.

It is not pretended that the minors had any separate or special defense, and we know of no rule of law or pleading requiring, in such a case, that a separate and special answer be filed in their behalf. The Code provides that findings may be waived by the several parties to an issue of fact. Section 634, Code Civil Proc. This provision includes all parties, and must be held to apply to infants as well as adults. But in this case the court did, in effect, make and recite findings of fact and conclusions of law therefrom in the judgment. The judgment was sufficient in form against Gifford, but, if not, the appellants were not prejudiced thereby. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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94 Cal. 56

GOODRICH v. LATHROP. (No. 14,421.)

(*Supreme Court of California.* March 26, 1892.)

RESCISSION OF CONTRACT—NEGLIGENCE—COMPENSATION.

1. Civil Code, § 3407, provides that "rescission cannot be adjudged for a mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made." Plaintiff, knowing that defendant had a certain lot for sale, went to examine it, with a view to purchase, but by mistake looked at the wrong lot, which was satisfactory. Believing it to be the lot defendant had for sale, she entered into a written contract for the purchase of defendant's lot. *Held*, that plaintiff's right to rescind was not defeated by the fact that the lot had largely depreciated in value when she discovered her mistake, and gave notice to rescind, the words "same position" in the statute being used with reference to the subject-matter of the contract, and not with reference to a change in the market value of the property which was the subject of such contract.

2. If, in equity, defendant is entitled to any relief by reason of plaintiff's mistake, the court can award full compensation therefor, under Civil Code, § 3408, providing that, on adjudging a rescission, the party to whom such relief is granted may be required to make any compensation to the other which justice may require.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Goodrich against Lathrop. Judgment for defendant. Plaintiff appeals. Reversed.

C. E. Sumner, for appellant. *H. B. Westerman*, for respondent.

GAROUTTE, J. This is an action by a vendee to rescind a contract of sale of realty, and to recover money paid thereunder, upon the ground that the contract was executed through a mistake of fact. Judgment went for defendant, and this is an appeal from the judgment and order denying a new trial. Plaintiff, knowing that defendant had a certain lot for sale, went to examine the same, with a view to purchase, but by mistake looked at a different lot, from the one defendant had for sale. She did not see defendant's lot, but, the one she viewed being satisfactory, and believing it to be the lot defendant had for sale, she entered into a written contract of purchase with defendant, the description in said contract being for defendant's lot. Later, upon ascertaining her mistake, she gave notice of rescission, and brought this action thereunder. Defendant, by his answer, conceded the mistake, but set out many facts tending to show negligence upon her part in viewing the wrong lot, and also claimed that the lot had largely depreciated in value since the making of the contract, and that consequently he could not be placed *in statu quo*. Under the authority of Barfield v. Price, 40 Cal. 542, these facts present ample ground for rescission of the sale, unless the defenses set out by the answer are sufficient to defeat it. As to these defenses the court found "that said mistakes were caused by the neglect of a legal duty on the part of plaintiff," and also that "defendant cannot be restored to substantially the same position as if the contract had not been made;" and upon these findings rendered judgment for defendant. Section 3407 of the Civil Code provides: "Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made." The words "same position," found in the section, are used with reference to the subject-matter of the contract; and the fact that the market value of the property may have depreciated while out of the possession of the vendor does not defeat the vendee's right of rescission. If the property can be returned by the vendee in substantially the same condition as when he received it, then the requirements of this section of the Code are fully satisfied. If in equity and good conscience the vendor is entitled to any relief from the vendee by reason of her mistake in the premises, then section 3408 gives the court full power to do what justice may require in the nature of compensation. As has been previously noted, the defendant set out various facts and circumstances tending to show that the mistake of plaintiff was occasioned by her own negligence. In response to these allegations of the answer the court made the single finding that "these mistakes were caused by the neglect of a legal duty on the part of plaintiff." Conceding that the facts set out by the answer in this regard constitute a good defense to the action, which question we do not decide, yet the finding of the court is a conclusion of law, and can only be considered as such. It follows that there are no findings of fact made by the court upon this defense, and we are unable to determine upon what fact or state of facts this conclusion was based. Let the judgment be reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; HARRISON, J.

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94 Cal. 66

OAKS v. OAKS. (No. 14,544.)

(*Supreme Court of California.* March 26, 1892.)

WIFE'S SEPARATE PROPERTY.

In an action to quiet title it appeared that a husband purchased property with community funds, and that his wife filed a declaration of homestead thereon; that the husband then conveyed the premises to his wife as a gift; that subsequently he wished to sell the land, but the wife refused to join in a deed unless he paid her one-half the proceeds of the sale; that they conveyed the premises by joint deed, and one-half the proceeds were paid to the wife by the husband's consent; that out of this money the wife purchased the property in controversy. *Held*, that the joint conveyance was an abandonment of the homestead under Civil Code, § 1243, and the proceeds paid to the wife, and the premises purchased with them, became her separate property.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Action to quiet title by W. J. Oaks against Carrie Oaks. Judgment for defendant. Plaintiff appeals. Affirmed.

J. M. Wilcoxon and *Wilcoxon & Bouldin*, for appellant. *W. B. Dillard*, for respondent.

FITZGERALD, C. Action to quiet plaintiff's title to lot 4, block 105, in the city of San Luis Obispo. The allegations of the complaint, which is in the usual form, but not verified, are denied by the answer, and defendant, by her cross-complaint, avers title to the lot in question in herself, and asks that her title thereto be quieted against plaintiff. Plaintiff answered the cross-complaint by a general denial, and afterwards, by leave of the court, filed a supplemental answer thereto, in which he sets up a declaration of homestead on said lot, made by him after the commencement of this action. At the trial plaintiff abandoned his complaint, and the case was tried by the court upon the cross-complaint, answer, and supplemental answer thereto, and judgment given in favor of the defendant. This appeal is taken by plaintiff on the judgment roll with a bill of exceptions.

It appears that plaintiff, who is the husband of defendant, purchased with community funds certain real property in the city of San Luis Obispo, on which he, with his family, were actually residing when the defendant filed her declaration of homestead thereon. Afterwards, on January 11, 1886, plaintiff conveyed to defendant by deed, said premises as a gift, and in 1887 they were sold for $6,000 in excess of a certain mortgage lien thereon. Of this sum defendant claimed $3,000, and refused to join in the deed unless the same was paid to her, and put in her own name. This sum was then paid to her by the purchaser, with the consent of the husband, and thereafter plaintiff and defendant joined in a conveyance of said premises. The $3,000 received by defendant was deposited in bank by her in her own name, with plaintiff's knowledge and consent, and thereafter she purchased for $2,500 the lot in controversy, paying therefor out of the said $3,000, and taking a deed thereof in her own name. It further appears that after the commencement of this action plaintiff filed for record a declaration of homestead on the lot in question, but the declaration was not made with the defendant's consent. It is contended by appellant that, as the marriage relation between the parties herein has never been severed, the wife held the proceeds of the sale of the homestead charged with the same trust that she held the title to the homestead, and that when such proceeds were invested in another home, it became, as it had always been, community property. The effect of the deed from plaintiff to defendant conveying the property out of which the homestead was carved by the wife's declaration, was to vest in her the legal title, subject to the husband's rights in the homestead, (Schuler v. Society, 64 Cal. 397, 1 Pac. Rep. 479; Burkett v. Burkett, 78 Cal. 310, 20 Pac. Rep. 715;) and, so long as the property continued to be impressed with the character of a homestead, it could not be extinguished during the existence of the marriage relation, except by the joint act of husband and wife in the mode pointed out by the statute. In the case before us, the premises from which the homestead was selected by the wife were afterwards sold, but the wife refused to join in the deed unless the sum of $3,000—one-half of the proceeds realized from said sale—were paid over to her, "and put in her own name." This the husband consented to, and, after receiving said sum from the purchaser in pursuance of such consent, she joined with her husband in a conveyance to the purchaser of the premises. This joint conveyance was an abandonment of the homestead under section 1243 of the Civil Code, and the proceeds so received by her from said sale became by virtue of the deed of January 11, 1886, her separate property, and under the rule laid down in Schuler v. Society, supra, they became her separate property independent of the deed. It therefore follows that the judgment decreeing the lot in controversy to be the separate property of defendant, and the husband's declaration of homestead thereon to be void, because made without her consent, should be affirmed, and we so advise.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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94 Cal. 49

GREEN *et al.* v. CLIFFORD. (No. 14,276.)

(*Supreme Court of California.* March 26, 1892.)

PLEADING—MECHANICS' LIENS—FINDINGS—PARTIES.

1. A count may incorporate by reference certain general averments which are in a previous count in the same pleading.

2. Plaintiff furnished materials to a contractor, who afterwards abandoned his contract. In an action to enforce a lien, plaintiff, after the time for commencing an action, amended its complaint by making the contractor a party. *Held* that, even if the contractor was a necessary party, defendant was not prejudiced by the amendment.

3. The complaint in an action to enforce a mechanic's lien alleged that there was due and owing from defendant to the contractor, on the contract, "an amount exceeding the sum due this plaintiff as hereinbefore stated;" and there was a finding of the court to the same effect. *Held*, that the pleading and finding were full enough to cover everything necessary on the subject.

4. A contractor is not a necessary party to an action to enforce liens for labor and materials furnished after the abandonment of his contract.

In bank. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Consolidation of several actions brought by Green and others against Mrs. R. N. Clifford to enforce liens for labor and materials. Judgment for plaintiffs. Defendant appeals. Affirmed.

Wells, Monroe & Lee, for appellant. *Wilson & Bulla, Johnsson & Borden, Smith, Winder & Smith, Scarborough & J. F. Waterman, E. E. Powers*, and *J. L. Murphy*, for respondents.

MCFARLAND, J. This is a consolidation of several actions brought to enforce liens of various mechanics and material-men against premises owned by defendant, Clifford. Judgment was rendered in favor of the plaintiffs, and defendant, Clifford, appeals from the judgment. There was no motion for a new trial. There is no bill of exceptions, and all the points made by appellant arise upon the pleadings and findings. There were general demurrers to all of the complaints, and also demurrers on some special grounds. There is no contention that the amounts of the liens claimed were not correct and just. Most of the points made are highly technical, and we will not attempt to notice all of them in detail.

1. The appellant, Clifford, on December 3, 1888, made a written contract with one Graham for the construction by the latter of a house on land owned by her for $1,800. This contract was recorded December 4, 1888; and immediately afterwards Graham commenced work on the house, and continued it until December 26, 1888, "when he abandoned the contract and fled the country." He had given a bond to Mrs. Clifford for the faithful performance of the contract, and on said bond one Sylvester was a surety. After the flight of Graham the building was completed under the supervision of Sylvester; and appellant contends that Sylvester, as such surety, carried out the said contract of Graham, and that, therefore, the rights of all the respondents must depend upon and be measured by said contract. Upon this contention many of appellant's points rest. The court, however, found that such was not the fact, and that, after the abandonment by Graham, Sylvester was merely the agent and foreman for defendant, Clifford, and as such agent ordered the labor and materials mentioned in the various complaints, except in that of the plaintiff the Western Lumber Company. As there is no evidence before us, such finding must be taken as true. All of the labor and materials for which the liens sued on were filed were furnished after the abandonment by Graham, and to the appellant through her agent, Sylvester, except those furnished by said Western Lumber Company, which will be separately noticed hereafter. Hence the contention of appellant that the Graham contract must control the rights involved herein cannot be maintained, and all the incidents of that contention fall with it.

2. Among the plaintiffs, Green claimed and recovered the largest amount; and it is contended that all of his complaint, except the first count, was fatally defective. Green had a lien for work done by himself, and he was also the assignee of 11 other lienholders; and it was necessary for him to put the cause of action upon each lien in a separate count. His first count was plainly divided into distinct paragraphs, accurately designated by Roman numerals from I. to X. Paragraph I. contained certain necessary averments as to the land owned by appellant upon which the building was erected, etc. The subsequent counts commenced in this way: "Plaintiff hereby refers to paragraph I. of the first cause of action, hereinbefore set forth, and expressly makes said paragraph a part of this cause of action, as if incorporated herein." And appellant contends that the judgment should be reversed because paragraph I. of the first count was not written in full in each of the other counts. It has never been the settled law here that the preliminary averments of a complaint can never be made part of subsequent counts by apt and express reference and without being rewritten. In the opinion of the court in Pennie v. Hildreth, 81 Cal. 131, 22 Pac. Rep. 398, where, in a second count, it was averred "that certain paragraphs of the first count are true," the pleading was hostilely criticised, and certain remarks were made which were *obiter dicta;* but nothing upon the subject was there decided. In Haskell v. Haskell, 54 Cal. 266, the court quotes approvingly from Chitty's Pleadings, as follows: "But, unless the second count expressly refers to the first, no defect therein will be aided by the preceding count." And the

language which the court itself uses is substantially to the same effect. Of course, each count must stand by itself; but it is not fatally defective because it incorporates by reference certain general averments which are in the same pleading, and which are necessary to all the counts, if the reference be so plain and explicit as to leave no doubt as to the meaning. Such pleading is not, in general, to be commended. It may be, as it has been called, "slovenly," but it is not bad enough to upset a judgment.

3. As before stated, the Western Lumber Company, one of the plaintiffs, furnished the materials covered by its lien to Graham before he abandoned the contract. In its original complaint, it did not make Graham a party, but afterwards, and after the statutory time for commencing the action, it amended its complaint by making said Graham a party; and appellant contends that this was fatal to the validity of the judgment. We do not know of any law which makes the contractor a necessary party, so far at least as the rights of the owner of the building are concerned; and the contrary was substantially decreed in Lumber Co. v. Garrettson, 87 Cal. 596, 25 Pac. Rep. 747. But at all events the appellant could not be prejudiced by the amendment making Graham a party, although made after the statutory time for commencing the action. It is also contended that there is no averment in the complaint of the Western Lumber Company of what amount, if any, was due from appellant to Graham on the contract. It is doubtful if this point is raised by the demurrer. But it is averred that there is due and owing from appellant to said Graham, upon said contract, "an amount exceeding the sum due this plaintiff as hereinbefore stated;" and there is a finding of the court to the same effect. Under any view of the law the pleading and finding are full enough to cover everything necessary in this case to have been pleaded or found on the subject.

4. Graham was certainly not a necessary party to the actions brought to enforce liens for labor and materials furnished after the abandonment of his contract.

5. Many points are made as to alleged variances between some of the averments of the various complaints and the findings, but we see no variances that are material, or that prejudice the substantial rights of appellant. In a few of the counts for labor, it is averred that the laborers were hired at certain specified wages per day, but it is alleged that the hiring was by appellant through her agent; and the court found that all the amounts for which judgment was given were "the reasonable value of said work and materials done and furnished."

So far, at least, as appellant's rights are concerned, there are no valid objections to the constitutionality of the mechanic's lien law. We do not deem it necessary to notice at large the many other minor points made by appellant. It is sufficient to say that we see no error in the record for which the judgment should be reversed. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.; SHARPSTEIN, J.; DE HAVEN, J.; PATERSON, J.

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94 Cal. 33

STONESIFER *et al.* v. KILBURN *et al.* (No. 14,629.)

(*Supreme Court of California.* March 26, 1892.)

BILL OF EXCEPTIONS—REFUSAL TO SETTLE—APPEAL—EXCUSABLE NEGLECT.

1. An order refusing to settle a bill of exceptions because, owing to mistake or neglect, the same had not been presented within the time prescribed by law, is appealable. Ketchum v. Crippen, 31 Cal. 367, overruled.

2. Code Civil Proc. § 473, declares that a court may allow an answer to be made after the time limited by the Code, and may also relieve a party from a judgment, order, or other "proceeding" taken against him through his mistake or excusable neglect. Section 4 declares that the provisions of the Code are to be liberally construed. *Held*, that the settlement of a bill of exceptions is a proceeding within the meaning of said section, and that a court has power, although the bill may not have been served in time, to allow a settlement upon a proper showing that the failure of service resulted solely from mistake or excusable neglect, or that the settlement will promote justice.

3. Where an attorney in a cause asks that 30 days be allowed in addition to the 10 days allowed by law within which to prepare and serve a bill of exceptions, and the attorney for the other party, without making any objection, afterwards presents a stipulation which the first attorney merely glances over without reading, and, seeing "thirty days," assumes it to be in conformity to his request, whereas in fact the time allowed is only 30 days after service of the notice of intention to move for a new trial, his conduct, although negligent, is, under the circumstances, and considering that the time allowed by such stipulations is usually expressed to be in addition to the time allowed by law, excusable.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; JOHN W. ARMSTRONG, Judge.

Action by A. G. Stonesifer and others against Paris Kilburn and others. From a judgment for three of the defendants, plaintiffs and the other defendants appeal. Reversed.

Pringle, Hayne & Boyd and *Stonesifer & Minor*, for appellants. *William Matthews* and *C. C. Wright*, for respondents.

VANCLIEF, C. On June 13, 1889, judgment was entered in this case in favor of three of the defendants and against the plaintiffs and two of the defendants. The parties in whose favor the judgment was given notified the other parties of the decision on the 17th day of June, 1889. On June 21, 1889, the plaintiffs and the two defendants against whom judgment was given (all of whom are appellants) gave due notice of their intention to move for a new trial on various grounds, and that the motion would be made upon a bill of exceptions thereafter "to be prepared, settled, and allowed by the court." On June 26, 1889, a written stipulation was signed and filed by the attorneys for all the parties, giving 30 days after service of notice of intention to move for a new trial in which to prepare a bill of exceptions. On the 3d day of August, 1889, the attorneys for plaintiffs served their draft of their proposed bill of exceptions on the attorneys for defendants, who received the same subject to the objection that it was not served within the time stipulated; and on October 8, 1889, served their proposed amendments, with a reservation therein of their objection to a settlement of the proposed bill of exceptions on the ground that it was not served in time. After due notice of the non-acceptance of the proposed amendments by plaintiffs, and within 10 days after service thereof, plaintiffs delivered their proposed bill of exceptions, and the proposed amendments thereto, to the clerk of the court, for the judge who tried the action. On November 25th, and before any further steps towards settling the exceptions had been taken, the plaintiffs' attorneys served on the attorneys for defendants the following notice:

"You will please take notice that on the 6th day of December, A. D. 1889, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the court-room of this court, the plaintiffs and the defendants Montgomery and Paige will make application to the court for an order that the bill of exceptions on motion for a new trial served herein on defendants Kilburn, with the amendments proposed thereto by the said defendants under objection reserved that the said bill was not served in due season, be settled, allowed, and certified, and thereupon filed with the clerk of said court, and the motion for new trial heard thereon, and that the plaintiffs and said Montgomery and Paige be relieved from said objection on the ground of mistake, inadvertence, surprise, and excusable neglect as set forth in the affidavits of A. Stonesifer and Edward J. Pringle, copies of which are hereunto annexed, upon which affidavits and the papers on file herein the said application will be based."

The affidavits of Pringle and Stonesifer annexed to this notice are as follows:

"Edward J. Pringle, being duly sworn, makes oath that since the commencement of this action he has been one of the attorneys of the plaintiffs in the above-entitled action, residing in the county of Alameda, state of California, and having his law office and place of business in the city and county of San Francisco; and that Mr. William Matthews, ne of the attorneys of the defendants Kilburn, has been residing in the city and county of San Francisco. That in conducting the said cause arrangements in reference to it have been made in San Francisco between this affiant and Mr. Matthews, and in Modesto between Messrs. Stonesifer and Wright. That relations of a very friendly character have always existed between this affiant and Mr. Matthews, and, as this affiant believes, between Messrs. Stonesifer and Wright. That, after giving notice of intention to move for a new trial in said cause, this affiant called upon Mr. Matthews, and requested from him an extension of the usual statutory period to prepare and serve a bill of exceptions. Mr. Matthews readily consented to give any reasonable time that the affiant would require, and the stipulation giving thirty days' time was written by Mr. Matthews, who promised to send the same to Modesto, to be signed and delivered by Mr. Wright. That this affiant did not himself make any memorandum of the terms of the stipulation, or charge his memory with the date of its maturity, or enter it in his office diary, because it was not put in his hands or delivered to him, but was to be sent to Modesto, being still subject to Mr. Wright's approval; but the affiant wrote immediately to Mr. Stonesifer, telling him generally of the stipulation, and that it would be signed and presented to him by Mr. Wright, and requesting Mr. Stonesifer to prepare the bill of exceptions within the time of the stipulation, and to submit the bill to him for examination. That Mr. Stonesifer afterwards gave to the managing clerk in the office of the affiant a memorandum of the day to which by said stipulation the time for serving of the bill of exceptions was extended, stating that that day was the 3d day of August, and thereupon entry to that effect was made on the office diary of affiant. That when Mr. Stonesifer prepared the bill of exceptions, and sent it to San Francisco for examination by this affiant, he stated in his letter accompanying the bill that the last day for serving it was on August 3d, and the affiant wholly believed such statement to be correct, and relied upon the same."

"C. A. Stonesifer, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action, and a member of the firm of Stonesifer & Minor, attorneys for plaintiffs, and resides and has his office in the city of Modesto, county of Stanislaus. That on the 24th day of June, 1889, the above-named plaintiffs and defendants A. Montgomery and Timothy Paige duly served and filed their notice of intention to move for a new trial herein, specifying therein that the same would be made upon a bill of exceptions thereafter to be prepared, settled, and allowed by the court. That on the same day, and at the time of the service of the said notice of intention to move for a new trial, affiant applied to C. C. Wright, Esq., of the firm of Wright & Hazen, who reside and have their office in the city of Modesto, county of Stanislaus, attorneys for defendants Paris, Guy, and Jeanette Kilburn, for a stipulation extending the time within which plaintiffs and said defendants Montgomery and Paige might prepare and serve their proposed bill of exceptions to thirty days in addition to the time allowed by law, in view of the fact that the testimony was rather lengthy, and that it would take considerable time to prepare the bill of exceptions. That said Wright replied to affiant that they were perfectly willing to give such time by stipulation, and any further time plaintiffs and defendants Montgomery and Paige might desire. That two days thereafter, and on the 26th day of June, said Wright came into the office of affiant, and stated that he had just received from Mr. Matthews, who was also one of the attorneys for defendants Kilburn, and was residing and having his office in the city and county of San Francisco, a stipulation giving the time previously agreed upon between affiant and said Wright. That affiant, looking over the stipulation, and finding it not very legibly written, but seeing the words 'thirty days,' at once assumed, as well from seeing these words in the stipulation as from the fact that Mr. Wright had brought it to him as embodying their previous understanding, that the stipulation gave thirty days in addition to the ten days allowed by law. That the stipulation is hastily and illegibly written, and is certainly not so plain as to strike the attention and change the idea of the affiant previously formed as to its contents, without a closer examination than was given to it under the circumstances. That affiant has no doubt that Mr. Wright put the same construction upon the stipulation. That in the presence of Mr. Wright, and while the stipulation was lying before them on the table, affiant made the following entry in his pocket diary, under date of August 3, 1889: 'Stonesifer vs. Kilburn. Serve bill of exceptions. Last day;' and made a similar entry in the office diary of Stonesifer & Minor. That, in fact, this affiant and Mr. Wright, after the first general reference to the stipulation made by Mr. Wright as aforesaid, paid no further attention to the time allowed, but discussed only the subsequent part of the stipulation, which they had not previously considered. That the said stipulation is in the exact words and figures following: 'It is agreed that the plaintiff may have thirty days after service of notice of intention to move for a new trial in which to prepare and serve bill of exceptions in thereof. No objection is to be taken by either party for the failure to serve the Radols with process, and no further papers shall be required to be served on them to fully litigate the rights of the parties now in court.' That said Wright then took said stipulation, and filed it in the county clerk's office, as affiant is informed; and affiant never saw it again until the 1st day of August, 1889. That affiant subsequently wrote to E. J. Pringle, Esq., one of the attorneys for plaintiffs, at his office in the city of San Francisco, that a stipulation had been signed extending the time to plaintiffs and defendants Montgomery and Paige to serve the bill of exceptions, and that August 3, 1889, was the last day to serve it. That affiant prepared said proposed bill of exceptions, and on the 23d day of July, 1889, it was completed and ready for service, and could have been served on that day, but, affiant believing that August 3d was the last day, he forwarded it to said Pringle on that day (July 23, 1889) for his examination and service on said Matthews, and again wrote said Pringle on that day that August 3d was the last day to serve it. That affiant, at all times from the time of signing said stipulation until the first day of August thereafter, believed and so understood that it gave thirty days in addition to the time allowed by law within which to prepare and serve said proposed bill of exceptions, on which day the following letter was received by R. C. Minor, of the said firm of Stonesifer & Minor, from said Pringle, to-wit: 'San Francisco, July 31, '89. My Dear Mr. Minor: Stonesifer wrote to me that the time for serving bill of exceptions in the Kilburn case did not expire until August 3d, and I applied to Matthews to-day for an extension. Matthews alarmed me by saying that the time had already expired, and would give no other stipulation than the inclosed. Please look immediately, and see which of us is right. I think Stonesifer got a stipulation on July 3d giving us 30 days. Please see how we stand, and let me know. Yours, truly, EDWARD J. PRINGLE.' The stipulation referred to in the above letter is as follows: 'It is hereby stipulated and agreed in the above-entitled action that, if the time to prepare and serve bill of exceptions has not expired, plaintiffs and defendants Paige and Montgomery may have until and including the 23d day of August, 1889, in which to prepare and serve proposed bill of exceptions on motion for a new trial. If the time has expired, this stipulation is void. Dated July 31, 1889.'"

The following counter-affidavits of Messrs. Matthews and Wright were filed:

"William Matthews, being duly sworn, makes oath that the stipulation giving the plaintiff Stonesifer and the defendants Paige and Montgomery additional time to prepare a bill of exceptions in support of their motion for a new trial was written by affiant in the presence of Mr. Edward J. Pringle, and that the time therein named as the period within which the bill of exceptions should be filed and served was then agreed upon by Mr. Pringle and affiant, and according to the best of affiant's recollection the said stipulation was read by affiant to Mr. Pringle before said stipulation was signed. WILLIAM MATTHEWS."

"C. C. Wright, being duly sworn, deposes and says that he is one of the attorneys for the defendants Paris, Guy, and Jeanette Kilburn, in the above-entitled action. Denies that he understood the stipulation referred to in the affidavits of E. J. Pringle, Esq., and C. A. Stonesifer, Esq., in any other or different sense from what its terms plainly import, or that affiant ever put any other construction upon it. Admits that he may have said, and probably did say, to said Stonesifer, on the 24th day of June, 1889, that we 'were willing to give such time by stipulation' as might be necessary, but alleges that it was with the understanding that the stipulation would be regularly extended in the mode and manner provided by law and the rules of this court. That rule 28 of this court is the following, to-wit: 'Rule 28. No agreement, consent, or stipulation between the parties or their attorneys, in respect to the proceedings in a cause, will be regarded by the court, unless the same shall have been made in open court, and entered by the clerk in the minutes of that day's proceedings of court; or unless the evidence thereof shall be in writing, subscribed by the party against whom the same is alleged, or by his attorney.' Affiant does not remember the conversation fully which occurred between said Stonesifer and himself on the 24th day of June, 1889, but alleges that when affiant signed said stip.

ulation he did so with full understanding of its contents, and did not know that said Stonesifer did not so understand it. Denies that in anything which affiant may have said he meant to mislead said Stonesifer or any one else, and alleges that he expected that, if further time were required for said purpose, it would be applied for in the regular way. Denies that affiant ever said to said Stonesifer that said stipulation was in any other or different form from what it was and is; and denies that affiant said it was a stipulation extending said time to thirty days in addition to the time allowed by law. C. C. WRIGHT."

On December 6th the motion was heard by the court, and thereafter (omitting immaterial recitals) the court made the following order: "It appearing to the court that the said bill was not served in due season by reason of the mistake, inadvertence, and excusable neglect of one of the attorneys of the plaintiffs who had charge of the matter of preparing and serving the said bill of exceptions, but that the court has no power to relieve the parties from the objection so made by the defendants Kilburn, and the said defendants still insisting upon the said objection, and the proceedings upon the said motion and application having been duly and regularly continued since the 6th day of December, 1889, it is ordered that the said motion be, and the same is, for the reason aforesaid, hereby denied, and the application for settlement of the said bill of exceptions is refused." The appeal is from this order.

1. It is contended for respondents that the order is not appealable; citing Ketchum v. Crippen, 31 Cal. 367, and other early cases to the same effect. But these cases have been expressly overruled on the point to which they are cited. Calderwood v. Peyser, 42 Cal. 110; Morris v. De Celis, 41 Cal. 331; Dooly v. Norton, Id. 440; Clark v. Crane, 57 Cal. 630; and Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. Rep. 810. Besides, in this case a writ of mandate was denied by this court, on the ground that, if the court below erred or abused its discretion, its action could be reviewed on appeal. Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. Rep. 50.

2. It is contended that the court had no power to relieve appellants from the legal effect of their failure to serve their proposed bill of exceptions in time, even though their default was caused by their excusable mistake, and the relief asked be deemed just. But the cases cited in support of this point seem to go no further than to determine what is the legal effect of the default in the absence of a proper and well-grounded proceeding to be relieved from it, and do not determine that the court has no power, under any circumstances, to relieve a party from such legal effect. The distinction seems quite as clear as that between determining the legal effect of a judgment by default and adjudging that under no circumstances can a party be relieved from the legal effect of such judgment. Section 473 of the Code of Civil Procedure provides: "The court * * * may allow an answer to be made after the time limited by this Code; and may also * * * relieve a party * * * from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." Section 4 of the same Code declares that "its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice." "The settlement of a bill of exceptions is a proceeding in an action." Lukes v. Logan, 66 Cal. 33, 4 Pac. Rep. 883; Irwin v. Bank, 6 Ohio St. 86; Wilson v. Allen, 3 How. Pr. 371; Rich v. Husson, 1 Duer, 620; Wilson v. Macklin, 7 Neb. 52; Strong v. Hardenburgh, 25 How. Pr. 438. In Irwin v. Bank, supra, it is said: "The word [proceeding] is generally applicable to any step taken by a suitor to obtain the interposition or action of a court." In Wilson v. Allen, the court said: "The term 'proceeding' is generally applicable to any step taken by a party in the progress of a civil action; anything done from the commencement to the termination is a proceeding." In this case respondents objected to a settlement of appellants' bill of exceptions, and moved the court to disregard it, on the ground that it was not filed within the stipulated time. These were steps taken in the action "to obtain the interposition or action of the court," which, according to the cases cited, amounted to a proceeding against the appellants, even within the letter, and certainly within the spirit, of section 473 of the Code of Civil Procedure, and not distinguishable in principle from a proceeding to obtain a judgment by default. It is from this proceeding that appellants ask relief; and I think the court had the power to grant it, upon a proper showing that the default of appellants resulted solely from their excusable mistake or neglect, and that the relief will promote justice. Such a showing, if made, brought the matter within the jurisdiction conferred by section 493 of the Code of Civil Procedure. Roland v. Kreyenhagen, 18 Cal. 456; Ward v. Clay, 82 Cal. 502, 23 Pac. Rep. 50, 227.

3. I think the showing made by appellants was sufficient, and that the court should have granted the relief asked. There appears to be no reason to doubt that the failure to serve and file the proposed bill of exceptions within the stipulated time was caused solely and entirely by an excusable inadvertence of one of the attorneys for plaintiffs, (Mr. Stonesifer,) who was also one of the plaintiffs in the action, and therefore directly interested in having the proposed bill served in time. Before reading the stipulation, (which had been prepared in San Francisco and sent to Mr. Wright at Modesto,) Mr. Stonesifer had the impression that the time to be allowed by it was thirty days in addition to the time allowed by law, and upon hastily glancing over it and reading "thirty days, he assumed that it was so, without carefully reading the whole stipulation. This was negligence, but under the circumstances, and considering that the time allowed by such stipulations is generally expressed to be in

addition to the time allowed by law, and that the stipulation could have no other effect than to add to the time allowed by law, I think the negligence was excusable; and so thought the court that heard the motion, as appears by its opinion. It certainly cannot be attributed to bad faith. It also appears that the granting of the relief would be in furtherance of justice. I therefore think the order should be reversed, and cause remanded for further proceedings.

We concur: Belcher, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for further proceedings.

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94 Cal. 82

Thomson v. Bettens *et al.* (No. 14,562.)

(*Supreme Court of California.* March 26, 1892.)

Mortgages—Foreclosure—Deficiency Judgment against Mortgagor's Grantee.

In an action to foreclose a purchase-money mortgage, brought against the mortgagor and one B., who purchased from him after the mortgage was given, it was not error to refuse a deficiency judgment against B. on the ground that he assumed the mortgage debt, where, in his answer and testimony, he denied that he assumed the debt, and the only evidence to the contrary was the testimony of the mortgagor that in purchasing the land and executing the mortgage he was acting as agent for B., and with the purpose of conveying to him, as he afterwards did; that he had purchased other land for him in the same way, and he had always assumed the mortgages thereon; and where it does not otherwise appear that the mortgagor acted in this particular transaction as agent for B.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Eva R. Thomson against Philip A. Bettens, Sr., and E. S. Babcock to foreclose a mortgage. From a judgment for plaintiff in part as prayed, the court refusing to give a deficiency judgment against Babcock, plaintiff appeals. Affirmed.

F. W. Ewing, for appellant. *Works, Gibson & Titus* and *Johnstone Jones*, for respondents.

Foote, C. The plaintiff, under the name of Eva R. Casady, before she became by marriage Mrs. Thomson, sold a piece of land to Philip A. Bettens, Sr., and took his promissory note for $3,200, payable at a future date, with interest, and secured to be paid by a mortgage upon the land transferred by deed to Bettens. Bettens transferred it by deed to E. S. Babcock. The note remaining unpaid when due, Mrs. Thomson endeavored to foreclose her mortgage, and to obtain a deficiency judgment for any balance that the property might not bring at sheriff's sale against Bettens and Babcock. The ground upon which it is sought to hold Babcock for a deficiency judgment is, as set out in the complaint, that at the date of the execution of the note and mortgage by Bettens, and of the date of the transfer of the property by deed from Bettens to Babcock, the latter "assumed and agreed with said Bettens to fully pay and discharge at maturity the promissory note and mortgage set forth herein, and all the debts and obligations evidenced thereby." The court below found that no such assumption or agreement was made by Babcock, and thereupon refused to render any deficiency judgment against him, but ordered the mortgage foreclosed, and a deficiency judgment against Bettens. Babcock, in his answer, denied that he had undertaken or assumed to pay the note and mortgage. Bettens, in his answer, endeavors to relieve himself of all responsibility in the premises, except as to the foreclosure of the mortgage as against the property involved, by claiming that he was merely the agent of Babcock, and bought the property for him, and that his principal was therefore responsible for the payment of the note and mortgage. Mrs. Thomson, when on the stand as a witness, declared that she never knew Babcock as a principal in the transaction, either from himself or Bettens. Bettens, who, upon this state of facts, was held by the court for the deficiency, is not appealing or complaining. There is no direct evidence at all by which it could be inferred positively that Babcock did agree with Bettens to assume and pay the note and mortgage, except what at a casual examination might seem such,—that of Bettens himself. But when we come to examine closely what he says in the light of the defense he made,—that is, that Babcock was principal and he agent,—we cannot say that such agreement was made. It was for the plaintiff affirmatively to show that Babcock did make this agreement with Bettens, which would inure to her benefit, under the rule laid down in section 1559, Civil Code. "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties rescind it." And under that enunciated by Mr. Justice McKee in his concurring opinion in the case of Biddel v. Brizzolara, 64 Cal. 363: "Where a purchaser of real estate from a mortgagor assumes payment of the mortgage debt as a part of the consideration of his contract of purchase, there arises out of the transaction, upon the principle of subrogation, a cause of action for the benefit of the mortgagee," etc. And see, also, Pellier v. Gillespie, 67 Cal. 583, 8 Pac. Rep. 185. But, as we have seen, the plaintiff could not and did not give evidence as to any such express agreement. Nor do the letters of Babcock, in the record, show its existence. When Mr. Bettens comes to testify, although he says that he had a conversation or agreement with Babcock on the day the land was mortgaged and sold by him to Babcock, he also says: "I can't state any conversation." And the perusal of the record of his testimony shows that he was going upon the general idea that he was only the agent of Babcock, and he assumes from that that Babcock was to pay the note and mortgage. He says again: "I came to town either the same day or shortly afterwards, and I immediately transferred this property to the defendant Babcock, he assuming the payment of the note. There was nothing said then that I know of, or I don't recall there was anything said about it. It was simply understood I was to transfer the property to him, and he assumed the payment of all obligations. I always remained under the impression it was so worded in the deed. Other deeds have it where I made purchases of land for him. Under the same transaction I made other purchases for him,—a great many thousand dollars' worth. He paid the half of the others, and assumed the payment of the mortgages when I transferred them to him. When I came in after making the purchase from the plaintiff, I saw the defendant Babcock personally in his office. I told him I would go out and make a deed to him for this property. He said, 'All right;' at least it was assented to. I do not recollect that the note or mortgage was mentioned." It seems as if this witness, when he speaks of an understanding or agreement, means one which he alone supposed to exist, either from the fact that he was acting as the agent of Babcock, or from the fact that all the deeds he made to Babcock of lands, except that herein involved, contained a clause binding Babcock to assume the mortgage debt resting on the property conveyed to him; for otherwise he could certainly have stated at least something of the language of such an assumption or agreement which it is claimed the defendant Babcock made. It is not to be said, therefore, that the trial court acted without legal justification in finding as it did as to the issue under discussion. For these reasons we advise that the judgment and order refusing a new trial be affirmed.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order refusing a new trial are affirmed.

94 Cal. 291

HEATHMAN *et ux.* v. HOLMES *et al.* (No. 14,692.)

(*Supreme Court of California.* April 2, 1892.)

HOMESTEAD—USE OF, FOR BUSINESS PURPOSES—ABANDONMENT.

Plaintiff executed and duly recorded a declaration of homestead on a certain house and lot owned by him, and afterwards built a large addition to the house, and then leased the greater part thereof to a woman, who used such part for a boarding-house. Plaintiff in his lease reserved several rooms, where he and his family continued to live, though they took their meals with the lessee. *Held*, that plaintiff did not thereby lose his right of homestead. Laughlin v. Wright, 63 Cal. 113, and Maloney v. Hefer, 17 Pac. Rep. 539, 75 Cal. 422, distinguished. HARRISON and PATERSON, JJ., dissenting.

Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Bill by W. F. Heathman and wife against W. H. Holmes and others for an injunction. From an order dissolving the injunction, plaintiffs appeal. Reversed.

E. C. Bower and *J. D. Pope*, for appellants. *J. T. Houx*, *E. S. Messerne*, and *S. C. Ward*, for respondents.

MCFARLAND, J. Plaintiffs obtained a writ of injunction enjoining the sale under execution of certain premises claimed by them as a homestead. On motion of defendants the injunction was dissolved; and from the order dissolving it the plaintiffs appeal. The only question in the case is whether or not the premises constitute the legal homestead of the appellants. The evidence shows, substantially, these facts: In 1883, the appellant M. F. Heathman purchased the lot of land involved, situated in the residence part of the city of Los Angeles, "for the purpose of erecting a dwelling-house thereon, and making the same a home and dwelling-place for himself and family." In the summer of 1885 he moved into the house with his family, consisting of a wife and daughter, and has resided on the premises with his family continuously ever since. On February 17, 1890, the said M. F. Heathman duly executed a declaration of homestead upon the said premises, which was on the same day duly recorded. However, in 1888, he built a large addition to the house, and in October of that year he leased the greater part of the house to Mrs. Samantha Kelly for a term of three years. He reserved from the lease two main rooms over the parlors, and also a bath-room, and certain other privileges, and he, with the family, continued to live and make their home in the house until about March 1, 1890, when Mrs. Kelly forfeited her lease, and left the house; Heathman and his family remaining in the house and continuing to make it their home. He was not the lessee of Mrs. Kelly of the part of the house used by him and his family while Mrs. Kelly was there, but that part of the house was reserved from the operation of the lease from him to her. The rooms thus reserved were taken care of by his family, although he and his family took their meals with Mrs. Kelly at a certain price agreed upon when the lease was made, and which was deducted from the monthly rent due him from her. The part of the building leased by her was used by her as a boarding and lodging house. Two witnesses—the said Mrs. Kelly and one J. A. Kelly—swore that the addition to the house was built for hotel purposes, and with special reference to its use as an hotel. Heathman testified that he built the addition partly on account of financial loss in his business, and partly because, his wife not being physically strong enough to bear the cares of housekeeping, he decided to adopt measures by which his family could have their board furnished in their own house.

We think that the court below erred in dissolving the injunction. We have not been referred to any decision of this court where the facts were exactly like those in the case at bar; but it has been held here that using a building partly, or even chiefly, for business purposes, or renting part of it, is not inconsistent with the right of homestead, provided it is, and continues to be, the *bona fide* residence of the family. Ackley v. Chamberlain, 16 Cal. 181; Skinner v. Hall, 69 Cal. 195, 10 Pac. Rep. 406; Lubbock v. McMann, 82 Cal. 226, 22 Pac. Rep. 1145. In other states this rule has been very broadly stated. In Phelps v. Rooney, 9 Wis. 70, for instance,—perhaps a somewhat extreme case,—the homestead claimant owned a building three stories high in front and four at the rear. The court say that "the style of the building externally is that of a store, and it is situated in a compact block on one of the principal business streets of the city of Milwaukee." The basement and the first story and a room of the second story were rented and occupied by tenants as a wholesale and retail store; the balance of the second story and the third story were occupied by the claimant and his family as a dwelling. The property was much more valuable for business than for residence purposes. The store would command a rent of $1,500 per annum, while the rooms used as a residence would not rent for more than $250 or $300. But the court held the homestead to be good, saying: "Nor does the owner forfeit the benefit of his exemption by devoting some, even the most valuable, portion of the building to another use than a mere residence of his family." And there is no substantial difference between the statutory provisions there and here, except that there the amount of land which may be covered by a homestead is limited. See, also, Rush v. Gordon, (Kan.) 16 Pac. Rep. 700. In the case at bar it is not contended by respondents that the appellants did not continue to reside in the building and to make it their home, or that they had any other residence or home. They have never ceased for a day to reside there from 1885 to the present time. But it is contended that because for part of that time they leased part of the building, although residing themselves in the part not leased, therefore they lost the right of homestead. We cannot concur in this view. To do so would be to hold that appellants lost their residence without changing it, and left their home without going away from it. In Ackley v. Chamberlain, supra, FIELD, C. J., said that "the question whether property devoted chiefly to business purposes can be subject to a homestead claim is full of embarrassment;" but we think that there should, at least, be no embarrassment in a case like the one at bar, where, after the family had lived on the premises for years and devoted it entirely to a home, it was concluded to enlarge the building for both domestic and financial reasons. It would be strange, indeed, if the occupants of a house could not use part of it for family revenue, no matter how favorable the opportunity might be to do so, without forfeiting the home itself. There is nothing in the homestead laws which prohibits such use, and it has been settled here that "the homestead statute is a remedial measure, and should be liberally construed." Schuyler v. Broughton, 76 Cal. 524, 18 Pac. Rep. 436; Southwick v. Davis, 78 Cal. 504, 21 Pac. Rep. 121.

The contention of respondents rests almost entirely on the authority of Laughlin v. Wright, 63 Cal. 113, and mainly upon some language used in the opinion delivered in that case. The statement of facts in the opinion is very meager; but it appears that the premises were used primarily and principally as an hotel, and that the residence of the family there was merely "incidental to the business of running an hotel," and that when they became financially embarrassed "they sought a residence elsewhere." So far, therefore, as the facts appear in that case, the family had never really made the premises their *bona fide* home. In the opinion the case of Ackley v. Chamberlain is cited approvingly, and the latter case is entirely inconsistent with the conclusion which respondents here seek to draw from language used in Laughlin v. Wright. The case of Maloney v. Hefer, 75 Cal. 422, 17 Pac. Rep. 539, also cited by respondents, was materially different from the case at bar. In that case there were two houses entirely separate and distinct from each other. The family lived in one of the houses and rented the other; and it was merely held that the homestead did not include the house in which the claimants did not live. We are satisfied that from the facts developed in the case at bar the appellants are entitled to their asserted homestead rights, and that the court erred in dissolving the injunction. Of course, the decision here has no effect upon any right which respondents may assert to reach the excess of the value of the property over the homestead valuation. The order dissolving the injunction is reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; DE HAVEN, J.; SHARPSTEIN, J.

We dissent: HARRISON, J.; PATERSON, J.

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HILL v. McKAY. (No. 13,964.)

(*Supreme Court of California.* March 26, 1892.)

CONSTRUCTION OF CONTRACT—CANCELLATION—BREACH—MEASURE OF DAMAGES.

1. Plaintiff, the owner of timber lands on a slough, below tide-water, agreed with defendant's assignors, who owned timber lands above tide-water on the same slough, to allow them a right of way for a railroad for logging purposes across plaintiff's land to the slough below plaintiff's landing, for a given period, at a fixed annual rental, defendant's assignors agreeing that they "will, providing they make landings and deposit their logs down stream from the present landings of" plaintiff, "purchase yearly all logs hauled by" plaintiff, "and deposited in said slough, paying therefor the prevailing market price." In case a price could not be agreed on, the same to be fixed by arbitration. Defendant's assignors built their road and constructed a landing on plaintiff's land a short distance below his landing, and several years later carried their road 240 rods further down the slough, and set up a landing on land other than the plaintiff's. *Held*, that the removal of the landing did not release them from their obligation under the contract to purchase plaintiff's logs.

2. The refusal of defendant's assignors to purchase plaintiff's logs for any one year after tender of the same, and the sale of a part of the logs thereafter by plaintiff, did not cancel their obligation to purchase the remainder during said year.

3. Where defendant's assignors refused to be bound by the contract to accept or purchase plaintiff's logs for any one year, deposited in the slough, it was not incumbent on plaintiff to offer to determine by arbitration "the prevailing market price."

4. The measure of damages for such refusal to purchase plaintiff's logs is the market price at the nearest market at the time of delivery, less the expense of transportation; and in determining the cost of transportation plaintiff is entitled to recover the additional expense of rafting his logs to market caused by the obstructions placed in the slough by defendant's assignors below plaintiff's landing.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by Charles W. Hill against Rebecca McKay. Judgment for plaintiff. Defendant appeals. Reversed.

Mastick, Belcher & Mastick, for appellant. *J. D. H. Chamberlin*, for respondent.

VANCLIEF, C. At and before the time of the execution of the contract hereinafter set out, the plaintiff was the owner of timber lands adjacent to and including a portion of Ryan's slough, in the county of Humboldt. This slough is connected with Humboldt bay, and is of sufficient size and depth to float rafts of saw-logs from plaintiff's lands. Near the head of tidewater in this slough, plaintiff had a landing at which he dumped logs into the slough, and thence floated them to market, on Humboldt bay. During the same time Allan McKay, Alexander Connick, and John A. Sinclair, copartners under the name of McKay & Co., were engaged in the business of logging on lands adjacent to Ryan's slough, above the plaintiff's landing, and above tide-water, where the capacity of the slough was considerably less than at and below plaintiff's landing. Besides, at plaintiff's landing, the slough was often obstructed by his logs. McKay & Co., therefore, desired to carry their logs by railroad to a point on the slough below plaintiff's landing, but, in order to do this, they must acquire the right of way for their road over plaintiff's land. Under these circumstances the following agreement was executed: "Know all men by these presents that I, Charles W. Hill, of the county of Humboldt, state of California, party of the first part, for and in consideration of the sum of three hundred dollars in gold coin of the United States to me in hand paid by Allen McKay, of the city and county of San Francisco, and Alexander Connick, of said county of Humboldt, all in said state, parties of the second part, the receipt of which is hereby acknowledged, and for other good and valuable considerations, do hereby grant to said parties of the second part a right of way two (2) rods in width for logging and lumbering purposes over and upon the south-west quarter of section number thirty, (30,) and the north-west quarter of section number thirty-one, (31,) in township number five (5) north, of range number one (1) east, of Humboldt meridian. Said way being more particularly described as beginning at the Freese dam, on Ryan's slough, at the intersection of the west bank thereof with the Humboldt meridian line, and running from thence north along or near said meridian line one-half (½) miles (more or less) to its intersection with the west bank of said slough and Humboldt meridian line, said way to be at no point more than two hundred and sixteen (216) feet from said meander line. Together with the right to construct and maintain over such way all such roads, railroads, bridges, or other structures for logging and lumbering purposes as such parties shall choose. All of which said rights shall continue and remain in full force and effect for the period of ten (10) years from the date hereof; and at the expiration of this instrument shall, at the option of said parties of the second part, be renewed in periods of ten (10) years each, not to exceed in all the full period of thirty (30) years from the date of these presents, subject always to the same terms and conditions. In consideration whereof said parties of the second part agree to pay to said party of the first part, in gold coin, on the 6th day of April, A. D. 1884, the sum of three hundred dollars, and a like sum annually thereafter. That after the logging season of the year 1883 said parties of the second part will, providing they make landings and deposit their logs down stream from the present landings of said party of the first part, purchase yearly all logs hauled by said party of the first part, and deposited in said slough, paying therefor the prevailing market rates. It is also agreed, by and between the parties hereto, that, providing they fail to agree upon said market rate, then it shall be determined by arbitration. That each of the parties hereto shall select one person to act as arbitrator, and, if the two arbitrators fail to agree, they, the arbitrators, shall select a third person, and the decision of the arbitrators shall be final. The covenants herein contained are to bind the heirs, executors, administrators, and assigns of the respective parties. Time is hereby expressly declared to be of the essence of this contract. Executed in duplicate this sixth day of April, A. D. 1883, as witness our hands and seals. C. W. HILL. [Seal.] ALLAN MCKAY. [Seal.] ALEX. CONNICK. [Seal.]

It is admitted that McKay and Connick, in executing this agreement, acted for the copartnership, and that the copartnership was bound by the agreement. In 1883 McKay & Co. constructed their railroad to a point on the slough about 120 rods below the plaintiff's landing, where they established a landing at which they continued to dump their logs into the slough, until the latter part of 1887, and during all that period purchased plaintiff's logs according to the agreement. During the year of 1887, McKay & Co. extended their railroad from this landing a distance of about 240 rods in a direct line across a bow in the slough, and terminating at a point on the slough about 385 rods (by way of the stream) below their dam used in connection with their upper landing, and there established a new landing, at which they have ever since dumped all their logs. Between their upper and lower landings there is a junction of Ryan's slough with Freshwater slough, and it was a disputed question at the trial, upon which the evidence was conflicting, whether the name of the slough below this junction is "Ryan's" slough or "Freshwater" slough. On September 12, 1888, the defendant acquired all the copartnership property of McKay & Co., including the agreement above set out, and it is admitted that she is bound by that agreement as McKay & Co. were bound by it before it was assigned to her. The object of this action is to recover from defendant damages for an alleged breach of that agreement by her in the year 1888. The complaint alleges that during the year 1888 the plaintiff cut, hauled, and put into said slough, below his landing, 1,240 saw-logs, containing 1,078,232 feet of merchantable lumber of the value of $10,782.32, which, on the 12th day of September, 1888, and many times thereafter during the year 1888, he tendered to the defendant and demanded that she purchase the same, in accordance with the terms of said agreement, which she "absolutely and unqualifiedly refused to do, and she still does absolutely and unqualifiedly refuse to purchase the same at any price or upon any terms or conditions; that plaintiff has ever since been and is now unable to sell the said saw-logs; and plaintiff avers that by the said breach of said agreement, in not purchasing his said saw-logs, he has been and is damaged in the sum of $10,782.32." The answer denies the alleged tender of the logs; denies that 1,240 logs were all the logs hauled by plaintiff, and deposited in Ryan's slough during the year 1888; denies the alleged value of the logs; denies that McKay & Co., or defendant, during the year 1888, deposited any logs in Ryan's slough "down stream from" plaintiff's landing; alleges that, without the consent of defendant, plaintiff sold to other persons 542 of the logs hauled and deposited in the slough by him during the year 1888; and denies all damages.

The case was tried by a jury. Verdict and judgment in favor of plaintiff for the sum of $1,590.80, from which defendant brings this appeal on the judgment roll containing a bill of exceptions which raises questions of both law and fact.

1. Appellant's counsel contend that defendant's lower landing, where she and her predecessors deposited all their logs during the year 1888, was not upon Ryan's slough, but was upon Freshwater slough, and that the contract bound them to purchase plaintiff's logs only while they deposited logs in Ryan's slough below plaintiff's landing; and upon this point they requested the following instruction to the jury, which the court refused: "I charge you that, if you find from the evidence that all the logs that were deposited by McKay & Co. or by defendant, during the year 1888, were deposited from landings maintained and used by them on the stream formed by the junction of Ryan's slough with Freshwater slough, and below said junction, then I instruct you that defendant is not liable under said contract set forth in said amended complaint, and your verdict must be for the defendant."

Considering the admitted circumstances under which the agreement was made, and the conflicting evidence as to the extent of Ryan's slough below the junction of the two sloughs, I think the court did not err in refusing the requested instruction. The object of McKay & Co. in procuring the agreement was to enable them to make their landings on tide-water below plaintiff's landing, where the slough was of greater capacity, and would not be obstructed by plaintiff's dam and logs. The agreement on their part to purchase plaintiff's logs during the term of the lease, at the prevailing market rates, "providing they make landings and deposit their logs down stream from the present landings" of plaintiff, was evidently intended to compensate plaintiff for the advantage he gave them in the change of the relative positions of their respective landings, whereby they were permitted to obstruct the navigation of the slough below his landing by their dam and logs. By their agreement to purchase his logs at market rates, he was relieved from rafting his logs, and therefore their obstructions below his landing did not affect his interests. Besides, the agreement does not fix any points below plaintiff's landing at which McKay & Co. were to establish their landings. They might have established a landing at the point of their present lower landing in the first instance, by constructing 240 rods of additional railroad. The language of the agreement is, "down stream from the present landings of said party of the first part," not down stream upon Ryan's slough. Ryan's slough is not mentioned in that part of the agreement relating to the purchase of plaintiff's logs. Nor is there anything elsewhere in the agreement limiting the words "down stream" to Ryan's slough, while the circumstances under which the agreement was made plainly indicate that no such limitation was intended.

On the theory of defendant's counsel the question as to whether or not Ryan's slough extends down to and includes defendant's lower landing is a material question of fact. As such, it was tacitly submitted to the jury on conflicting evidence without any instruction as to the legal effect of a finding upon it, none having been requested, except the one under consideration, and another to the same effect, by defendant's counsel; yet the requested instruction assumed that Ryan's slough extends only to its junction with Freshwater, and thereby took from the jury the question as to whether it does so or not. Therefore, whether the question was material or not, the requested instruction was erroneous; although, as above indicated, I think the question was immaterial; and, had an instruction been asked to this effect, judging from the opinion of the court on defendant's motion for nonsuit, it probably would have been given.

2. It is contended for appellant that the defendant was not bound to purchase less than all the logs hauled by plaintiff, and deposited in the slough in any one year; and that plaintiff did not tender to defendant all the logs hauled and deposited in the slough in the year 1888, but sold a considerable portion of them to other parties. The evidence on the part of the plaintiff tended to prove that all the logs hauled or deposited in the slough by plaintiff during the year 1888 had been tendered by him either to McKay & Co. before September 12th, or to defendant on and after September 12th of that year, and that he had sold no logs to other parties until after they had been so tendered, and after McKay & Co., or defendant, had absolutely refused to accept or purchase such logs, or any part thereof, upon any terms whatever, claiming that they were not bound by the agreement to purchase any logs from plaintiff during 1888, because, during that year, they had deposited no logs in Ryan's slough, down stream from plaintiff's landing. Under this state of the evidence counsel for the defendant requested two instructions to the jury which the court refused to give as requested, but gave with modifying additions, as follows, the additions being italicized: "(11) I charge you that, if you find from the evidence that the plaintiff did not tender to defendant, or offer to sell to her, all the logs hauled by him and deposited in Ryan's slough during the year 1888, then your verdict must be for the defendant; *unless you further find from the evidence that defendant or McKay & Co. absolutely refused to accept or purchase from plaintiff any logs hauled and deposited by him in Ryan's slough during the year 1888, in which case a tender of said logs by plaintiff would not have been necessary.* (12) I charge you that if you find from the evidence that the plaintiff, before making the tender to defendant alleged in the complaint, had sold to persons other than defendant, or McKay & Co., a portion of the logs hauled by him and deposited in Ryan's slough during the year 1888, then your verdict must be for the defendant. *But if you find from the evidence that, before making such sales, plaintiff tendered to defendant all the logs deposited by him in Ryan's slough at that time, during that year, and that the defendant, or McKay & Co., absolutely refused to accept or purchase from plaintiff, under said contract, any logs during said year, and that, in making such sales, plaintiff was acting upon such refusal, then, in that case, he could recover in this action.*" The court, of its own motion, further instructed the jury on this point as follows: "If you find from the evidence that plaintiff sold a portion of the logs hauled and deposited by him in Ryan's slough, during the year 1888, to other parties than the defendant or McKay & Co., but that no logs were sold by him during said year until after he had tendered all of his logs to defendant or McKay & Co., or until after defendant or McKay & Co. had unequivocally refused to accept from plaintiff his logs under said contract during said year, and that, in making such sales to other parties, the defendant was acting upon such refusal, then, in such case, the plaintiff would be entitled to recover whatever damages he may have suffered, if any, by the refusal of defendant to accept and pay for the logs deposited by plaintiff in Ryan's slough during the year 1888, and remaining therein at the time this action was brought."

Appellant's counsel contend that the court erred in refusing the first two of these instructions as requested, and in giving them as modified, and also in giving the third. In the first place, it is urged that these instructions are erroneous, so far as they "laid down the rule that plaintiff could recover without proof of a tender." But I do not understand them as laying down such a rule. In the second place, it is said that they are erroneous "in so far as they charged that a prior refusal by McKay & Co. would, in any event, entitle plaintiff to recover without proof of a tender to defendant." They do not so charge. Nor does the plaintiff, by his complaint or otherwise, seek to recover for any breach of the contract by McKay & Co., before the assignment of the agreement to defendant. The evidence offered by plaintiff tending to prove a tender to McKay & Co. prior to September 12, 1888, and their refusal to purchase, could have had no other effect in this case than to excuse plaintiff's sale of a portion of the logs hauled in 1888 after they refused to purchase. The defendant is not sued for or on account of any logs sold by plaintiff before she became the assignee of the agreement and the owner of all the partnership property; but only for not purchasing a specified number of logs which were alleged to be on hand and in the slough at the times they were tendered to her on and after September 12, 1888. The third of the instructions under consideration limits the damages to such as resulted from defendant's refusal to purchase "the logs deposited by plaintiff in Ryan's slough during the year 1888, and remaining therein at the time this action was brought." After McKay & Co. refused to purchase, it was not only the privilege of the plaintiff, but his duty, to sell as many of his logs as he could for the highest obtainable price; and, had he succeeded in selling all for a price equal to that which McKay & Co. agreed to pay, he could have recovered from them no more than nominal damages, (Utter v. Chapman, 38 Cal. 659; Winans v. Lumber Co., 66 Cal. 61, 4 Pac. Rep. 952;) but however this may be, no question as to the logs sold by plaintiff is involved in this case, except the question as to whether McKay & Co. unqualifiedly refused to purchase them after tender by the plaintiff. The refusal of McKay & Co. to purchase, and the sale of a part of the logs thereafter by plaintiff, did not cancel their obligation to purchase the remainder during the year 1888, (Sedg. Dam. § 754;) and their obligation to purchase the remainder during the year 1888 devolved upon the defendant by the express terms of the lease, viz., "the covenants herein contained are to bind the * * * assigns of the respective parties."

3. Defendant's counsel requested an instruction applicable to the arbitration paragraph of the agreement, which, as requested, the court refused, but gave with an addition as follows, the addition being in italics: "I charge you that, if it appears from the evidence that plaintiff and defendant failed to agree upon the market rate for said logs, and if the evidence fails to show that plaintiff demanded that such rate should be determined by arbitration, then your verdict must be for the defendant; *unless you further find from the evidence that the defendant absolutely and unqualifiedly refused to be bound by said contract, and to accept or purchase from plaintiff the logs hauled and deposited by him in Ryan's slough during the year 1888, in which case it was not incumbent upon plaintiff, after such refusal of performance on the part of the defendant, if such refusal was made, to offer to determine by arbitration the prevailing market rate.*" The only objection urged to the addition made by the court is that there was no evidence tending to prove the facts therein hypothetically stated. But in this I think counsel are mistaken.

4. Appellant contends that the court did not properly instruct the jury as to the measure of damages, and consequently that the damages are excessive. I think this point should be sustained. The evidence tended to show that the market for logs nearest to the place in Ryan's slough, where, by the contract, plaintiff was to deliver and defendant to accept the logs in question, was at the mills in the vicinity of the city of Eureka, on Humboldt bay, and that, if there was any prevailing market price at the place where the logs were to be delivered, it was the same as the market price at the sawmills on the bay, less the costs of transportation. The court, of its own motion, instructed the jury as follows: "If you find for the plaintiff upon the issues submitted to you, then you will have to estimate the amount of damages; and I charge you that the measure of damages in this case is the difference, if any, between the sum which the logs hauled and deposited in Ryan's slough by plaintiff during the year 1888, and remaining therein at the commencement of this action, would have brought in the market here, on Humboldt bay, at the prevailing rates during the year 1888, and the value of said logs to the plaintiff as they lay in the slough, at the time of defendant's refusal to accept them, if such refusal was made." As contended by counsel for appellant, I think this instruction is based upon a misconstruction of the agreement as to the price to be paid for the logs in case there was no market price at Ryan's slough, where the logs were to be delivered, in that the instruction allows nothing to be deducted from the market value at Humboldt bay—the nearest market—on account of expenses of transportation. Section 3311 of the Civil Code, so far as applicable to this case, is as follows: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: (1) * * * (2) If the property has not been resold in the manner prescribed by section 3049, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it." The agreement does not directly or conclusively fix the price to be annually paid, but provides that defendant shall purchase all logs deposited in the slough, "paying therefor the prevailing market rates." Unless controlled by circumstances *dehors* the agreement as written, this means the prevailing market rates at the place and times of delivery, if that can be ascertained; but, if no market rate at such place and times can be ascertained, it means the market rates at the nearest market at the times of delivery, less the expenses of transportation, (Sedg. Dam., 8th Ed., §§ 738, 739;) this being the rule in case of a breach of the agreement by the buyer, when the title has not passed. In such case, "when there is no market at the place of delivery, the price of getting the goods to the nearest market is to be subtracted from the price at that market in order to find the value at the place of delivery." Sedg. Dam. § 753. By this rule the value of the logs to plaintiff (the seller) at the place

of delivery was the market value at Humboldt bay, less costs of transportation, "at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale," (Civil Code, § 3353;) that is, at such time after the breach as would have sufficed to transport the logs to Humboldt bay, and resell them at the market rate there.

From the foregoing consideration it seems necessarily to follow that the value of the logs to plaintiff at the place of delivery, and at such time after the breach as would have sufficed to transport and resell them, was precisely equal to "the amount due from the buyer," (defendant,) according to the agreement, and therefore that the plaintiff was entitled to only nominal damages. Sedg. Dam. 753. Were there any circumstances *dehors* the written agreement which would warrant a construction of the agreement different from that above given? The only claim that the evidence tended to prove any such circumstance is to be found in the opinion of the court upon denying defendant's motion for a nonsuit, in which, as to this, the court said: "Now, the view I take of it is that, under that contract, considering the advantages which the plaintiff had yielded to them, (McKay & Co.,) they were willing to take his logs there as he deposited them in Ryan's slough, and pay him whatever was the prevailing market rate for saw-logs in the vicinity of Humboldt bay during the year that the deposit was made." This assumes, without evidence, that the payment of the annual rent of $300, and the purchase of plaintiff's logs by McKay & Co., at their market value in the nearest market, less the cost of transportation, would not fully compensate plaintiff for the advantages which he "had yielded to them." There is not a particle of evidence tending to prove that $300 per year for the right of way for defendant's road was not full compensation for the grant of that right. The only other advantage that plaintiff yielded to McKay & Co. was the privilege of establishing their landings and dumping their logs into the slough below his landing, and thus, to some extent, obstructing the rafting of his logs. For this, was not the purchase of all his logs at his landing at a price equal to the market value in the nearest market, less the cost of transportation to such market, adequate compensation? He was thereby relieved from rafting his logs to market; yet realized from the sale of them at his landing precisely what he would have realized if he had never yielded to McKay & Co. any advantage whatever. This, certainly, was full compensation for all advantages yielded by him, and there is no evidence that both parties to the agreement did not so consider and intend. There was evidence on behalf of the defendant, however, which, if the agreement is, in any degree, ambiguous or uncertain, strongly tends to confirm the construction for which the appellant contends, by showing the action of the parties under the agreement during the five years preceding the year 1888. Alexander Connick, one of the parties to the agreement, testified that during that period, "the price of the logs in each year was arrived at and regulated by the price of lumber in the market. We based the price upon the market rates here at the mill, delivered at the mill on Humboldt bay. We paid him that market rate, less the cost of transportation,—the rafting them out. That was the market rate of his logs as they lay in the slough below his dam. * * * In fixing these rates, the cost of transportation was discussed between McKay & Co. and the plaintiff." This testimony was undisputed. When the meaning of the language of a contract is considered doubtful, the acts of the parties done under it afford one of the most reliable clews to the intention of the parties. Mulford v. Le Franc, 26 Cal. 108; Pio Pico v. Coleman, 47 Cal. 65; Truett v. Adams, 66 Cal. 218, 5 Pac. Rep. 96. Therefore, conceding that the agreement is ambiguous or uncertain as to the price to be paid for the logs, this practical construction of it by the acts of the parties more certainly indicates their intention than does the supposed inadequacy of compensation for advantages yielded by plaintiff, adverted to by the court.

5. It is contended for respondent, however, that the defendant and her assignors have so obstructed the slough below his landing as to make the expense of rafting his logs to market much greater than it was before they made their landings below his, and much greater than it would be now, but for such obstructions; and, against the objection of defendant's counsel, plaintiff was permitted by the court to introduce evidence tending to prove this. The ground of the objection to this evidence was that it was irrelevant to any issue in the case. As to the effect of this evidence the court instructed the jury as follows: "The testimony in relation to the condition of the slough, and as to whether obstructions have existed therein or not, and, if so, to what extent, was admitted solely for the purpose of informing you as to whether said logs could have been taken to the bay or to market, and, if so, with what facility and at what expense, and in that connection to be considered by you with the other evidence, in estimating the value of the logs to the plaintiff as they lay in the slough, in the fall of 1888." Thus limited, I think the evidence was not irrelevant. The plaintiff was entitled to recover as damages the excess of the expenses of rafting his logs to market over and above what such expenses would have been if no obstructions had been placed in the slough by defendant or her assigns. In other words, he is entitled to recover a sum equal to the additional expense of rafting his logs to market caused by the obstructions which have been placed in the slough by defendant or her assignors. For the purpose of ascertaining this sum, it would be necessary to prove the expense of rafting in an unobstructed condition of the slough, and also the expense of rafting in the obstructed condition caused by defendant or her predecessors. The difference would be the true measure of damages. But there was

no evidence of what would have been the expense of rafting in an unobstructed state of the slough, and consequently no evidence of any difference. The plaintiff introduced no evidence of the expense of rafting in any condition of the slough, and of the nine witnesses who testified on behalf of defendant as to such expense in the actual condition of the slough during 1888, and since, one estimated it at 45 cents per 1,000 feet, five at 50 cents, one at 60 cents, and two at 75 cents. At 75 cents per 1,000 feet, the transportation of the 1,078,232 feet alleged to have been tendered to defendant would have cost $808.67, yet the verdict is $1,590.80. It therefore appears that the damages are excessive. I think the judgment should be reversed, and a new trial granted.

We concur: FITZGERALD, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and a new trial granted.

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94 Cal. 26

UPTON v. UPTON. (No. 14,591.)

(*Supreme Court of California.* March 26, 1892.)

CHANGE OF VENUE—DISQUALIFICATION OF JUDGE.

Code Civil Proc. § 170, provides that no judge shall try a case in which he has been attorney for either party, but that the section shall not apply to the power of transferring the action to some other court. Section 398 provides that, if the judge is disqualified from acting, the case must be transferred to a court the parties may agree upon, or, if they do not agree, then to the nearest court. The constitution authorizes a judge of any superior court to hold a superior court in any county, at the request of the judge of the superior court thereof. *Held*, where a superior court judge, who was disqualified to try a certain case, "called in" another judge to try such case, that the parties were not entitled to have the case "transferred" to another court.

Department 1. Appeal from superior court, Merced county; JOSEPH H. BUDD, Judge.

Action by Thomas Upton against Albert E. Upton. To an order overruling plaintiff's motion for a change of venue, plaintiff excepted. Affirmed.

R. E. Houghton, for appellant. *T. C. Law*, for respondent.

PATERSON, J. This is an appeal from an order denying plaintiff's motion to change the place of trial. The motion was made on the ground that Hon. J. K. LAW, judge of the superior court of Merced county, was disqualified by reason of having acted as attorney for defendant prior to the time of his election. The notice of motion fixed Saturday, the 7th day of March, 1891, at 10 A. M., as the time for hearing the motion. On that day and at that hour Hon. JOSEPH H. BUDD, judge of the superior court of San Joaquin county, at the request of Judge LAW, held a session of the superior court of Merced county, and called the motion referred to for hearing and determination, whereupon the plaintiff insisted that Judge LAW should hear the motion, because it was his duty to hear it, and he had no authority to call in another judge to pass upon the motion, and thereby deprive the plaintiff of his right to have the case transferred to an adjoining county. The request was denied, and an order was made by Judge BUDD denying the motion to change the place of trial, to which ruling the plaintiff excepted. In passing upon the motion the judge stated that he was ready and willing to try the case at that or any other time for which it might be set for trial.

Appellant relies upon sections 170 and 398, Code Civil Proc.: "No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding * * * when he has been attorney or counsel for either party in the action or proceeding. But the provisions of this section shall not apply to the arrangement of the calendar, or the regulation of the order of business, nor to the power of transferring the action or proceeding to some other court." Section 170. "If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, or if, from any cause, the court orders the place of trial to be changed, it must be transferred for trial to a court the parties may agree upon by stipulation in writing or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist; as follows: if in the superior court, to another superior court." Section 398. It is undoubtedly true that if the motion had been entertained by Judge LAW, and there had been no other judge present, qualified to hear the motion, it would have been his duty to grant it. Barnhart v. Fulkerth, 59 Cal. 130; Livermore v. Brundage, 64 Cal. 299; Finn v. Spagnoli, 67 Cal. 330, 7 Pac. Rep. 746. But it has been held here that if the judge who is holding court at the time the motion is heard is qualified to try the case, and ready and willing to try it, the motion should be denied, the court saying that "the provision upon which the appellant relies was intended to secure to litigants a trial before a judge who is not disqualified from acting as such, and nothing more." Paige v. Carroll, 61 Cal. 216. We cannot, without overruling that case, sustain the appellant's contention; but we see no reason for departing from the rule there laid down. It seems to be sanctioned by the provisions of the constitution, which are broad enough to authorize a judge of one superior court to call in a judge of another superior court to hear and determine any matter. "A judge of any superior court may hold a superior court in any county, at the request of a judge of the superior court thereof; and upon the request of the governor it shall be his duty so to do." In view of this constitutional provision, and the construction placed upon these sections by our own court, we deem it unnecessary to consider the cases cited by appellant from other states. Order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

3 Cal. Unrep. 486

YOUNG v. DONEGAN. (No. 13,900.)

(*Supreme Court of California.* March 26, 1892.)

APPEAL—REVIEW—MATTERS NOT APPARENT OF RECORD.

A contention on appeal that the court erred in matter of law in rejecting a part of appellant's counter-claim cannot be considered where there is no foundation for the point in the record, either by exception or specification.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Frank C. Young against D. F. Donegan. Judgment for plaintiff. Defendant appeals. Affirmed.

Richard Dunnigan, for appellant. *J. M. Damron*, for respondent.

VANCLIEF, C. Action to recover $1,769, as the value of labor done and materials furnished by plaintiff in building a house for defendant. The answer of defendant denies that the plaintiff did the amount of labor or furnished the amount of materials alleged in the complaint; and also denies the alleged value of the labor and materials admitted to have been done and furnished, but admits them to have been of the value of $841.70. Defendant also pleads a counter-claim against plaintiff for labor and materials, amounting to $139.75. The cause was tried by the court, and judgment given for the plaintiff in the sum of $1,177.15. From this judgment, and from an order denying his motion for a new trial, the defendant appeals.

1. It is contended for appellant that the evidence is insufficient to justify certain findings of fact, as to which his counsel admits that there is a slight conflict of evidence. It seems to me, however, after a careful examination of the evidence, that the conflict is substantial to a degree which precludes consideration of the question here.

2. Appellant's counsel, in his brief, makes the point that the court erred in matter of law in rejecting a part of defendant's counter-claim; but there is no foundation for this point in the record, either by exception or specification. I think the judgment and order should be affirmed.

We concur. TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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94 Cal. 22

In re KENNEDY'S ESTATE. (No. 14,815.)

(*Supreme Court of California.* March 26, 1892.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIMS—INTEREST ON JUDGMENT—RES ADJUDICATA—COSTS.

1. Even though one who, after his claim against an estate was rejected by the executor, recovered a judgment against the estate, to be paid in the due course of administration, was entitled to interest from the date of the rejection to the date of the judgment, the probate court cannot, in ordering the judgment to be paid, allow such interest, where the same was not included in the judgment, since the court, in ordering the claim paid, can base its order only on the transcript of the judgment.

2. Even if the probate court could otherwise order the interest to be paid, the judgment would be a bar to its recovery, since the claimant could have had it included in the judgment when it was rendered.

3. In such case, however, the claimant should be allowed interest on his judgment for costs.

Department 1. Appeal from superior court, San Francisco county; JOHN HUNT, Judge.

Thomas E. Curran, as administrator of the estate of Thomas Cushing, deceased, presented to the probate court a judgment against the estate of Philip Kennedy, deceased, and it was allowed as a claim and ordered to be paid. The court refused to allow interest on the claim from the time it was rejected by the executor and executrix of the estate until the date of the judgment, or to allow interest on the judgment for costs, and Curran appeals. Modified.

James Gartlan, for appellant. *Charles F. Hanlon*, for respondent.

GAROUTTE, J. Thomas E. Curran, as administrator of the estate of Thomas Cushing, deceased, recovered a judgment in the sum of $2,642.25 principal and $128 costs against the executor and executrix of the estate of Philip Kennedy, deceased, to be paid in the due course of administration. Thereafter the probate court ordered the judgment and costs to be paid from the assets of the estate, and denied appellant's motion to allow him interest upon the amount of the judgment from the date of the rejection of his claim by the executor and executrix to the date of the rendition of the judgment, and also denied his application for interest upon the amount of his judgment for costs. It is from the order of the court in these regards that this appeal is prosecuted. It would seem, under the authority of Pico v. Stevers, 18 Cal. 376, that upon the recovery of a judgment against an estate upon a rejected claim the creditor is entitled to recover interest from the date of such rejection. In this case it is not entirely clear from the record that the amount of the judgment recovered did not include such interest, but, conceding such to be the fact, still the probate court had no authority to order any amount paid not included in the judgment. A certified transcript of the docket of the judgment forms the claim which is to be paid, and furnishes the evidence upon which the court acts in ordering its payment. Conceding appellant was entitled to recover interest from the date of the rejection of his claim, and the amount of such interest was not included in the judgment rendered, still such judgment is a bar to its recovery. If he failed to ask for such interest in his complaint, or if he asked for it, and his prayer was denied by the court, in either case the judgment is a bar. In the court where the probate proceedings are pending the question as to the amount to which appellant is entitled is *res adjudicata* by the judgment, and authorities are not necessary to be cited upon the proposition. We think appellant is entitled to legal interest upon the amount of his judgment for costs. Linck v. City of Litchfield, 31 Ill. App. 104. Let the cause be remanded, with directions to the lower court to allow appellant legal interest upon the amount of his cost-bill, and in other respects let the order be affirmed, appellant to pay the costs of this appeal.

We concur: PATERSON, J.; HARRISON, J.

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94 Cal. 91

KURTZ v. FORQUER *et al.* (No. 14,525.)

(*Supreme Court of California.* March 28, 1892.)

ACTION ON BOND—FAILURE OF ALL PARTIES TO SIGN—PLEADING—VARIANCE—QUESTIONS ON APPEAL.

1. The fact that a joint and several bond is signed by a part only of those who are named as parties in the body of the instrument does not render it invalid, as against those who have signed, since Code Civil Proc. § 383, allows any or all persons who are severally liable on any instrument to be proceeded against in the same action. Sacramento v. Dunlap, 14 Cal. 421, and People v. Hartley, 21 Cal. 585, distinguished.

2. Where suit is brought on a bond conditioned for the faithful performance of a certain contract, it is proper to admit the contract in evidence for the purpose of proving its provisions.

3. In an action on a bond alleged to have been executed by certain persons, proof that it was executed by a part only of the said persons is not a material variance, within the meaning of Code Civil Proc. § 469, since those who executed it could not thereby have been misled to their prejudice in making a defense.

4. An alleged error in refusing to strike out a judgment roll which had been admitted in evidence will not be considered on appeal where there is nothing in the record to show what the judgment roll was.

In bank. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by Christian Kurtz against James M. Forquer and others upon a bond. From a judgment for plaintiff, defendants appeal. Affirmed.

Willis, Cole & Craig, for appellants. *Parris & Fox*, for respondent.

MCFARLAND, J. This is an action upon a bond alleged to have been executed by the defendants Forquer and Deyo as principals, and the defendants Allen, Smith, and Stewart as sureties, conditioned for the faithful performance by Forquer and Deyo of a certain contract by which they agreed to build and deliver to plaintiff, free of indebtedness, liens, etc., a certain house. Judgment went for plaintiff against Allen, Smith, and Stewart, and they appeal from the judgment and from an order denying a new trial.

1. The bond purports to be the bond of all the defendants, but it was, in fact, signed only by Allen, Smith, and Stewart; and it is contended that it created no liability against appellants, because not signed by Forquer and Deyo. Sacramento v. Dunlap, 14 Cal. 421, and People v. Hartley, 21 Cal. 585, are cited to this proposition; but they are not in point, because in those cases the bonds sued on were strictly joint, and not several, while in the case at bar the obligation is expressly joint and several. People v. Love, 25 Cal. 530. In such case the obligors "may, all or any of them, be included in the same action at the option of the plaintiff." Code Civil Proc. § 383. Where several persons are named in the body of an instrument as parties thereto, it is not necessarily invalid as against those who have signed it because others named have not signed. Such a result would follow where it appeared on the face of the instrument or by proof that the person sought to be charged signed upon the consideration that other persons named would also sign. Cavanaugh v. Casselman, 88 Cal. 549, 26 Pac. Rep. 515. Nothing of the kind, however, appears in the case at bar. The three sureties, who stood on the same footing, did sign the instrument; and it is evident that the signatures of the principals, who were already bound by the contract referred to in the bond, were not necessary as a consideration. Moreover, appellants delivered the bond, without the signatures of the principals, to the plaintiff. We think, therefore, that the sureties were liable, so far as this point is concerned.

2. There was no error in the admission in evidence of the written building contract between Forquer and Deyo and plaintiff. The bond referred to such a contract, and it was proper to show what it was.

3. It is contended that there was a fatal variance between the averment of the complaint and the proof, on the ground that the former shows a bond executed by Forquer and Deyo and the other defendants, while the bond offered in evidence was not executed by said Forquer and Deyo. Strictly speaking, it is, perhaps, doubtful if there was a variance; because, while in the body of the complaint it is averred that the principals executed the bond, a copy of the bond which is attached as Exhibit A, and made a part of the complaint, shows that it was not signed by the principals, and the bond offered in evidence was identical with Exhibit A. This was undoubtedly bad pleading, and the complaint could, perhaps, have been successfully assailed by a special demurrer on the ground of ambiguity; but it is not clear that Exhibit A cannot be considered on the point of variance. Assuming, however, that there was such a variance as is contended for, we think it was immaterial, within the meaning of section 469 of the Code of Civil Procedure, which provides that "no variance between the allegation in the pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." The case was fully tried on its merits, and we do not see how appellants were misled, or in what different position they would have been if the body of the complaint had corresponded exactly with the exhibit. It would be a vain thing to reverse the judgment in order to allow the plaintiff to make an amendment to his complaint which would in no material way change the positions of the parties or the merits of the case.

4. Appellants assign as error the refusal of the court to strike out a certain judgment roll which had been admitted in evi-

dence. With respect to this point it is sufficient to say that, as there is nothing in the record to show what said judgment roll was, we cannot say whether or not it was error to admit it. Dyer v. Leach, (Cal.) 27 Pac. Rep. 598.

5. As to the merits of the case, we see no reason to disturb the judgment. There was sufficient evidence to support the findings that there were unsatisfied indebtedness and liens created by the contractors to the extent found by the court, and that the amount of money to be retained by plaintiff on the building contract was appropriated to the satisfaction of liens and indebtedness against the building. The judgment and order appealed from are affirmed.

We concur: De Haven, J.; Sharpstein, J.; Harrison, J.; Garoutte, J.; Paterson, J.

94 Cal. 105

Riciotto v. Clement. (No. 14,378.)

(*Supreme Court of California.* March 28, 1892.)

Action of Claim and Delivery—When Lies—Possession at Time of Suit.

An action of claim and delivery cannot be maintained, under Code Civil Proc. § 509, against a constable "to recover possession of personal property," which has been wrongfully attached, unless brought before the property has been sold, and while it is still in defendant's possession.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action of claim and delivery, brought by Giacomo Riciotto against H. S. Clement, to recover possession of personal property, or for the value thereof, in case delivery cannot be made, together with damages. Judgment for plaintiff. Defendant appeals. Reversed.

Henry Bleeker, for appellant. *Shinn & Ling* and *P. E. King*, for repondent.

Temple, C. Appeal from judgment and order refusing a new trial. This is an action of claim and delivery, to recover possession of two horses which plaintiff alleges defendant "still unlawfully withholds and detains." The pleadings were verified, and the defendant in his answer denies that he "unlawfully withholds or detains or detained said goods and chattels." For a further and separate defense he admits the taking, and attempts to justify as constable under a writ of attachment against one Smith, as whose property they were taken. He avers that judgment passed against Smith in the attachment suit, and the goods were taken by him, as constable, under an execution issued upon the judgment, and were sold, by virtue of the writ, June 6, 1889. This suit was commenced June 19, 1889, which was after the goods had passed out of the possession of defendant. The plaintiff, testifying on the trial, states, in effect, that the goods had been sold and delivered before suit was commenced; but his attorney here contends that, as the answer admits that defendant still detains the goods, such evidence cannot be noticed. But, as we have seen, the defendant shows, in the affirmative allegations, that he had taken the goods under an execution, and had sold them June 6, 1889, which was 13 days before the commencement of this action. The evidence came in without objection; was in fact put in by plaintiff himself. Does it show that he had no cause of action? In the Code, the action is called "an action to recover the possession of personal property," (section 509, Code Civil Proc.;) and the provisional remedy provided, with all the machinery and procedure, implies that it is to recover property from the defendant which he unjustly detains. The facts which constitute the plaintiff's cause of action certainly are those which show that plaintiff is entitled to possession, and that defendant wrongfully withholds the property from him. Quite often the plaintiff may choose whether he will content himself with damages for the conversion, or seek to recover the specific property, but the two remedies are quite distinct. In what is called "trover," present possession of the property is immaterial, but the relief sought in claim and delivery cannot be had from the defendant unless he is then possessed of the property, which fact must therefore constitute an essential element in plaintiff's cause of action. A different conclusion has been reached by the courts in some states by identifying the action with the common-law actions of replevin or detinue. But there is no ground for this. It is a statutory remedy provided to enable one to recover the possession of personal property wrongfully detained, with an alternate remedy if possession cannot be had. In Washburn v. Huntington, 78 Cal. 573, 21 Pac. Rep. 305, this court held that the alternate judgment for value could not be entered unless it is found that plaintiff is entitled to recover the property. Could he be entitled to recover the property upon a showing that at the time the suit was commenced defendant did not have the possession? In New York the decisions have varied. Perhaps it may be considered now to be the law in that state that the action will lie although defendant was not in possession at the time the action was commenced. That view is presented in Nichols v. Michael, 23 N. Y. 264, and in Ellis v. Lersner, 48 Barb. 546. They seem to be based entirely upon the analogies of the common-law actions. The contrary is maintained in Missouri, (Feder v. Abrahams, 28 Mo. App. 454;) in Iowa, (Coffin v. Gephart, 18 Iowa, 257;) in North Carolina, (Haughton v. Newberry, 69 N. C. 456;) in Massachusetts, (Hall v. White, 106 Mass. 599;) and in Michigan, (Aber v. Bratton, 60 Mich. 357, 27 N. W. Rep. 564.) Perhaps the question has not been directly passed upon in this state, but in Hawkins v. Roberts, 45 Cal. 38, it is said: "If he [the defendant] was not in possession, then the action of replevin in the *detinet* cannot be supported against him." If the action of claim and delivery can be said to be an action of replevin, it must be in the *detinet*, and not in the *cepit*. At all events, if it was such in that case, it must be so here. Perhaps, if it were found after suit brought that the defendant had wrongfully disposed of the property before the commencement of the action, plaintiff might be allowed to amend, so as to claim damages for a wrongful taking or conversion. Permission to do this was not asked in this case. If the complaint must contain a logical statement of plaintiff's cause of action, this complaint does not justify recovery for a conversion, and the judgment should be reversed. It is not necessary to consider the other points raised. We therefore advise that the judgment and order be reversed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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94 Cal. 96

FIRST NAT. BANK OF SAN DIEGO v. BABCOCK. (No. 14,505.)

(Supreme Court of California. March 28, 1892.)

GUARANTOR OF NOTE—DEMAND.

A person who indorses his name on the back of a non-negotiable note, to give it credit, is, under Civil Code, §§ 2787, 2807, 2823, a guarantor, and liable, on default of the principal, without any previous demand or notice.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action by the First National Bank of San Diego against E. S. Babcock, Jr. Judgment for plaintiff. Defendant appeals. Affirmed.

Works, Gibson & Titus, for appellant. *Conklin & Hughes* and *Wellborn, Parker & Stevens*, for respondent.

BELCHER, C. This is an action upon a promissory note made by one Story, payable to the order of plaintiff, 90 days after date, and containing the following provision: "Should suit be commenced, or an attorney employed to enforce the payment of this note, I agree to pay an additional sum of five per cent. on principal and accrued interest as attorney's fees in such suit." The note was executed at the instance and request of the defendant to take up another note, on which he was liable, and before its delivery he indorsed it, by writing his name upon the back thereof, and then delivered it to the plaintiff. The complaint contains no averment that demand for the payment of the note was ever made on the maker, or that notice of its non-payment was given to the defendant before the action was commenced; and the answer denies that defendant, by his indorsement or otherwise, waived protest, or demand, or notice of non-payment, or that he guarantied the payment of the note; and avers that notice of non-payment was never given him by the plaintiff, or any other person. After trial the court found the facts, and as conclusions of law: "That by the writing of his name upon the back of said note, and the delivery thereof to plaintiff, the defendant, Babcock, became and is a guarantor upon said note; that no demand or notice of protest was required to be given to said defendant; * * * that defendant was not exonerated from the payment of said note as such guarantor by the mere delay on the part of plaintiff in bringing suit or to prosecute Story;" and that plaintiff was entitled to recover from the defendant the amount due on the note, after deducting certain credits. Judgment was accordingly so entered, and from it the defendant has appealed on the judgment roll.

The principal question in the case is: What liability did the defendant assume by writing his name on the back of the note; or, in other words, did he thereby become a maker, an indorser, or a guarantor of the note? It is contended for appellant that he was an indorser, and that demand and notice of non-payment were necessary to fix his liability. The authorities upon this subject in other states are irreconcilably conflicting, and the question must be solved by reference to the decisions in this state and the provisions of the Code. In Riggs v. Waldo, 2 Cal. 485, HEYDENFELDT, J., delivered the opinion of the court, and said: "One who puts his name on the back of a promissory note, out of the course of regular negotiability, is not an indorser, according to strict commercial meaning. He is termed a 'guarantor,' and this is so whether his inscription is simply in blank or preceded by the words, 'I guaranty,' etc." He then went on to discuss the question, and concluded by saying that the undertaking of such a guarantor "is attended with all the liability and all the rights of an indorser *stricti juris*." In Pierce v. Kennedy, 5 Cal. 139, the note was indorsed by Ford, Lathrop & Co., out of the course of regular negotiability, and the same learned judge said: "The defendants, Ford, Lathrop & Co., were guarantors upon the note which is the foundation of this action." He then added that their liability, according to the decision in Riggs v. Waldo, was strictly that of an indorser. In Brady v. Reynolds, 13 Cal. 32, the defendant and two other persons indorsed a promissory note, before its delivery, to assist the maker in obtaining money upon it, and it was held that they were guarantors, and jointly liable. The court, by FIELD, J, said: "Over their names a contract of guaranty could have been written in terms," etc. It is then further said: "The decision of this court in Riggs v. Waldo, 2 Cal. 485, only goes to the extent of holding that a notice of protest is as essential to charge a guarantor as an indorser. It does not change the previous rule in relation to guarantors in any other respect. There are words, it is true, in the opinion which lead to the inference that the distinguished judge who delivered it considered the distinction between the undertaking of an indorser and that of a guarantor more nice and subtle than solid and just. In this we may differ from him, for we are disposed to regard the undertaking of the two as materially different. The contract of both is conditional, but the conditions are unlike. The contract of indorsement is primarily that of transfer; the contract of guaranty is that of security. It is unnecessary, however, to question the language or reasoning of the opinion. The case only decides that notice of protest is equally necessary to fix the liability of a guarantor as to fix that of an indorser." In Ford v. Hendricks, 34 Cal. 673, the note in suit was made by Hendricks, and indorsed by one Reed before delivery; and the court, by SANDERSON, J., said: "As to the relation of Reed—whether it be that of maker, indorser, or guarantor—there is much conflict of authority; but, under the settled rule in this state, he must be regarded as a guarantor." In Crooks v. Tully, 50 Cal. 254, the note sued upon was indorsed by one Durkin after it became due, to obtain further time for the maker to pay it; and the court, by NILES, J., said: "The contract of Durkin was that of a guarantor. It has been frequently so held by this court."

It clearly appears from these decisions that when one, before the enactment of the Codes, wrote his name on the back of a promissory note for the purpose of giving it security, and not for the purpose of transfer, his undertaking was that of a guarantor, though he was entitled to the same notice of demand and non-payment as he would have been if an indorser. See, also, Jones v. Goodwin, 39 Cal. 493. In this condition of the decisions the Codes were enacted, and we must look to them to see in what respects, if any, the rule above stated has been changed. The Civil Code contains the following provisions: "Sec. 2787. A guaranty is a promise to answer for the debt, default, or miscarriage of another person." "Sec. 2807. A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." "Sec. 2823. Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor." "Sec. 3108. One who writes his name upon a negotiable instrument otherwise than as a maker or acceptor, and delivers it, with his name thereon, to another person, is called an 'indorser,' and his act is called 'indorsement.'" "Sec. 3117. One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee as an indorser." It will be observed that the two sections last quoted relate only to negotiable instruments, and, in accordance with the rule declared by them, the case of Fessenden v. Summers, 62 Cal. 484, was decided. They do not in any way affect this case, for the reason that the note here sued upon was not a negotiable instrument. Adams v. Seaman, 82 Cal. 636, 23 Pac. Rep. 53. This being so, the defendant must still be treated and held liable as a guarantor. The question, then, is, what is now the liability, in this state, of a guarantor? As we have seen, a guaranty is a promise to answer for the debt of another person, and it may be enforced, upon default of the principal, without any previous demand or notice. It is an absolute undertaking to pay the whole debt, if the principal does not; and no mere delay of the creditor to proceed against the principal, or to enforce any other remedy, can be availed of as a defense. And such a liability is assumed *prima facie* when, as in this case, the guarantor writes his name on the back of a non-negotiable note to give it credit. Under the circumstances shown here, we think the findings were sufficient, and the court below rightfully refused to allow any offset for damages alleged to have been sustained by defendant, because plaintiff, after demand that he should do so, neglected and refused to institute an action against the maker of the note, and thereby secure payment of a portion of the money due thereon. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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94 Cal. 86

GALLIANO v. KILFOY. (No. 14,186.)

(*Supreme Court of California.* March 28, 1892.)

SUPPLEMENTAL COMPLAINT—SERVICE—RETURN OF WRIT.

1. Pending an action to foreclose a mortgage plaintiff gave defendant written notice, to which was attached a copy of a supplemental complaint, that on a certain day he would ask leave to file such complaint. Thereafter the complaint was filed by leave of court, and subsequently a default entered thereon against defendant, without any additional service. *Held*, that the default was erroneous, the defendant being entitled to service of the complaint after it was filed.

2. A return of a writ showed that service was made on "Rose" K., "by delivering to Rose K., one of the defendants, personally, * * * a copy." Upon this return default was entered against "Rosa" K., a defendant in the action. *Held*, that the return and default were *prima facie* regular, Rose and Rosa being substantially the same name.

Department 1. Appeal from superior court, Merced county; C. H. MARKS, Judge.

Action by G. Galliano against Rosa Kilfoy and others. From a judgment for plaintiff, defendant Rosa Kilfoy appeals. Affirmed.

R. Percy Wright, for appellant. *Law & Law*, for respondent.

GAROUTTE, J. This was an action to foreclose two certain mortgages upon real property. A judgment by default was entered against all the defendants, from which judgment Rosa Kilfoy appeals. Pending the action a supplemental complaint was filed, asking judgment under certain covenants contained in the mortgages for moneys paid out for the insurance of the property. Respondent gave appellant written notice, to which was attached a copy of the supplemental complaint, that upon a certain day he would ask leave of the court to file such complaint. Thereafter the complaint was filed by permission of the court, and subsequently a default thereon was entered against appellant, without any additional service thereof. This was erroneous. A copy of the supplemental complaint should have been served upon appellant after it was filed, and the judgment should be modified to the extent of the relief granted by that complaint. Washburn v. Wilkinson, 59 Cal. 538.

Appellant attacks the proof of service. The defendant was sued as "Rosa" Kilfoy; the return shows the service to have been made upon "Rose" Kilfoy "by delivering to Rose Kilfoy, one of the defendants, personally, in the city and county of San Francsco, state of California, a copy," etc. Upon this return a default was entered against "Rosa" Kilfoy. It was said in Com. v. Donovan, 13 Allen, 571: "The question whether one name is *idem sonans* with another is not a question of spelling, but of pronunciation, depending less upon the rule than upon the usage." In various languages "Rose" is pronounced "Rosa," and even in this country, in various communities and among various classes of people, that pronunciation is maintained. Indeed, it may well be said that they are substantially the same name, and, taken in connection with the recital in the return, her identity as one of the defendants, as against nothing to the contrary, is *prima facie* established.

The record is not all before us, and in its absence we cannot say that the attorney's fee allowed to plaintiff was unreasonable.

Let the cause be remanded and the judgment modified to the extent of the relief given by the supplemental complaint, and in all other respects let it be affirmed.

We concur: PATERSON, J.; HARRISON, J.

(3 Cal. Unrep. 487)

MONAHAN v. SAN DIEGO COUNTY. (No. 14,703.)

(*Supreme Court of California.* March 28, 1892.)

CONSTABLES—MILEAGE FEES.

Under Act March 5, 1870, providing that constables shall receive mileage for "every mile necessarily traveled, in going only, in executing any warrant of arrest, subpœna, or *venire*, bringing up a prisoner on *habeas corpus*, taking prisoners before a magistrate or to prison," a constable is entitled to mileage both for the distance traveled in going to make an arrest, and for that traveled in bringing his prisoner from the place of arrest to the magistrate or to prison. Allen v. Napa County, 23 Pac. Rep. 43, 82 Cal. 187, followed.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by T. J. Monahan against the county of San Diego for fees as constable in criminal cases. Judgment for plaintiff. Defendant appeals. Affirmed.

Hunsaker, Britt & Goodrich, for appellant. *Leonard Goodwin* and *Works, Gibson & Titus*, for respondent.

VANCLIEF, C. The plaintiff, as a constable, charged the defendant fees for services in criminal cases, amounting to $578.75, and presented to the board of supervisors his verified, itemized bill for this amount. The board allowed his claim to the extent of $384, but rejected it for the balance of $194.95, on the ground that the charge for the sum rejected was for "mileage in bringing various persons arrested by him from the place of arrest to the court from which the warrant of arrest was issued, or from the place of arrest to the county jail, in addition to mileage for going from the place where said process was issued to the place where the arrest was made; that is to say, * * * claimed mileage for both going to arrest such persons, and for bringing such persons before the magistrate or to prison from the place of arrest." Plaintiff sued, and recovered judgment for his entire demand. The defendant brings this appeal from the judgment on the judgment roll.

The questions presented were decided adversely to appellant's contention in Allen v. Napa County, 82 Cal. 187, 23 Pac. Rep. 43, following Cunningham v. San Joaquin County, 49 Cal. 323. I think the judgment should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(94 Cal. 131)

CERF v. PFLEGING *et al.* (No. 14,492.)

(*Supreme Court of California.* March 28, 1892.)

HIGHWAYS—CLAIM OF TOWN—DEDICATION—REFERENCE TO OFFICIAL MAP.

1. A town authorized by Act Cong. March 2, 1867, and Act March 23, 1868, (St. 1867–68, p. 245,) to enter lands within its limits "in trust for the several use and benefit of the occupants," and, after determining conflicting claims, to make deeds to the proper parties, caused a map of the town to be made and adopted as official which embraced and showed a certain tract in the possession of one M. to be laid off in blocks and lots, with streets extending through it, though in fact there were at the time no such divisions thereof. Thereafter it received a patent embracing the tract, and on petition of the assignees of M., who referred for description to the map, executed to them a deed of the land. *Held*, that the town could not be regarded as having asserted a claim to the streets, and as having deeded the land subject to the recognition of such claim by the grantees.

2. The mere mention of the streets as landmarks in deeds conveying parts of the land, without describing it by lot or block, or as bounded by any of the streets, is not such an adoption of the map as to constitute a dedication of the streets.

3. The fact that all but one of the streets were opened and used does not show a dedication of the one.

4. Neither is a conveyance of land in such street by deed describing it as part of the street a dedication.

5. Nor would a deed bounding land on such street imply that the street is there according to the description.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Action by Ernest Cerf against Jacob Pfleging and another to enjoin the opening of a street. Judgment for defendants. Plaintiff appeals. Reversed.

Venable & Goodchild, for appellant. *Wm. Shipsey*, for respondents.

TEMPLE, C. Appeal from judgment and order denying a new trial. This action was brought against the city of San Luis Obispo and its street superintendent to enjoin the opening of a street therein. The city of San Luis Obispo, formerly the town of that name, was located upon public lands of the United States, and acquired title under an act of congress entitled "An act for the relief of the inhabitants of cities and towns," passed March 2, 1867. March 23, 1868, the legislature passed an act defining the limits of the town, and authorizing her board of trustees to enter these lands "in trust for the several use and benefit of the occupants." St. 1867–68, p. 245. The statute authorized the board to ascertain who were the beneficiaries of the trust, and to determine conflicting claims, and directed them to execute deeds to the proper parties. The act of congress referred to provided that the corporate authorities in such cases might enter the lands "in trust for the several use and benefit of the occupants thereof, according to their respective interests." The board, therefore, was a mere trustee for the occupants, and by the terms of the act of congress were to execute their trust under such regulations as might be prescribed by the legislature. As early as 1866 one Murray was in possession of a tract consisting of 31.78 acres within the town limits. At that time the tract was not divided into blocks and lots, and no streets extended through it. In 1869 the town trustees caused the town to be surveyed, of which survey a map was made, called the "Harris and Ward Map," which was adopted as the official map, and deposited in the recorder's office, in 1870, but not filed until 1878. This map embraces the 31.78 acres, and shows it laid off into blocks and lots, and the piece of land in controversy as a part of Pacific street, which is in accordance with the claim of defendants. October 5, 1871, a patent was issued to the town trustees by the United States, in accordance with the act of congress. The 31.78-acre tract was part of the land granted. November 8, 1870, a petition was presented by the successors in interest of A. Murray to the trustees for a deed to said tract. The petition referred for description to an annexed map, which was that portion of the Harris and Ward map which included the Murray tract. A description was also attached, defining the boundaries, which mentioned some of the streets by name, particularly Pacific street. The streets marked on the map, except Pacific, were opened after the survey, and have been traveled as the necessities of the public required. Pacific street, also, except the portions in controversy here, has been opened and traveled for many years. That portion has never been opened or used as a street, and no special ordinance or resolution has been passed by the town trustees accepting the street. November 22, 1870, the trustees, acting upon the above petition, granted and authorized the deed, "always saving and excepting from the operation of this conveyance so much as is covered by streets, lanes, and alleys." February 7, 1872, the president of the board executed the deed, making no reservation as to streets. In 1872 the recipients of the deed from the trustees sold and conveyed, by eight several deeds, parcels of land, part of the Murray tract, in which deeds reference is made to the Harris and Ward map as follows: "According to the official survey and map made by Harris and Ward on file in the recorder's office of said county." February 16, 1874, the grantees of the town executed to plaintiff a deed to the premises in controversy, describing it by reference to the lines of Pacific street and as "being a part of Pacific street." It is also found that in 1872 the grantees of the town agreed with E. H. Smith to sell him a corner lot adjoining the land in controversy,—whether a part of the Murray tract is not found; that Smith by mistake built on the lot in controversy a house worth $150, which is still there; that the grantees of the town refused to convey to him because the land was a street. Plaintiff also claims under E. H. Smith, who conveyed to him. It is obvious that the conveyance of the title by the city did not affect the tenure by which the land was held. The title was still the possessory title, quieted by a release to the occupants of the title of the United States. It was still affected by the previous acts of the owners, as though no new title had been acquired. But necessarily, as also by express provision of the legislative act, the trustees were required to decide in the first instance who were the occupants, within the meaning of the act of congress. It is contended that the town, by the survey and map marking streets upon this land, laid claim to them as streets, and, when the petitioners annexed to their petition a copy of the map, they recognized the strips of land marked on the map as streets as rightfully so marked. That the trustees, finding that the claim of the town was conceded in the petition, awarded the deed, reserving the streets, is conceded. But can the mere making of a map be regarded as the assertion of a claim to the streets? It must be assumed that the town authorities knew that they did not own the streets, and could acquire no right to them by surveying and platting them upon an official map. It is not a very unusual proceeding, and may be regarded as a suggestion to the owner, who, it may be presumed, could more profitably dispose of his lands as lots than otherwise, that it was the proper subdivision to be made. The acts of the officials could certainly have no greater effect. But the land-owner may adopt a survey made by the town, and convey lots and blocks according to it, and thereby perhaps dedicate streets designated upon it. In this case, however, the only evidence which tends to show that the owner of the land adopted the map is the fact that the streets have been opened and are being used by the public, except that portion of Pacific street in question here. How they came to be opened does not appear, but from the fact that they have been opened and used for some length of time, without objection, we may infer that it was by consent of the owners. But how can we infer from that a consent to the use of lands which have not been thrown open to the public and not used? Undoubtedly, we are at liberty to infer that the proprietors did not propose that all the other streets should be open, and to obstruct Pacific street at this point. Certainly they expected, at some time or other, that Pacific street would be open through its entire extent. But this does not constitute the *animus dedicandi*, which must include, not only a general intention that some time or other the land shall be surrendered to the use of the public, but a present offer. There must be the act of giving,—the actual offer and acceptance. Property cannot be taken for public use without compensation unless the owner is willing; and this willingness should be manifested by clear and unmistakable acts. Parties are not to be done out of their property by doubtful implications, no matter how greatly the public may be inconvenienced. Has the owner freely given, or is he by some act estopped from denying that he has? is the real inquiry in every such case. Otherwise it would constitute a taking *in invitum* for public use without compensation. It does not appear that the owners have conveyed any of the land by lot or block, or as bounded by any of the streets. The only references to streets are as above stated. A street mapped might be as good a landmark as a street legally established, and such a conveyance, disregarding subdivisions, was held, in People v. Reed, 81 Cal. 70, 22 Pac. Rep. 474, to be a withdrawal of an offer to dedicate, previously made.

A deed bounding land upon a street merely existing upon a map or plat made by the owner of the land as a convenience in selling, implies in favor of the grantee that the street is there according to the description. There is no such implied covenant in a deed describing land as bounded upon a public highway established by public authority. The grantor in such case assumes no responsibility in regard to the highway. Each party is equally well acquainted with the law in accordance with which the highway exists or may be abandoned. And it has been held, and the conclusion seems reasonable, that the rule is the same where a highway has been laid out, but not yet opened by public authority. In re Opening of Brooklyn Street, 118 Pa. St. 640, 12 Atl. Rep. 664; Bellinger v. Society, 10 Pa. St. 135. Much less should the mere mention of streets as landmarks, which have been platted by the town authorities without leave of the owners, have such effect. It is plain that the conveyance of the identical property in question, describing it as a part of Pacific street, cannot have that effect. A mere statement of the owner of land that it constitutes a part of a street is certainly not an offer to dedicate, although it may be a probative fact of some value in determining whether he had not previously dedicated it. Here the very act asserts the contrary. He would not have conveyed the property for a valuable consideration, intending thereby to give it to the public, unless the grantee had a special interest in having it so dedicated. Precisely the contrary appears. There was a house upon it which evidently the grantee desired to acquire, and presumptively to hold and enjoy with the land. Such a dedication would be inconsistent with the grant, and void, if so intended. The grantor would be dedicating the land of another. I think the case should be remanded, with directions to set aside the judgment in favor of the defendants, and enter judgment for the plaintiff as demanded in his complaint.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the case is remanded, with directions to the court below to set aside the judgment in favor of the defendants, and enter judgment for the plaintiff as demanded in his complaint.

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94 Cal. 110

SAN GABRIEL WINE CO. v. BEHLOW *et ux.*

(No. 14,486.)

(*Supreme Court of California.* March 28, 1892.)

APPEAL—REVIEW OF EVIDENCE.

A verdict will not be disturbed on appeal where the evidence is conflicting.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by the San Gabriel Wine Company against William Behlow and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

Chapman & Hendrick, for appellant. *Gottschalk & Luckel*, for respondents.

SHARPSTEIN, J. This appeal is from an order denying appellant's motion for a new trial, in an action brought to recover the sum of $500, alleged to be due for the balance of the purchase price of a tract of land sold by plaintiff to defendants, for the sum of $4,500, upon which the sum of $4,000 was paid; and for a decree foreclosing a vendor's lien. The plaintiff alleged that the defendants agreed to pay $4,500 for the land, of which $4,000 was paid, and a conveyance of the premises was executed by plaintiff to the defendants upon a promise of defendants to pay $500 more. Defendants deny that they ever agreed to pay more than $4,000 for said land. This, with some other issues, was submitted to a jury, which found against the plaintiff, and in favor of defendants thereon. The grounds of plaintiff's motion for a new trial are that the evidence is insufficient to justify the verdict of the jury or findings of the court; and that the decision is against law; and errors occurring at the trial and excepted to by plaintiff. But the ground mainly relied on is insufficiency of the evidence to justify the verdict or finding that the amount for which plaintiff sold the property was $4,000. Of course, plaintiff could not have sold the property to defendants for more than defendants paid or agreed to pay for it. There is evidence on the part of plaintiff tending to prove that defendants agreed to pay $4,500 for the property; and evidence on the part of defendants that they agreed to pay $4,000 only for the property. This presents a conflict in the evidence, which, under a well-settled rule in this state, precludes a review of it by this court. A review of it would involve a determination of the relative credibility of the witnesses, and the weight which should be given to the testimony of each respectively. Those were matters exclusively for the jury and the trial court to consider and pass upon. We fail to find in the record any errors of law occurring at the trial which were excepted to by the plaintiff. The finding of the jury is not, in our opinion, contrary to any of the instructions of the court. Besides, the court adopted the finding of the jury as the finding of the court. Order affirmed.

We concur: HARRISON, J.; MCFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; PATERSON, J.

(94 Cal. 108)

SAN GABRIEL WINE Co. v. BEHLOW *et ux.* (No. 14,490.)

(*Supreme Court of California.* March 28, 1892.)

APPEAL—REVIEW OF EVIDENCE.

A verdict will not be disturbed on appea where there is evidence to support it.

In bank. Appeal from superior court, Los Angeles county · WALTER VAN DYKE, Judge.

Action by the San Gabriel Wine Company against William Behlow and wife. Defendants set up a counter-claim. From a judgment for plaintiff as to the counter-claim, defendants appeal. Affirmed.

Chapman & Hendrick, for appellants. *Gottschalk & Luckel*, for respondent.

SHARPSTEIN, J. This appeal is from the order of the court denying the motion of appellants for a new trial, as to their counter-claim, in an action brought by plaintiff to recover $500, alleged to be a balance due plaintiff from defendants for purchase money of a block of land in Ramona. The counter-claim is for a breach of covenant in the conveyance against incumbrances; the alleged incumbrance consisting of a prior conveyance by respondent of a right of way over said block to the San Gabriel Valley Rapid Transit Railway, a corporation. Defendants alleged that they were thereby damaged $3,000, for which they demanded judgment against plaintiff. Among the special issues submitted to the jury was the following: "What is the amount of damage to said block from the existence of said railroad? Answer. No damage." There is sufficient evidence to justify this finding; and appellants, in their specification of particulars in which the evidence is insufficient to justify the special findings or verdict of the jury, do not specify wherein the evidence is insufficient to justify that finding. None of the alleged errors of law occurring at the trial could have influenced the jury, in the least, in reaching the conclusion that the block of land through which said right of way had been granted was not damaged thereby. We therefore omit the discussion of such alleged errors as could not have affected the substantial rights of appellants. If they sustained no damage, they were not entitled to recover any, and the order must be affirmed. Order affirmed.

We concur: PATERSON, J.; HARRISON, J; MCFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.

(94 Cal. 89)

PEOPLE v. DILWOOD *et al.* (No. 20,859.)

(*Supreme Court of California.* March 28, 1892.)

CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—DECLARATIONS.

1. On a trial for grand larceny it was reversible error to instruct, on the subject of circumstantial evidence, that the jury should be regulated by the superior number of probabilities on the one side or the other, whether the amount of such probabilities be expressed in words or arguments, or by figures and numbers.

2. Declarations of a co-conspirator, made subsequent to the crime, and in the absence of defendant, are not admissible in evidence.

In bank. Appeal from superior court, Fresno county; S. A. HOLMES, Judge.

Prosecution against O. H. Dilwood, J. E. Deegan, and E. W. Burnsides for grand larceny. From a judgment entered on a verdict of guilty defendants appeal. Reversed.

Hinds & Merriam, for appellants.

William H. Layson, Dep. Atty. Gen., for the People, cited the following authorities on the point that the declarations of one of the defendants, made on the day subsequent to the larceny, were admissible as those of a co-conspirator: Whart. Crim. Ev. (9th Ed.) No. 699, p. 601; Scott v. State, 30 Ala. 503; O'Neal v. State, 17 Reporter, 285; 2 Bish. Crim. Proc. § 230; 12 Amer. & Eng. Enc. Law, p. 854; Wilson v. State, 66 Ga. 591; 12 Amer. & Eng. Enc. Law, p. 844, tit. "Acts of Confederates;" Lewis v. State, 4 Kan. 296.

GAROUTTE, J. The defendant was convicted of grand larceny in stealing a calf, and now prosecutes this appeal.

The court gave the jury the following instruction upon the subject of circumstantial evidence: "As mathematical or absolute certainty is seldom to be obtained in human affairs, reason and public utility require that jurors, as well as all mankind, in forming their opinion of facts, should be regulated by the superior number of probabilities on the one side or the other, whether the amount of these probabilities be expressed in words or arguments, or by figures and numbers." We have looked in vain in our standard works upon criminal law for an indorsement of the principle contained in this instruction of the court. Starkie on Evidence, in discussing this question, at page 860, says: "It is very possible, indeed, that mere coincidences may be so numerous as, by force of multiplied probability, to exclude all reasonable doubt; but this can never happen in the absence of circumstances of a conclusive tendency, unless the probability be increased to an indefinite extent beyond the reach of mere calculation. Whenever the probability is of a definite and limited nature, (whether in the proportion of one hundred to one, or of one thousand to one, or any other ratio, is immaterial,) it cannot be safely made the ground of conviction; for to act upon it in any case would be to decide that, for the sake of convicting many criminals, the life of one innocent man might be sacrificed." This instruction appears to have been before the court in the case of People v. Sansome, 84 Cal. 449, 24 Pac. Rep. 143, and Justice MCFARLAND, in that case, very properly said: "This is not only against the settled rule as to the amount of proof necessary to convict in criminal cases, but is against the express language of the Code." The instruction was not only erroneous, but of such a prejudicial character that the error was incurable by the giving of further instructions correctly stating the law.

The court erred in admitting evidence as to the appearance, conduct, and declarations of one Deegan, a co-defendant, the day subsequent to the larceny, the defendant being absent. Conceding that Deegan and defendants were co-conspirators in stealing the calf, at this time the theft has been consummated, and the conspiracy a thing of the past. The declarations of a co-conspirator, after the object of the conspiracy had been accomplished, are not admissible in evidence. The authorities relied upon by respondent are cases where a disposition of the stolen property and a division of the proceeds were a part of the scheme or plan of the criminals. The facts of this case do not bring it within the rule there discussed. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: McFarland, J.; De Haven, J.; Harrison, J.; Sharpstein, J.; Paterson, J.

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94 Cal. 112

People v. Smalling. (No. 20,876.)

(*Supreme Court of California.* March 28, 1892.)

Murder—Confession—Discharge of Jury—Failure to Agree—Abuse of Discretion—Receiving Verdict—Harmless Error.

1. A voluntary confession of murder is not inadmissible because made to free defendant's sister, then under arrest for the crime, from suspicion, especially where defendant testifies in self-defense to every fact contained in the confession, and the sister testifies that he acknowledged to her substantially the same facts immediately after the killing.

2. The record of the discharge of a jury in a criminal case for failure to agree cannot be impeached by extrinsic evidence showing an abuse of judicial discretion; and the exclusion of a transcript of the proceedings, offered to show, by the answers of the jurors to the court's questions, that the judge abused his discretion, if error, is harmless.

3. The absence of defendant at the discharge of the jury, when waived by his counsel, does not affect the question of his jeopardy.

4. Pen. Code, § 1149, provides that, when the jury have announced that they have agreed on a verdict, they must, on being required, declare the same. Section 1164 provides that, where the verdict given is such as the court may receive, the clerk must immediately record it in full upon the minutes, read it to the jury, and inquire of them whether it is their verdict. *Held*, that where on a murder trial the jury return a verdict of guilty, which is received in proper manner, and also written verdicts for the state on the pleas of former acquittal, former conviction, and former jeopardy, as directed by the court, and defendant's counsel expressly waives the recording thereof at the time, failure to cause them to be recorded and read to the jury, and have them declare whether they are their verdicts, is harmless error, under section 1404, providing that no departure from the form prescribed by the Code in respect to any proceeding renders it invalid, unless it tends to prejudice defendant in regard to a substantial right.

In bank. Appeal from superior court, Calaveras county; C. V. Gottschalk, Judge.

John W. Smalling was convicted of murder in the first degree, and appeals. Affirmed.

J. G. Swinnerton and *Paul C. Morf*, for appellant. *Ira Hill Reed*, Dist. Atty., *F. J. Solinsky*, and *Atty. Gen. Hart*, for the People.

Garoutte, J. The appellant was convicted of murder in the first degree, with punishment fixed at imprisonment for life, and now appeals from the judgment. For a reversal of the judgment he relies upon the following assigned errors of law: (1) The court erred in admitting in evidence the written confession of defendant, under objection. (2) The court erred in excluding Exhibit B from the jury, it being the evidence of what occurred on the discharge of the jury at the first trial of the action, and in sustaining the people's objection thereto. (3) The court erred in denying defendant's motion to be discharged from custody, and in pronouncing judgment on said defendant. (4) The court erred in instructing the jury to find for the people upon the pleas of former acquittal, former conviction, and former jeopardy.

The confession of the defendant was clearly admissible. It appears to have been an entirely free and voluntary statement. The fact that defendant's sister was also under arrest for the commission of the homicide, and that the confession may have been made to free her from suspicion of guilt, is a matter that in no way tends to invalidate it as material and competent evidence. Again, this sister testified at the trial that immediately subsequent to the commission of the homicide defendant acknowledged to her the facts of the killing, and the facts as stated by her were substantially the same as contained in the written confession admitted in evidence. In his defense the defendant went upon the witness stand, and again stated, with additional matters, every fact contained in the said confession. Thus, from any and every stand-point of the case, we conclude the assignment of error not well taken.

It is claimed that the court erred in excluding Exhibit B as evidence in the case. Exhibit B was that portion of the transcript of the proceedings of the previous trial, taken by the phonographic reporter, showing what occurred at the time the jury were discharged by the court, for the reason that they were unable to agree upon a verdict. When this case was called for trial counsel for defendant announced themselves as not ready, by reason of the absence of one Hood, the party who acted as short-hand reporter at the previous trial, but that if the district attorney would stipulate to admit the certified copy of the reporter's notes in evidence, in lieu of the presence of the reporter, they were ready to proceed. The district attorney agreed to admit the transcript, to-wit, Exhibit B, in evidence, whereupon the trial proceeded. When defendant attempted to introduce the exhibit in evidence, counsel for the people waived the objection that it was not the best evidence, but objected upon the ground that it was irrelevant, immaterial, and incompetent, and the court sustained the objection. We will not enter into a discussion as to the effect of the stipulation, or as to the professional proprieties which should exist among attorneys in carrying out stipulations made in good faith. If the evidence was improperly rejected, but the defendant was not prejudiced thereby, it was not error; or if the evidence had been admitted before the jury, and could not have affected the character of the verdict, then a violation of the stipulation, if it occurred, did the defendant no injury. In addition to the plea of not guilty, the defendant entered the plea of prior acquittal, prior conviction, and once in jeopardy, and depended upon the proceedings of the first trial for the facts to support such pleas. The jeopardy relied upon by defendant is insisted to have attached by reason of the fact that at such trial the jury were discharged without legal necessity, and also discharged in the absence of the defendant. The records of the court were introduced, which showed that the defendant had once been placed on his trial for the same offense, on a valid information, before a legal jury, and in a court of competent jurisdiction. People v. Webb, 38 Cal. 467; People v. Hunckeler, 48 Cal. 334. This jeopardy once having attached was a shield forever protecting the defendant from a second prosecution, unless the jury was prevented from rendering a verdict from some legal necessity. It cannot be questioned but that the inability of a jury to agree upon a verdict is one of those necessities that will authorize a court to discharge the jury, and thereby subject the defendant to a second trial. At the time Exhibit B was offered in evidence, the record of the previous trial had been placed before the jury, and one of the recitals thereof was as follows: "At 11 o'clock and 15 minutes P. M. the jury came into court. Present, Hon. C. V. Gottschalk, judge, Ira Hill Reed, district attorney, Ben. K. Thom, sheriff, A. L. Kyllie, clerk, by Sam. E. Redmond, deputy-clerk, Reporter E. E. Hood, and defendant's attorneys, J. G. Swinnerton and Paul C. Morf, defendant's presence in court being waived by his said attorneys. Roll-call of jurors,—all found present. The jury were asked by the court if they had agreed upon a verdict, and they replied that they had not. The court, after questioning each one of the jurors as to the probability of their agreeing upon a verdict, and being satisfied that there is no reasonable probability of the jury so agreeing, orders the jury discharged from further consideration of the case." Exhibit B contained a transcript of the proceedings occurring in court at the time the jury were discharged, showing the examination of the jurors by the court as to the probability of arriving at a verdict, and it was offered for the purpose of showing by the answers of the jurors that there was a probability of agreement. Its purpose was necessarily to impeach the recitals of the record and show a gross abuse of discretion in discharging the jury under the circumstances there indicated. A defendant is not entitled to impeach the record by extrinsic evidence of facts, showing an erroneous exercise of judicial discretion in discharging a jury. He is bound by the judgment of the court as declared by the record. In U. S. v. Perez, 9 Wheat. 580, Justice Story said: "We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would be defeated." In the case of People v. Green, 13 Wend. 57, Chief Justice Savage said: "The subject has been fully considered by this court in several cases, particularly in People v. Olcott, 2 Johns. Cas. 301, and People v. Goodwin, 18 Johns. 200. The rule was laid down by Mr. Justice Kent in the first of these cases, which was acquiesced in by Chief Justice Spencer in the last, that the question of discharging a jury is one which must rest in the sound discretion of the court. Either the court must determine when it is requisite to discharge, or the rule must be inflexible, that after the jury are once sworn and discharged no other jury can in any event be sworn and charged in the same case. The moment cases of necessity are admitted to form exceptions, that moment a door is open to the discretion of the court to judge of that necessity, and to determine what combination of circumstances will create one." In this case the jury were out but 30 minutes. In People v. Harding, 53 Mich. 487, 19 N. W. Rep. 155, Chief Justice Cooley, in speakng as to the power of the judge to discharge the jury without a verdict, said: "The whole subject, however, is referred to his judgment, and, when he decides, no one can question his conclusion." Counsel relies upon the case of Ex parte McLaughlin, 41 Cal. 219, as authority to authorize a reversal of the judgment of the court upon the necessity for a discharge of the jury, by extrinsic evidence. This case was heard upon the record alone, and the language used in the opinion, as to the right of the appellate court to review the judgment of the trial court upon this question, must be limited to a review of the facts as disclosed by the record; and especially does this appear when the entire opinion is carefully considered. It follows that the admission of Exhibit B as evidence in this case would have resulted in no benefit to the defendant, for neither court nor jury could have considered it in passing upon the question of jeopardy. The record recital is full and complete, and clearly indicates the legal necessity contemplated in law to justify the discharge of a jury.

The fact that the defendant was not present at the time the jury was discharged, his presence having been waived by his counsel, does not affect the question of his jeopardy; for his objection to the discharge of the jury at that time could not have defeated the validity of the court's action. It follows that the defendant wholly failed to establish his special defense by any evidence, and, under such circumstances, it was the duty of the court to instruct the jury to find for the people thereon. Varnes v. State, 20 Tex. App. 109; O'Connor v. State, 28 Tex. App. 288, 13 S. W. Rep. 14.

There remains but one additional assignment for consideration, and, in a case of the importance of the present one, it is a matter of regret that it ever should have arisen. When the jury were about to retire to consult as to their verdict, the court handed them forms of verdicts as to the pleas of former acquittal, former conviction, and once in jeopardy, and instructed them to find for the people upon these pleas, and have their foreman sign and date them, and return them into court, with their verdict upon the merits of the case. The jury, having retired, returned into court, and announced that they had agreed upon a verdict. The foreman declared the verdict to be guilty of murder in the first degree, and fixed the punishment at imprisonment for life. The clerk read the verdict to the jury as recorded, and asked them if that was their verdict, and they all responded, "It is." The bill of exceptions then recites: "The foreman also handed to the court three other verdicts, being the same verdicts heretofore set out and delivered to the jury, which verdicts were all signed by the foreman and properly dated. The court then said: 'Now, I desire to know of the counsel in regard to these verdicts found by the jury, as to the defendant having been once acquitted of the offense charged, and having been once convicted of the offense charged, and having been once in jeopardy for the offense charged, whether or not it will be understood by counsel that these verdicts may be entered by the clerk subsequently,—they having been brought in by the foreman in favor of the people under the instructions of the court,—or whether they insist upon having those verdicts now entered by the clerk before the jury are discharged, and read to the jury and have them declare whether these are the verdicts.' Mr. Swinnerton: 'We do not insist on that,—the recording at this time.' The Court: 'The clerk may then record those verdicts afterwards. They were brought in under the instructions given to the jury.' The jury was then discharged. The jury did not orally declare, nor did their foreman nor any member of the jury read aloud, any verdict on the pleas of former acquittal, former conviction, or former jeopardy. Such verdicts were not read aloud to the jury by any person, nor was anything asked them to establish what verdict, if any, they had agreed upon as to the issues raised by such pleas. But counsel for defendant expressly waived the declaring and recording of said verdicts at the time, and agreed that they might be recorded afterwards, as appears in this bill of exceptions, and all the facts constituting such waivers are therein set forth." Under section 1149 of the Penal Code, when the jury have returned into court, and announced that they have agreed upon a verdict, they are required, through their foreman, to declare such verdict, and under section 1164[1] of the Code, when the verdict is so declared, and upon an examination by the court it appears to be correct in form, it must then be recorded, etc. In this case these verdicts were declared by the jury, through their foreman, to be their verdicts, when, in response to the interrogatory of the court, the foreman announced they had agreed upon a verdict, and handed these three verdicts to the court as their verdicts upon these special pleas. The court then announced to the counsel, and in the presence of the jury, the contents of these verdicts, and, necessarily, each member of the jury knew what the verdicts in effect declared. Indeed, under the instructions of the court, the jury was not at liberty to bring in a verdict upon these pleas in any other form. After all these proceedings had taken place, defendant's counsel waived the recording of the verdicts in the presence of the jury; and, having made such waiver, he of necessity waived the declaration of the jury that it was their verdict, which the statute requires to be made subsequently to the record of the verdict. In the case of People v. Gilbert, 57 Cal. 96, there was no waiver, and the verdict was not recorded until after the jury had been discharged; and, while the proceeding was irregular, the court decided, especially in the light of sections 1404 and 1258 of the Penal Code, that no error existed which would justify a reversal of the judgment. This principle of irregularity of procedure without prejudicial error was also recognized and approved in People v. Sprague, 53 Cal. 494. Section 1404 reads: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor any error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Section 1258: "After hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." The record clearly shows that irregularities existed in the manner in which these various verdicts were returned into court; irregularities occasioned without necessity, and which could have been easily avoided. In cases of felony, and especially where a defendant is charged with the crime of murder, the only correct procedure is to adhere strictly to the statute. Any other course is a dangerous innovation, which generally results in a miscarriage of justice. We think the irregularities here shown do not affect the validity of the judgment, and are such as come squarely within the provisions of the Penal Code cited. Let the judgment be affirmed.

We concur: McFarland, J.; Harrison, J.; Paterson, J.; De Haven, J.; Sharpstein, J.

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[1] Pen. Code, § 1164, provides: "When the verdict given is such as the court may receive, the clerk must immediately record it in full upon the minutes, read it to the jury, and inquire of them whether it is their verdict," etc.

(94 Cal. 269)

KAUFFMAN v. MAIER *et al.* (No. 14,571.)

(*Supreme Court of California.* April 2, 1892.)

APPEAL FROM ORDER GRANTING NEW TRIAL—MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—NON-EXPERT TESTIMONY—ADMISSIONS—INSTRUCTIONS.

1. Where an appeal is taken from an order granting a new trial, the court is not confined to considering the ground on which such order is made, but will review the entire record, except that where the evidence is conflicting, and the trial court excludes the question of the insufficiency thereof as a ground for granting the new trial, the supreme court will not re-examine the evidence.

2. Where plaintiff, an employe of defendant, while at work threw a towel over a certain shaft, which was not a part of the machinery with which his service was connected, and was never intended for the use to which he put it, defendants are not liable for injuries sustained by plaintiff in attempting to draw the towel from the shaft while the machinery was in motion.

3. Where the testimony of a witness that he informed the foreman of the condition of the shaft was admitted to show knowledge of defendants, it was error to admit the opinions of the witness concerning the shaft, or to permit him to testify as to his motives in telling the foreman.

4. It was error to admit the testimony of machinists as to whether the shaft would be more dangerous if it were jagged and split on the end, since the jury was capable of deciding such question without the aid of experts.

5. Under Const. art. 6, § 19, forbidding judges to charge juries with respect to matters of fact, it was error for the trial court to charge that, as a "general rule, the statements of the witnesses as to verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake," such conclusion being an inference of fact to be made by the jury from the peculiar circumstances of each particular case.

In bank. Appeal from superior court, Los Angeles county; GEORGE PUTERBAUGH, Judge.

Action by Kauffman against Maier and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Max Lowenthal, Geo. J. Denis, and *J. L. Murphy*, for appellant. *Chapman & Hendrick* and *Hutton & Swanwick*, for respondents.

HARRISON, J. The plaintiff brought this action against the defendants to recover damages for personal injuries alleged to have resulted from their negligence. He was in their employ at the time of the injury, and the negligence charged upon them was their permitting the shaft of a wheel to protrude into the room where he was at work, by reason of which his sleeve was caught upon the jagged end of the shaft, causing him to be carried around it, whereby his arm was so injured as to require amputation. The plaintiff recovered judgment in the court below, and a new trial was granted upon the motion of the defendants, and from this order the plaintiff has appealed. In their statement upon the motion for a new trial the defendants have assigned various errors of law on the part of the court, as well as many particulars in which the evidence is claimed to be insufficient.

1. In its order granting a new trial the court included the following as a part thereof, viz.: "The new trial is hereby granted upon the following ground specifically, and upon no other ground or grounds, no error being by this court deemed to have occurred at the trial on account whereof a new trial should be granted to defendants, except such ground above referred to, which ground is as follows, to-wit: The court erred in denying defendant's motion for a nonsuit, which motion should have been granted on the sole ground that the placing of the towel on the shaft, as shown by the evidence, constituted such contributory negligence on his part as to preclude him from recovering in this action. On all other grounds embraced in said motion, save said ground aforesaid, said motion for a new trial is denied." The proposition of the appellant that this court is limited upon this appeal to a consideration of the grounds specified in the order granting the new trial is untenable. A party has the right to move for a new trial upon any or all of the

grounds permitted by the statute; and, if the record on which his motion is based discloses more than one ground for which a new trial should be granted, the court cannot, by stating in its order that the motion is granted upon one ground only, and denied upon the others, deprive the other party of the right to a review by this court of the entire record. The action of the court below is limited to granting or refusing a new trial, and, excepting those cases in which it is justified in limiting the new trial to one or more designated issues, the effect of an order granting a new trial is to place the cause in the position it held before any trial had been had. Upon an appeal from that order this court will review the entire record upon which the order was based, and, if there be found any error in the record which would have justified the court in making the order, the order will be affirmed, upon the same principles that an order sustaining a demurrer to a defective complaint will be sustained, even though the ground upon which the trial court sustained it may be held untenable. A motion for a new trial is a proceeding in the nature of a new action, wherein the statement or bill of exceptions corresponds to the complaint, and the specifications of error to a demurrer thereto, and the action of the trial court in sustaining the motion is to be treated on the same principles. If there be any grounds upon which its action can be upheld, the order will be sustained, irrespective of the particular ground given by that court, whether in an opinion or by a statement in the order itself. A contrary rule might work great injustice. If a new trial is granted, the former decision is set aside, and the party whose motion has prevailed is not "aggrieved," and has no ground for an appeal. By the order granting the new trial the judgment is vacated, and the cause is in the same condition as when the issues were joined. But if, upon an appeal from that order, the action by this court is limited to a review of merely the ground designated by the lower court, and that ground should be held insufficient, the moving party would be deprived of the new trial to which the record might show that he is manifestly entitled. This rule has a limitation in cases where one of the grounds upon which the new trial is sought is the insufficiency of the evidence to justify the verdict or decision. If in such a case the trial court in its order granting a new trial excludes this as a ground of its action, by direct language, and the record shows that there was a conflict of evidence, this court, upon the same principles that cause it to affirm an order granting or denying a new trial upon that ground, will accept the conclusion of the trial court, and not re-examine the evidence.

2. The plaintiff was employed in the malt-room, and at the time of the injury was engaged in cleaning the elevator,—an endless belt, with buckets attached thereto, for carrying the malt from this room to the upper portion of the building. This elevator passed into a hopper about a foot in depth below the surface of the floor, into which the malt was shoved in order that it might be taken up by the buckets attached to the elevator, and was carried around a wheel, whose shaft, an inch and a half in diameter, and about six feet above the floor of the room, projected into the room about eighteen inches beyond the timbers upon which it rested. The end of the shaft had been battered by hammering, so that it had a crown a little larger than the shaft itself, with its edges jagged and rough. On this day, after the malt that had been spread upon the floor had been all carried to the upper part of the building, the plaintiff commenced to clean the elevator, and, having an endless towel upon his shoulder which impeded him in his work, he threw it over the projecting end of the shaft, and went across the room to get a broom. After he left, the engine started, and on his return he saw the towel going around with the shaft, and as he was to work directly under the shaft, thinking that the towel in its movements might interfere with his work, he attempted to remove it, and in so doing was in some way caught by the shaft, and sustained the injury complained of. At the close of the plaintiff's case the defendants asked for a nonsuit, upon the ground that the evidence showed that the injury was not the result of any negligence on their part, but resulted solely from an act of the plaintiff unconnected with his employment. The plaintiff's right to recover from the defendants for injuries received by him from defective machinery depends upon the negligence of the defendants in respect to the machinery upon which upon which he was employed to work, and cannot be maintained by showing negligence on their part in reference to other machinery with which his employment had no connection, unless such machinery was in some way incidental to the service in which he was engaged. The fact that certain machinery furnished by an employer is defective does not furnish a basis for recovery for an injury, unless that machinery is the proximate cause of the injury. The negligence for which the employer is held responsible is his failure to supply his employe with suitable machinery for the service for which he is employed; but, if that machinery is sufficient, it is no ground of action that other machinery, not furnished for his service, is defective, or that the employe makes use of the machinery which is furnished him in a mode unauthorized by his employment, or for a purpose not contemplated by the employer. "If the servants undertake to use machinery or instruments for purposes for which they were not designed, and for which the employer had no reason to suppose they would be used, it is their own fault or folly if harm comes from it." Felch v. Allen, 98 Mass. 575.

The act of the plaintiff in hanging the towel upon the shaft had no connection with the service for which he was employed, but was an act done by him for his own convenience, and in which he voluntarily selected the means by which he would subserve that convenience. The projecting shaft was not a part of the machinery with which his service was connected, and was never intended for the use to which he applied it. Even if its condition was such that the defendants would have been liable for an injury sustained by one of their employes in case he had accidentally come in contact with it while engaged in the service for which he was employed, that condition does not establish any negligence on their part towards the plaintiff in the present case. The plaintiff was not injured by any accidental contact with it while engaged in his employment, but his injury was the result of an unauthorized act of his own, which he did for his own convenience, and at his own risk. He was looking for a place on which to hang his towel, and, seeing this projection, availed himself of it as being the most convenient. The defendants cannot be held liable for the injury received in taking it off, any more than if he had thrown it across a saw, or hung it upon a sharp hook, and been injured in its removal. Not being under the necessity of making use of the shaft for any purpose connected with his employment, whatever risk attended his selection of it for his own purposes was a risk assumed by himself. As his selection of it as a place on which to hang his towel could not have been contemplated by the defendants, they were under no obligation to make it suitable for that purpose, and cannot be held liable for the injury he sustained therefrom. See Pennsylvania Co. v. Lynch, 90 Ill. 333; Railroad Co. v. Sentmeyer, 92 Pa. St. 276; Railroad Co. v. Estes, 37 Kan. 736, 16 Pac. Rep. 131; Cahill v. Hilton, 106 N. Y. 512, 13 N. E. Rep. 339; Electric Light Co. v. Murphy, 115 Ind. 571, 18 N. E. Rep. 30; Iron Co. v. Burke, 12 Ill. App. 369; Shear. & R. Neg. § 207. The proximity of the shaft to the place where he was working was but an incident, and does not affect the liability of the defendants. That proximity doubtless determined his selection of it as the place on which to hang the towel; but, as this was a use of the shaft never intended by the defendants, its selection by him for such use cannot render them liable for the injury any more than if it had been at the end of the room opposite to the place in which he was at work. When, therefore, it appeared from the testimony of the plaintiff that the injury received by him resulted from his voluntary act, unconnected with the service for which he was employed, the court should have granted the nonsuit asked by the defendants, and its order granting a new trial for the error committed in refusing this motion must be affirmed.

3. For the purpose of showing that the defendants had knowledge of the character of the shaft, the witness Geiger was allowed to testify that previous to the injury to the plaintiff he had informed the foreman, Geisner, of its character. He was then asked "What made you tell August Geisner?" to which objection was made by the defendants. The court reserved its ruling upon the objection, and allowed the witness to answer, who said: "I told Geisner that the shaft was of no value there, and it should be cut off; and it was said then that I had nothing to say about it, and it was left as of yore. As foreman, it was Geisner's business to look out and do what was stated to him, but nothing was done there. He was the head man in the malt-house." After the answer had been given, the court overruled the objection to the question, and allowed the testimony to remain. The reason for permitting this witness to give testimony of what he had told Geisner was merely that the knowledge of the defendants concerning the condition of the shaft might be shown as a fact from which their negligence could be inferred, but the motives which prompted the witness to inform the foreman, as well as the opinions of the witness concerning the shaft, were immaterial, and should not have been allowed in evidence.

4. A witness (Ekman) having been shown to be a machinist, and conversant with machinery, was asked the following question: "Question. If that shaft on the end had been pounded or battered, or was in a battered or splintered condition,—that is, having something in the nature of a crown, that made it wider there than it was in further, nearer the wall,—would that make it dangerous or not?" to which he answered: "Answer. If the shaft was battered or split or splintered, in motion it would be dangerous." Also the following question: "Question. If this shaft was smooth, and a towel had been hung upon it, and it in motion, would there be any danger in drawing that towel off?" to which he answered: "Answer. If the shaft is smooth, and the towel hung on the shaft in motion, it would not be dangerous to take it off. If the shaft were not smooth, it is likely to come in contact with clothing, and, if it comes in contact with clothing, will certainly wind the clothing up." Another witness (Johnson) was asked: "Question. What is your opinion as to whether a shaft protruding about eighteen inches, at the height mentioned by him, into a room where workmen are working, against which they might come in contact, if the surface of the same is jagged, rough, and broken,—whether it is dangerous or not;" to which he answered: "Answer. It is. Q. Why is it so? A. It is very likely to catch the clothing of the operator." These questions were objected to by the defendants upon the ground that they were incompetent, irrelevant, and immaterial, and not a subject of expert testimony; but their objections were overruled. The court erred in not excluding this testimony. An answer to the questions did not involve the knowledge of any science or art, and was not the subject of testimony by an expert in machinery. The facts sought to be shown by the questions did not involve a knowledge of the construction or working of machinery, or in any respect depend upon such knowledge. Whether it is dangerous for a shaft with a rough surface or end to project into a room where there are workmen who may come into contact with it, is not in any case to be determined by expert testimony, but depends in every instance upon the circumstances of the particular case, and must be determined by the jury from all the facts

of that case. Whether a towel can be safely taken from a smooth, revolving shaft is a matter of common observation, and is not to be determined by one who is an expert in machinery, any more than by an expert in any other branch of knowledge. Such questions are to be determined by the jury themselves, either from their own experience in matters of common observation, or from all the evidence in the case, and cannot be asked of witnesses, even if such witnesses are experts in some particular art or science. Sappenfield v. Railroad Co., 91 Cal. 60, 27 Pac. Rep. 590. If the court permits the jury to be influenced by the judgment of such witnesses, it deprives the litigants of their right to have the jury render its verdict upon the facts in the case, and to this extent substitutes the judgment of the expert for what should be the judgment of the jury.

5. Evidence was given at the trial tending to show that shortly after the injury the plaintiff had made statements to the effect that it was the result of his own fault, and that the accident had been brought about by a different cause from that shown at the present trial. In its instructions to the jury the court said: "The court instructs the jury that, although parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often afford satisfactory evidence, yet as a general rule the statements of the witnesses as to the verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or may not have clearly expressed his meaning, or the witness may have misunderstood him; and it frequently happens that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh such evidence, and give it the consideration to which it is entitled in view of all the other evidence in the case." In thus instructing the jury the court disregarded the provision of the constitution that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."[1] While it is a matter of common knowledge that the statements of a witness as to the verbal admissions of another are liable to be erroneous, and for that reason should be received with caution, yet such conclusion is only an inference of fact which must be made by the jury, and is not a presumption or a conclusion of law to be declared by the court. The reasons which are to be urged in favor of receiving such statements with caution are based upon human experience, and vary in strength and conclusiveness with the facts and circumstances of each case, and their sufficiency in any particular case is an inference which the reason of the jury makes from those facts and circumstances; but there is no rule of law which directs the jury to invariably make such an inference from the mere fact that the proof of the admission is by oral testimony. That deduction, called a "presumption," which the law expressly directs to be made from particular facts, is uniform, and not dependent upon the varying conditions and circumstances of individual cases. To weigh the evidence and find the facts in any case is the province of the jury, and that province is invaded by the court whenever it instructs them that any particular evidence which has been laid before them is or is not entitled to receive weight or consideration from them. People v. Walden, 51 Cal. 588; People v. Fong Ching, 78 Cal. 173, 20 Pac. Rep. 396; Mauro v. Platt, 62 Ill. 450; Com. v. Galligan, 113 Mass. 202; McNeil v. Barney, 51 Cal. 603; People v. Dick, 34 Cal. 666. The instruction above quoted is, in substance, an argument to the jury with "respect to matters of fact" that had been presented at the trial, and a comment by the court upon the weight which they should give to that testimony. Whether the facts and circumstances proved in the case were sufficient to cause the reason of the jury to make this inference was fair matter of argument for the counsel of the respective parties; but the court forsook its judicial position when it assumed the office of commenting upon the weight and credibility of this evidence. The closing paragraph in the instruction, to the effect that it was for the jury to give to the evidence the consideration to which it was entitled, did not obviate the error, as by its remarks the court had in substance said to them that as matter of law the evidence was not entitled to any great consideration. The order is affirmed.

We concur: Sharpstein, J.; Garoutte, J., McFarland, J.

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94 Cal. 63

In re Richardson's Estate. (No. 14,610.)

(*Supreme Court of California.* March 26, 1892.)

What Constitutes Will.

Deceased wrote his sister as follows: "Nina: I wrote you yesterday hastily. Answer my letter at once. I want to know everything about mother, and all about you,—your children. I have reached the point of perfect independence, pecuniarily. My health is probably ruined, and I want to anticipate possibilities. You and your children get everything. Your boy I want given the best of educations. I would like him to go to Harvard. * * * Write me. As soon as I possibly can, I will be in Savannah." *Held*, that the letter was not testamentary in character, and made no disposition of the estate of the deceased.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

In the matter of the estate of C. B. Richardson, deceased. From a judgment denying a petition for the probate of the will, and refusing to allow letters of administration with the will annexed, Mrs. Hardee appeals. Affirmed.

Smith, Winder & Smith, for appellant. *Wells, Monroe & Lee*, for public administrator. *A. J. King*, for absent heirs and contestants.

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[1] Article 6, § 19

FOOTE, C. This appeal is taken from a judgment or decree denying the petition for the probate of a will, and refusing to allow letters of administration with the will annexed to be issued. That which is propounded as a will is a letter written and sent in due course of mail by the deceased in his life-time from Los Angeles, Cal., to his sister, Mrs. Hardee, in Savannah, Ga. It reads thus: "Los Angeles, Cal., October 1, '90. Nina: I wrote you yesterday, hastily. Answer my letter at once. I want to know everything about mother, and all about you,—your children. I have reached the point of perfect independence, pecuniarily. My health is probably ruined, and I want to anticipate possibilities. You and your children get everything. Your boy I want given the best of educations. I would like him to go to Harvard. I would like to have him a lawyer. Don't bring him up a prejudiced southerner, but teach honor,—make it dearer than life, and he must, with the blood in his veins, be a man. Write me. As soon as I possibly can, I will be in Savannah. BROTHER." We think it necessary to determine but one point made by the appellant, which is that the second conclusion of law is not warranted by the findings. It reads thus: "That said document is not testamentary in its character, and makes no testamentary disposition of the estate or property of said deceased." The language of the letter, which is propounded as the last will and testament of the deceased, is not, to our minds, testamentary in its character. There is nothing in the circumstances and surroundings of the writer which unmistakably evince that it was his intention that the letter in question should be a testamentary disposition of his estate to his sister Nina and her children. It may be that he wished to be informed of some fact or facts before he made a will, for in this letter he shows a desire to hear from his sister at once in answer to a letter written the day before. He was not *in extremis*, nor is there anything to show that he contemplated immediate or very proximate dissolution, which might necessitate a final disposition of his estate. Again, even in a document such as this, if intended as a will, it would be likely that some expression in the shape of "I wish or I desire" my property to go to such or such a person, would very naturally be used if the intention existed to make the instrument a testamentary disposition, rather than to say, "You and your children get everything;" for the first expressions would show a disposition at that time to have his estate go to certain persons. The last expression might be used in a letter like this, by one who had already made a formal will, which may have been lost or destroyed, or might be with reference to making a formal will,—that is, "You and your children get everything by a formal will," or "will get everything by a will I shall make." This construction of the language is as consistent with a proper interpretation of it as is that contended for by the appellant. It is not for courts to declare that to be a testamentary disposition of his estate, when it does not clearly appear that such was the intention of the individual executing it. The court below was justified, under the findings, in this conclusion of law. We advise that the judgment or decree be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment or decree is affirmed.

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94 Cal. 73

PEOPLE *ex rel.* WILLIS *et al.* v. HOWARD *et al.* (No. 14,447.)

(*Supreme Court of California.* March 26, 1892.)

PUBLIC LIBRARIES—GOVERNMENT.

In proceedings to determine the right to manage and control a public library, it appeared that, prior to March 28, 1878, there had been a private voluntary association which had established and maintained in L. a library for the use of its members. In 1874 an act was passed providing for the establishment of a public library in L., and by its provisions the library was controlled by nine regents, who were elected by the city council. March 28, 1878, the act was repealed by the city charter, and the mayor and council were constituted trustees of the library. March 28, 1878, the city council elected a board of regents, and April 6th the board duly organized, and the same day the library association made over to the public library thus organized all the books belonging to the association. *Held*, that this library did not come under Acts 1880, p. 231, which put in the charge of trustees therein provided for all libraries established by authority of that act.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Proceedings on the relation of F. R. Willis and others against F. H. Howard and others to determine the right to manage and control the Los Angeles public library. From a judgment for defendants the relators appeal. Affirmed.

W. H. H. Hart, Atty. Gen., and *Willis & Appel*, for appellants. *F. W. Howard*, for respondents.

TEMPLE, C. The relators were elected trustees of the public library of the city of Los Angeles, December 1, 1890, under an act of the legislature passed in 1880, entitled "An act to establish free public libraries and reading-rooms." The defendants were appointed by the city council, as provided by the city charter adopted and approved in 1889. Whether the city charter or the act of 1880 controls is the only question involved. We find in respondents' brief what purports to be the opinion of the learned judge of the trial court, which we approve and recommend for adoption as the opinion of this court, in accordance with which we think the judgment should be affirmed. The opinion is as follows:

"This is a proceeding to determine whether the relators or the defendants have the right to manage and control the Los Angeles public library. The case is submitted to the court for decision upon the facts stated in the pleadings. On March 4, 1874, a special act was passed by the legislature, providing for the establishment of a public library in the city of Los Angeles. Acts 1873–74, p. 274. Under this law the present Los Angeles public library was first organized and established. By its provisions the library was controlled by nine regents, who were elected by the council. This act of 1874 was repealed by the city charter of 1878, and different provisions were made in the charter for the management and control of the library. The mayor and council were constituted the trustees of the library, and had the control and management thereof. The library continued to be managed according to the provisions of the charter of 1878, until the adoption of the charter of 1889. This charter provides that the library shall be continued in existence, and shall be managed by five directors, to be appointed by the mayor, and confirmed by the council. The defendants were duly appointed directors of the library under the last charter, and ever since then have been, and still are, as such directors, in the control and management of the library. The constitution of 1879 provides that 'cities heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws.' Article 11, § 6. In 1880 a general law was passed, entitled 'An act to establish free public libraries and reading-rooms.' It contains the following provisions: 'Sec. 2. The municipal authorities of any incorporated city of this state are authorized and empowered, by a resolution duly passed for that purpose, to levy and collect, as in other cases, annually, a tax, not to exceed one mill on the dollar, for the purpose of establishing and maintaining in such city free public libraries and reading-rooms, and purchasing such books, journals, and other publications as may be necessary therefor.' 'Sec. 5. In a city of less than one hundred thousand population five trustees shall be elected at the same time, and in the same manner, as the other town officers are elected. They shall hold office the same length of time, to carry into effect the provisions of this act.' 'Sec. 8. The trustees of any library or reading-room established or acquired by authority of this act shall take charge of the same, and of all real and personal property thereunto belonging.' 'Sec. 14. An act entitled "An act to establish and maintain free public libraries and reading-rooms," approved March 18, 1878, is hereby repealed. All libraries and reading-rooms heretofore established by authority of the last-named act, in any city, shall be turned over to the charge, custody, and administration of such trustees as may be constituted or appointed therein under the provisions of this act.' Acts 1880, p. 231. The relators were duly elected trustees, under the provisions of the act of 1880, aforesaid, at the last city election, and have duly qualified as such trustees, and upon that ground claim the right to the control and management of the public library in question.

"The organization of the library under the act of 1874 did not take place until March 28, 1878. Prior to that time there had been a private voluntary association, known as the 'Los Angeles Library Association,' which had established and maintained a library, not for the public, but for the use of its members. On March 28, 1878, the city council elected a board of regents, as provided by the act of 1874, and on April 6, 1878, this board duly organized, and the same day the library association made over to the public library thus organized all the books belonging to the association. Thus began the present free public library. It was not therefore established under the authority of the act of March 18, 1878, nor under the act of 1880. The relators insist that, the act of 1880 being a general law, its provisions apply to all libraries existing in cities as public libraries, and that trustees elected under the act of 1880 have the legal right to manage and control all public libraries in such cities, and that, therefore, they have the legal right to the control of the Los Angeles public library. The defendants contend that the act of 1880 applies solely to libraries established under its provisions, and not to those existing prior to 1880, and established prior to that time under special laws and charters. At the time this library was established as a public library, there was no constitutional inhibition of the enactment of local or special laws for such purposes. The provision of the present constitution, making cities and charter cities subject to general laws, does not apply to this case; for it is manifest that they can be subject only to such general laws as, by their terms or by necessary implication, are made to apply to cities, or generally, throughout the state. So also it is clear that public libraries in cities are not necessarily subject to a general law which, by its own terms, does not apply to all libraries generally, but only to a particular class of libraries. In order to be subject to such a law, they must be of the class included in the law. The act of 1880 does not apply to all libraries, but only to such as may be established under its provisions. It does not give to the trustees elected under it any powers over other libraries. The language used is, 'The trustees of any library established or acquired by authority of this act shall take charge of the same.' They are not authorized to take charge of any library established under the act of 1874. Therefore the Los Angeles public library is not affected by the act of 1880, because it is not of the class mentioned in that act. Where there is no general law on a given subject to which the charter relates, the provisions of the charter must be allowed to prevail. The defendants being rightfully appointed under the provisions of the charter, they are entitled to the charge and control of this library. The judgment will therefore be in favor of the defendants."

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

94 Cal. 69

In re GROOME'S ESTATE. (No. 14,666.)

(*Supreme Court of California.* March 26, 1892.)

PUBLIC LANDS—HOMESTEAD ENTRIES—CREATION OF TRUST.

1. Under Rev. St. U. S. § 2290, which provides that a person applying for the benefit of the homestead law shall make affidavit before the register or receiver "that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person," an agreement by a partner to file on land under the United States homestead law, and take the title for the benefit of the partnership, is illegal and void.

2. Where a partner files on land and afterwards make a parol agreement that the land shall belong to the partnership, such agreement, not being in writing as required by Civil Code, § 852, does not create any trust, or vest in his partners any estate in the land.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Petition of Julia Groome, widow of Thomas B. Groome, deceased, praying that certain land might be set apart as a home for herself and minor daughter. Petition denied. Petitioner appeals. Order reversed.

F. A. Dorn and *Wm. Shipsey*, for appellant. *Wilcoxon & Bouldin*, for respondents.

BELCHER, C. In July, 1886, Thomas B. Groome, under the homestead laws of the United States, filed a homestead claim upon 160 acres of public land in San Luis Obispo county. At the time of filing his claim, he was living on the land filed upon with his family, and continued to do so thereafter till he died. In 1887 he commuted his homestead, and paid the government for the land, and in December, 1890, a government patent therefor was issued and delivered in his name. In May, 1890, he died intestate, leaving surviving him his widow, Julia Groome, and one daughter, then 16 years of age. In August, 1890, letters of administration upon his estate were duly issued to his widow, who qualified and entered upon the discharge of her duties. In December, 1890, appraisers of the estate were duly appointed, and in May, 1891, an inventory and appraisement of all the property of the estate were made and returned to the court. This inventory included the 160 acres of land above mentioned, and the tract was appraised at the sum of $800, its then cash value. During his life-time no homestead was ever selected by the decedent or his wife under the laws of this state. On May 29, 1891, the widow presented and filed in court her petition, alleging that at the time of his death her deceased husband was the owner of the said 160 acres of land, and that the same was then community property of herself and husband, and praying that the court make an order selecting, designating, and setting apart the said real property as a home for the use of herself and minor daughter. To this petition one L. T. Almstead filed written opposition, and alleged therein "that the real property described in said petition was owned by and belonged to said deceased, this opponent, and one John Mintern, who were partners at the time said decedent died; that the same was and is now partnership property; * * * that said decedent only had a five-sixteenths interest in said partnership." Wherefore he prayed that the prayer of the petition be not granted. When the petition came on to be heard, the petitioner introduced her proofs, including the United States patent to her deceased husband, dated December 29, 1890, and rested. Almstead was then allowed, against the objection of petitioner, to testify as follows: "I know the land described in the petition in this proceeding. In the year 1884 it was public land of the United States. It was claimed by the Atlantic & Pacific Railroad Company. Levi Sprague had possession, and had a fence on about 40 acres of it. I bought Sprague's right and possession. Shortly after that I formed a partnership with Thomas B. Groome, now deceased, and John Mintern, for the purpose of acquiring land and stock-raising. My interest in the partnership was eight-sixteenths, Groome's five-sixteenths, and Mintern's three-sixteenths. I turned this land into the partnership, and we placed thereon the house, fencing, and other improvements now on the land. In the year 1886 we found out that the Atlantic & Pacific Railroad had no right to the land, and we copartners then agreed that Groome should file on it under the United States homestead law, and get the title for the benefit of the partnership,—the partnership to pay all expenses. Groome then moved onto the land, and in July, 1886, filed on it under the United States homestead law. In the year 1887 Groome commuted said homestead and paid the government for the land out of the partnership funds, and he charged the money so paid to the partnership on the firm books; and thereafter, in settlement of our accounts, Groome agreed that the land belonged to the partnership. Since the year 1884 the partnership has used all of said land for partnership purposes, except the dwelling-house and buildings and garden. We cultivated a portion each year, and the remainder we used for pasture. Said partnership is solvent, having property at the value of about $15,000, and being indebted in the sum of $1,400." The court found the facts to be as above set forth, and as testified to by Almstead, and then as a conclusion of law found: "That at the time of his death said Thomas B. Groome was not the owner of said land. That said land was not the community property of said deceased and his wife, Julia. That said Thomas B. Groome, at the time of his death, held the legal title to said land in trust for said partnership composed of Almstead, Mintern, and Groome; and said partnership was then and is now the owner of the equitable title to said land." An order was accordingly entered denying the prayer of the petition, from which, and from an order refusing a new trial, the petitioner appeals.

It is very clear, we think, that the rulings complained of were erroneous. Section 2290 of the Revised Statutes of the United States provides that a person applying for the benefit of the homestead law shall make affidavit before the register or receiver "that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." If, therefore, Groome, before or at the time of making his application to file on the land, agreed with his partners to "file on it under the United States homestead law and get the title for the benefit of the partnership," the agreement was in contravention of the spirit and policy of the law, and hence illegal and void. Kreamer v. Earl, 91 Cal. 112, 27 Pac. Rep. 735. And if, after Groome acquired the title, he made a parol agreement in settlement of the accounts "that the land belonged to the partnership," such agreement did not create any trust or vest in his partners any estate in the land. Civil Code, § 852.

Again, as the decedent had the apparent legal title to the land and was residing on it at the time of his death, and it was inventoried and appraised as a part of his estate, the question of adverse ownership could not be considered in a proceeding like this, but must be tried and determined in another forum. Estate of Burton, 63 Cal. 36; Id., 64 Cal. 428, 1 Pac. Rep. 702. We advise that the orders appealed from be reversed, and the cause remanded for further proceedings.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders appealed from are reversed, and the cause remanded for further proceedings.

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94 Cal. 77

FIRST NAT. BANK OF SAN LUIS OBISPO v. BRUCE *et al.* (No. 14,433.)

(*Supreme Court of California.* March 26, 1892.)

HOMESTEAD—LIABILITY TO SALE FOR MORTGAGE DEBT.

Civil Code, § 1241, subd. 4, provides that the homestead shall be subject to sale in satisfaction of judgments obtained on debts secured by mortgage on the premises executed and recorded before the declaration of homestead was filed for record. *Held*, that premises occupied by a husband and wife were not subject to sale on execution in satisfaction of a judgment founded on a debt secured by mortgage thereon which was executed by the husband before, but not recorded until after, a declaration of homestead had been made by the wife, even though such declaration was made by her with full knowledge of her husband's intended removal from the premises, and with the intention on her part to remove therefrom with him.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Action by the First National Bank of San Luis Obispo against A. L. Bruce and I. A. Bruce on a note and mortgage. Judgment for plaintiff against A. L. Bruce, and in favor of defendant I. A. Bruce against plaintiff. Plaintiff appeals. Affirmed.

W. H. Spencer, for appellant. *John A. Kimball* and *S. M. Swinnerton*, for respondents.

FITZGERALD, C. On April 12, 1889, defendant A. L. Bruce mortgaged the premises described in the complaint, and valued at $2,000, to secure the payment of a certain promissory note executed by him to plaintiff for the sum of $500. On April 28, 1890, said mortgage was duly recorded. On April 7, 1890, defendant I. A. Bruce, wife of said A. L. Bruce, who, with her husband and children, was then, and for two years prior thereto had been, actually residing on and using said premises (which were common property) as a home, declared a homestead thereon, without any knowledge on her part, if that be material, at the time of such declaration, that they had been previously mortgaged by her husband to plaintiff. In July, 1889, the defendant A. L. Bruce made and filed his homestead application and claim under the homestead laws of the United States, on certain land adjoining said premises, and, in February, 1890, he hauled several hundred feet of lumber on said claim, with which he afterwards built a house thereon, commencing the construction thereof about the 1st of March, and completing the same between the 10th and 17th of April following. On April 17, 1890, defendants moved with their children and household goods from the land described in the complaint into the house built on the United States homestead claim referred to, where they continued thereafter to reside and make their home for about five months, when they abandoned the United States homestead claim, and returned to the land described in the complaint, where they have ever since resided. It further appears that at the time the defendant I. A. Bruce filed her said declaration of homestead on said premises, she had full knowledge of all her husband's acts in relation to said United States homestead claim, and that she intended to move with him therefrom to said claim, which she afterwards did on April 17th following. This action is brought to foreclose the above-mentioned mortgage, and I. A. Bruce, the wife, is joined as a party defendant. Judgment was given in favor of plaintiff against defendant A. L. Bruce for the full amount of the note, with interest and costs, and in favor of the defendant I. A. Bruce against plaintiff for costs. The appeal is taken by plaintiff upon the judgment roll alone.

The only question presented by this appeal is whether, upon the facts, as above stated, the premises in question are subject to execution or forced sale in satisfaction of a judgment or decree founded on a debt secured by mortgage thereon, executed by the husband before, but not recorded until after, the declaration of homestead was made by the wife, such declaration having been made by her with full knowledge, at the time, of her husband's intended removal from the premises, and with the intention on her part to remove therefrom with him. Section 1241 of the Civil Code provides that "the homestead is subject to execution or forced sale in satisfaction of judgments obtained * * * (4) On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." Mr. Justice McFARLAND, in construing the foregoing subdivision of said section, in Bank v. Gerry, 91 Cal. 95, 27 Pac. Rep. 531, uses the following language: "It makes no difference that the mortgage (if it was a mortgage on the land) in the case at bar was executed by the husband before the legal title vested in the wife; the mortgage was not recorded 'before the declaration of homestead was filed,' and therefore cannot be enforced against the wife's claim of homestead. And the wife has a right in the homestead which she can protect, not only against the husband's creditors, but against the husband himself. The respondent could have protected his mortgage by simply recording it. It is simply a matter of statutory provision." But it is contended by appellant that there should have existed, at the time of such declaration, "an honest intention on the part of the husband and wife to make the premises described in the declaration their permanent home. Neither entertained any such intention. They were then almost ready to remove to adjoining lands for the purpose of acquiring title thereto under the homestead laws of the United States. Ten days after filing the declaration they did remove to the adjoining land with their household goods, and there made their home until after the commencement of this action." At the time the declaration was made, the claimant, with her husband and children, actually occupied and used the premises in question as a home. It therefore follows that her right under the statute to declare a homestead thereon was absolute and unquestionable; and as she exercised it, as she had the right to do, independently of her husband, for their joint benefit, she cannot be held to answer for his acts and declarations to take up a residence on some other land. Assuming, then, the existence of the other necessary conditions, her declaration under these circumstances created a valid and subsisting homestead, under our statute, and her right to make such declaration was in no way affected by her intended removal, at the time, with her husband, which she afterwards carried into effect; and her removal in pursuance of such intention was but the performance of a solemn duty imposed on her by her obligations as a wife, and in this respect she was subject to his control. Our homestead laws were wisely intended to empower the wife to preserve and protect the home for the joint benefit of herself and husband, not only against the husband's creditors, but "against the husband himself," and this she would be powerless to effect if, by performing her duty as a spouse, she could be held to account for the husband's acts and declarations showing an intention to the contrary of that evidenced by her solemn declaration in writing. The residence of the husband is made by law the residence of the wife. According, then, to appellant's contention, if the husband intended, when the wife made her declaration, to move from the premises and take up his residence elsewhere, such declaration would be invalid, because, as she intended to perform her duty as a wife by moving with him, she could not, in the face of such a legal impediment, "have honestly intended to occupy them as a permanent home." This position is totally at variance with the letter and spirit of the homestead laws. That they subsequently abandoned the adjoining land, and returned to the premises occupied by them when the homestead was declared, furnishes a striking illustration of the wisdom and policy of the law in thus enabling the wife, independently of the husband, to preserve and protect the home, not only against the husband's creditors, but "against the husband himself." The court, in finding, if such finding was necessary, that the defendants intended to remove from the premises when the declaration was made, and that they afterwards carried such intention into effect, evidently meant to say that, as the husband intended to and did remove from the premises, the wife, as was her duty, also intended to and did remove with him.

The judgment should be affirmed, and we so advise.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(94 Cal. 128)

YOUNG v. BRADY. (No. 14,455.)

(*Supreme Court of California.* March 28, 1892.)

RECEPTION OF EVIDENCE—REBUTTAL—IMPEACHMENT OF WITNESS.

1. In *assumpsit*, where the issue was whether plaintiff paid money for defendant at his request, and whether the latter promised to repay him, defendant denied on cross-examination having any recollection of certain admissions as to such indebtedness. *Held*, that the testimony offered by plaintiff in rebuttal was properly excluded, as it was part of his original case.

2. As evidence to impeach defendant, it was inadmissible, no proper foundation having been laid by calling his attention to the circumstances under which the alleged admissions were made.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

Assumpsit by A. E. Young against Francis Brady. Judgment for defendant. Plaintiff appeals. Affirmed.

Hendrick & Younkin and *A. H. Sweet*, for appellant. *Parish, Mossholder & Lewis*, for respondent.

VANCLIEF, C. Action of *assumpsit* for money alleged to have been loaned by plaintiff to defendant. Judgment for defendant, from which, and from an order denying his motion for a new trial, the plaintiff brings this appeal.

The evidence for plaintiff tends to prove money paid or expended for the defendant, rather than money loaned; but no point is made on this ground. Whether the money had been paid for the defendant, or at his request, and whether he had promised to repay it, were the principal questions contested at the trial. The defendant testified that no money had been paid or expended by plaintiff for him, or at his request. On cross-examination he testified that he was at plaintiff's house probably half a dozen times while he was building a house on a piece of public land, which he had entered as a pre-emptioner, in the vicinity of plaintiff's residence, and that he was at plaintiff's house on the evening after he entered the land. He was then asked the following question: "Do you recollect having any conversation there with Mr. Young, [plaintiff] in the presence of Miss Green, during this time, in reference to how thankful you were that he had secured this claim [the pre-emption claim] for you, and that you were going to reimburse him as soon as you could? Answer. No, sir; never had such a conversation." The plaintiff called Miss Green in rebuttal, who testified that she had lived with plaintiff since she was a child, and recollected the time defendant took possession of the land; that she had heard conversations between plaintiff and defendant, at plaintiff's house, at different times, within 10 days after defendant took possession of the land, about that land, or the purchase of land. She was then asked whether, at any of those times, she heard a conversation between them "in reference to repaying Mr. Young the money Young had advanced to Mrs. Barton, * * * wherein the defendant stated that he was exceedingly thankful to Mr. Young for obtaining for him the land, and that he would endeavor to pay him the money which plaintiff had paid to Mrs. Barton as soon as he possibly could, at least by the time he would make his proof upon the land;" and asking the witness to confine herself "to the conversation in reference to his thankfulness to Mr. Young for securing the land, and that he would pay the money that he had paid Mrs. Barton as soon as he could, or by the time that he would make his proof upon the land." Upon objection by defendant's counsel, the court excluded this proffered testimony, on the grounds (1) that, as admissions of the defendant they were part of plaintiff's original case, which should not have been withheld for the purpose of rebutting the evidence on the part of the defendant; and (2) that, as evidence to impeach the defendant, the proper foundation had not been laid for its admission. The propriety of this ruling is the only question presented. The court was not asked to permit the plaintiff to reopen his case for the purpose of introducing this testimony; therefore the court did not err in excluding it as a part of plaintiff's original case. Kohler v. Wells, 26 Cal. 607; Water Co. Crary, 25 Cal. 506; sections 607, 2042, Code Civil Proc. As evidence to impeach the defendant, a proper foundation had not been laid for the admission of any material part of it. The defendant had not been asked whether in any conversation with plaintiff, in the presence of Miss Green, or at plaintiff's house, he had said anything about reimbursing or repaying plaintiff for any money advanced or paid by plaintiff to Mrs. Barton; nor anything as to the nature of the favor or service the plaintiff had done, for which he (defendant) had said he was thankful. That the defendant was thankful for some undisclosed favor or service in assisting him to secure his land claim, and for which he intended "to reimburse" plaintiff, was wholly irrelevant to any material issue. It had no tendency to prove that plaintiff had loaned money to defendant, or paid or expended money for or on account of the defendant; and therefore the answer of the defendant to the question of plaintiff's counsel as to this collateral irrelevant matter was conclusive upon the plaintiff. Pierce v. Schaden, 59 Cal. 540. I think the judgment and order should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

DE HAVEN, J., did not participate in the foregoing decision.

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94 Cal. 162

MOSGROVE v. HARRIS. (No. 14,481.)

(*Supreme Court of California.* March 30, 1892.)

FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—REPLEVIN OF ATTACHED PROPERTY—EVIDENCE.

1. One L. sold plaintiff a lot of hogs, which were on his ranch in another county than that in which the sale was made, the ranch being in the possession and occupancy of L. Plaintiff never saw the hogs, but had them inspected by his agent before purchasing them. After the sale, and until they were attached as the property of L., they remained on the ranch in charge of the same persons who had charge of them before the sale, though they were requested after the sale to take charge of them for plaintiff, and consented to do so. *Held*, that the court was warranted in finding the sale fraudulent as against L.'s creditors, on the ground that there was not an immediate delivery and actual and continued change of possession.

2. In replevin for property seized by defendant as sheriff on attachment against one from whom plaintiff had purchased the property, it being claimed that the sale was fraudulent, defendant may, to show the indebtedness of the seller to the attaching creditor, introduce the judgment in the action by such creditor against the seller, though the service on the seller therein was by publication, since the judgment is used to effect the attached property only.

In bank. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Action by one Mosgrove against one Harris to recover the possession of personal property. Judgment for defendant. Plaintiff appeals. Affirmed.

C. C. Stephens and *Z. B. West*, for appellant. *Victor Montgomery*, for respondent.

SHARPSTEIN, J. Action to recover the possession of certain personal property. Plaintiff claimed and obtained the delivery of the property to him as provided in chapter 2, tit. 7, Code Civil Proc. The defendant in his answer denies that plaintiff is the owner or ever was in the possession, or entitled to the possession, of said personal property; and alleges that he, (defendant,) as sheriff of the county of Orange, duly levied upon and attached said property under and by virtue of a writ of attachment duly issued out of the superior court of said county, in an action wherein the Commercial Bank of Santa Ana was plaintiff, and John Leberry and Claude E. Weber were defendants. The court found that on the 1st day of March, 1890, John Leberry was the sole owner of all the personal property described in the complaint, and that on the 5th day of March, 1890, he sold said property to the plaintiff for a valuable consideration. "That such sale was not followed by an immediate or any delivery of said property to said plaintiff, and was not followed by an actual and continued change of possession, or any change of possession whatsoever, but that the possession of said property remained in the possession of said Leberry and his employes." On the 13th day of March, 1890, the defendant, as such sheriff, and under and by virtue of such writ of attachment, levied upon, attached, and took into his possession the property described in plaintiff's complaint as the property of John Leberry, the defendant in the said writ, who at the time of such taking by the defendant herein had the control and possession of said property until the defendant herein, as sheriff, took the same from the possession of said John Leberry, his agents and employes. On the 18th day of March, 1890, plaintiff demanded of defendant the possession of said property, and at the same time exhibited a bill of sale dated March 1, 1890, from John Leberry to plaintiff; but defendant refused to deliver the possession of said property to plaintiff, and on the 21st day of March, 1890, plaintiff commenced this action to recover the possession of said property, and made an affidavit, and executed and filed an undertaking, and procured an order to the coroner of said county to take from defendant said property, and delivered the same to the said coroner, who on or about the 25th day of February, 1890, took said property from the possession of defendant, and delivered the same to the plaintiff herein, who still holds and retains the same. Defendant in his answer claimed the redelivery to him of said property, and demanded the return or its value in case a redelivery could not be had. The value of said property is found to be $620. As conclusions of law the court found: (1) That the sale of the property described in plaintiff's complaint from John Leberry to the plaintiff was fraudulent, and therefore void as to said Commercial Bank of Santa Ana; (2) that the defendant herein is entitled to the return of said personal property, and to recover the possession thereof from the plaintiff; and that, in case such return cannot be had, he is entitled to recover the sum of $620.50, the value thereof, from plaintiff, together with costs of suit; and judgment was entered accordingly. Plaintiff moved for a new trial on a statement. Said motion was denied, and from said judgment and order denying said motion for a new trial plaintiff appeals.

Appellant's main contention here is that the finding of the court "that such sale [by Leberry to plaintiff] was not followed by an immediate or any delivery of said property to said plaintiff, and was not followed by an actual and continued change of possession or any change of possession whatsoever, but that the possession of the property in the said Leberry, his agents and employes," is not justified by the evidence. There is evidence tending to prove that on the 1st day of March, 1890, John Leberry sold to plaintiff the personal property in controversy, to-wit, 159 hogs. The sale of the property was negotiated at the city of Los Angeles, but the hogs were on a ranch near Newport, in Orange county, and the ranch was in the possession and occupancy of Leberry, the owner of the hogs. The plaintiff never saw the hogs, but had them inspected by his agent Lowe, before purchasing them. The hogs after the sale remained upon the ranch of Leberry in charge of the same persons who had charge of them before the sale, although they were requested after the sale to take charge of them for plaintiff, and consented to do so and did so until the hogs were attached by the defendant. We think the evidence of immediate delivery and actual and continued change of possession of the property in this case much weaker than it was in Engles v. Marshall, 19 Cal. 320, therefore we cannot disturb the finding of the court upon that issue.

At the trial the defendant offered "in evidence the judgment in the case of Commercial Bank v. John Leberry, No. 152, in the superior court of the county of Orange, including the complaint, summons, affidavit of service of the summons, and judgment, for the purpose of showing indebtedness of said Leberry to the said bank." To the introduction of said judgment in evidence the plaintiff objected "upon the ground that, as against him, the judgment, having been obtained by the publication of summons in an action to which he was not a party, could not prove, or tend to prove, any indebtedness of Leberry to the said bank, that is, as against the plaintiff, and as incompetent, irrelevant, and immaterial; and further, that, even if personal service had been made upon Leberry, the judgment roll would not, as against the plaintiff, tend to prove any indebtedness of Leberry to the bank." The objection was overruled, and plaintiff excepted. A judgment entered in an action in which the service of summons is by publication, in any action in which property is attached, cannot be used as evidence in another proceeding not affecting the attached property. This action does affect the attached property, and nothing beyond it; therefore the judgment was admissible in evidence. The objection to the introduction of the affidavit for the writ of attachment was properly overruled. Judgment and order affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

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94 Cal. 195

MARTIN *et al.* v. LLOYD *et al.* (No. 14,380.)

(*Supreme Court of California.* March 30, 1892.)

DEED—DESCRIPTION—BONA FIDE PURCHASER.

1. In November, 1884, the owner of a tract of land, including the strip in dispute, contract-

ed to sell a portion of the land to D. and W. A part of the description of the land mentioned in the contract was as follows: "Bounded on the east by the road, 16 feet wide, between the lands of Price and the party of the first part, and a continuation of the west line of said road northerly to the *barranca*," etc. D. entered into possession of the land, but subsequently, after some litigation over the contract, judgment was rendered in the grantor's favor. In June, 1886, the owner entered into a contract with R., and three year later conveyed the piece to her by a description substantially the same as that in the contract with D. and W. Plaintiffs derive title from R. In September, 1886, the owners of the large tract sold it to one of defendants, "excepting a tract of land heretofore agreed to be conveyed by L. Snodgrass to D. and W., known as the 'Dunlap Place,' particularly described as follows: 'Commencing at the bridge at the Graveyard *barranca* on Telegraph road; thence running east along the N. line of said road to S. W. corner of Mrs. Price's land; thence N. to Graveyard *barranca;* thence down center of same to place of beginning.'" *Held*, that the language used in the deed to defendant showed an intention to except the "Dunlap Place," and that the latter part of the description was not intended to and did not limit the boundaries of that place.

2. The fact that the contract to convey to D. & W. was not recorded until after defendant's purchase, was not material, since the latter was put on inquiry as to the "Dunlap Place" by his contract and deed.

In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action to quiet title by S. C. Martin and others against Lewis M. Lloyd and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Blackstock & Shepherd, for appellants. *J. Hamer* and *W. H. Wilde*, for respondents.

McFarland. This is an action to quiet title. Judgment went for plaintiffs, and defendants appeal from the judgment and from an order denying a new trial.

The land in dispute is a narrow wedge-shaped piece, with the point to the south, and widening as it runs northerly. The northerly end of the piece is a certain ravine, called the "San Juan" or "Graveyard" *barranca*. On the east side of the strip in dispute there is a piece of land called the "Price Tract," which commences at the lower or southerly end of the land in dispute, and runs along it northerly about one-third of the distance up to the *barranca*. Along the west side of the Price tract there is a road 16 feet wide, which stops at the northerly line of said Price tract. Now, the contention of plaintiffs is that the easterly line of the land in contest is the westerly line of said road as far as it extends, and a prolongation of said line northerly to the *barranca*. The direction of such line would be several degrees east of north. The defendants contend that the true easterly line of the land in contest commences at the south-west corner of the Price tract, on the easterly side of the road, and runs diagonally across the said road, due north, to the said *barranca*.

It is true, as appellants contend, that this is not an action to reform a deed; and, being an action to quiet title, plaintiffs were called upon to show title in themselves. And the question to be determined was whether or not the exception in a certain deed to defendant Lewis M. Lloyd included the land in contest. On November 28, 1884, one Larkin Snodgrass owned a large tract of land,—4,280 acres,—including the land in contest in this case; and on that day he entered into a written contract to sell a certain part of said large tract to Alice L. Dunlap and Susan A. Watkins. The part of the description of the land mentioned in said contract which it is necessary to here state is as follows: "* * * Bounded on the east by the road, 16 feet wide, between the lands of Price and the party of the first part, and a continuation of the west line of said road northerly to the *barranca* known as the 'Graveyard *Barranca;*' thence southerly along the center of said *barranca*, or corporate limits to the town of San Buenaventura, to the northerly line of the public road; and thence easterly along said road to the westerly line of said road between the lands of the party of the first part and lands of Price." Thereupon Mrs. Dunlap entered upon the full possession of the land described in said contract, resided upon and cultivated it, and it became and was commonly known as "The Dunlap Place." Some time afterwards there was litigation over this contract, which finally terminated in favor of Snodgrass; and on June 5, 1886, Snodgrass and Cooper and Brooks, who then each owned one-third of the large tract, entered into a contract with Mary E. Redrup to sell her the said Dunlap place. The description in the contract with Redrup was substantially the same as that in the contract with Dunlap; the part in the description in the contract with Redrup material here being as follows: "* * * To the west line of the road running between lands of the parties of the first part and Price, and thence northerly along the west line of said road and the prolongation of said line to the said San Juan *barranca*." The land thus agreed to be sold to Redrup was identical with the land formerly agreed to be sold to Dunlap and Watkins, and known as "The Dunlap Place." On May 13, 1889, Snodgrass, Brooks, and Cooper conveyed by deed to Mrs. Redrup the land mentioned in said tract,—the description in the deed being the same as that in the contract; and on August 4, 1889, Mrs. Redrup, by deed with the same description, conveyed said land to the plaintiffs in this action. The said contract between Snodgrass and Dunlap and Watkins was recorded June 14, 1887; and the said contract with Mrs. Redrup was recorded November 1, 1887. The deeds above mentioned were recorded immediately after their execution.

If, therefore, the foregoing facts were the only facts to be considered in the case, it is clear that the easterly line of the plaintiffs' land is the westerly line of the 16-foot road adjoining the Price tract, extended northerly to the said *barranca*. But there are other facts upon which appellants base their contention. On September 8, 1886, Snodgrass, Brooks, and Cooper entered into a written contract with the defendant Lewis M. Lloyd, by which they agreed to sell to him the said large tract of land herein first described, excepting and reserving, however, several pieces of land which had theretofore been conveyed, or which the grantors had contracted to convey; and among such exceptions was the said Dunlap place, described simply as "about 60 acres, known as the 'Dunlap Tract.'" Three days thereafter, on September 11, 1886, they executed a deed of conveyance of said large tract to said Lloyd in pursuance of said contract, and in the deed the exception of the Dunlap tract was as follows: "Also excepting a tract of land heretofore agreed to be conveyed by L. Snodgrass to Mrs. Alice Dunlap and Mrs. Watkins, known as the 'Dunlap Place,' particularly described as follows: 'Commencing at the bridge at the Graveyard *barranca* on Telegraph road; thence running east along the N. line of said road to S. W. corner of Mrs. Price's land; thence N. to Graveyard *barranca;* thence down center of same to place of beginning.'" If this description had followed the contract, and had stopped with the words "Dunlap Place," there would have been no difficulty as to its meaning. But it is contended by appellants that the latter part of the description controls the first part; that the words "to S. W. corner of Mrs. Price's land" carries the line across the road; and that "thence N. to Graveyard *barranca*" carries the line running northward diagonally back across the road in a course due north to the *barranca.* In the absence of proof whether or not the 16-foot road was upon, and, therefore, a part of, the Price tract, it might be that the grantor, by the phrase "S. W. corner," meant a point on the west side of the road, in which case the descriptions in the Lloyd deed and the Dunlap contract would be substantially the same. But, passing that uncertainty, and admitting that by the S. W. corner was meant a point on the east side of the road, still it is by no means clear that "thence N." means "due north." Assuming that "N.," as here used, stands for "north," and not for some other word expressing generally a northerly direction, still such a word means "due north" only when that construction is necessary for certainty, or when there is nothing else to show that it was not used in that strict sense. Irwin v. Towne, 42 Cal. 334; Devl. Deeds, § 1035. The main thing to be got at is the intention of the parties to the instrument; and, when the language used is not absolute, we must construe it with reference to the situation of the parties and the character and condition of the subject-matter of the contract. This 16-foot road runs nearly north and south; and if, as appellants contend, the grantors, in describing the land, arrived at a point on the east line of said road, it is almost impossible to believe that by the words "thence N. to Graveyard *barranca*" they meant a line due north, which would run diagonally through and across the road. It would be a much more reasonable construction to say that they meant northerly along the side of the road on which the line commenced; and under such a construction the plaintiffs would get what they claim, and a strip the width of the road in addition. We say this much to show that the latter part of the description is uncertain; and the rule is clear that when a general description is certain, and a particular description uncertain, the former prevails.

There is no question that the general description is entirely certain. In the original Dunlap contract, the land is accurately bounded on the east by the 16-foot road and a continuation of the west line thereof,—a most probable and natural boundary. Afterwards, and down to the time of the deed to Lloyd, it was always known as the "Dunlap Place," having its eastern boundary on the road. The court so finds, and the evidence shows it. It was shown by the testimony of some of the grantors and others, that Dunlap was cultivating the Dunlap place "right up to that road" at the time of the sale to Lloyd, and that Lloyd then had actual knowledge where the said boundary was. And if he had not had such actual knowledge, as his contract and deed reserved the Dunlap place, he was put upon inquiry as to what that "place" was. We think, therefore, that the language used shows the intent of the parties to except the real Dunlap place, and that the latter part of the description was not intended to and does not limit the boundaries of that place. A reservation in a grant is to be interpreted in favor of the grantor, and the general rule is that, if two parts of a grant are irreconcilable, the first prevails. Civil Code, §§ 1069, 1070. The case at bar resembles very much the case of Haley v. Amestoy, 44 Cal. 132. The description involved in that case was: "All the undivided two-thirds (⅔) of all the lands known by the name of 'Rancho de San Vicente,' lying and being situated in the county of Los Angeles and state of California; the lands of said rancho being known and described as follows." Then follows a particular description of courses and distances, etc. This particular description, if adopted, would have left out a large portion of the rancho. The rancho, however, was well known by its name. The court, in its opinion, after some discussion of the question whether the particular description was uncertain, proceeds as follows: "But, however this may be, we are of the opinion that the rancho is well described by name, and that the particular description was not intended to be used in the sense of restriction. The language is, [giving the general description as above stated.] This language indicates that the dominant idea in the mind of the grantor when the deed was made was of the rancho of San Vicente as a whole, and not of the particular lines or marks by which it might be described. This being so, the deed must be held to convey two-thirds of the whole rancho, however erroneous may be the particular description." And, in accordance with the views expressed in that case, we think the language involved in the case at bar must be held as embracing the whole Dunlap place, notwithstanding anything contained in the attempted particular description. The conclusion of the court below in favor of respondents was, in our opinion, right.

The minor points in the case are not of sufficient importance to affect the correctness of the judgment. It was of no consequence that the contract to convey to Dunlap and Watkins was not recorded until after Lloyd's purchase. His contract and deed put him on inquiry, and were the equivalent of actual notice. The co-defendants of Lewis M. Lloyd, to whom he conveyed certain interests in the land, occupy a position no different from that of Lloyd himself. The court did not err in denying defendants' offer to introduce the judgment roll in a certain action of Snodgrass v. Parks, 79 Cal. 55, 21 Pac. Rep. 429, which was an action to foreclose a mortgage upon certain described premises. In the first place, plaintiff was not in privity with the parties to that action; and, in the second place, the complaint therein does not purport to describe the "Dunlap Place." And for the same reasons there was no error in sustaining plaintiff's objection to a certain homestead declaration made at one time by Mrs. Dunlap. Other rulings on admission of evidence are not necessary to be specially noticed.

The court reserved some objections to offered evidence, and ruled upon them at the final decision of the case; and appellants contend that such practice was erroneous, and a ground for reversal of the judgment. In Mayo v. Mazeaux, 38 Cal. 448, such practice was severely criticised, but was not held to be *ipso facto* a cause for reversal. The better practice is, no doubt, to rule upon questions involving the admissibility of evidence as they arise; but it happens sometimes that the determination of the merits of the case turns upon a question touching the relevancy or incompetency of certain offered evidence, and in such event it would be entirely proper for the court to take the question under advisement, where neither party could be prejudiced by such a course. On the other hand, the practice, which seems nowadays to be too freely indulged in, might in some cases seriously embarrass a party who, not knowing what the final ruling would be, could not determine what further evidence he should introduce. Therefore, whether such practice would be ground for reversal in any given case would depend upon the particular circumstances of that case. In the case at bar we cannot see that appellants were at all prejudiced by the practice complained of.

Judgment and order denying a new trial affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.; DE HAVEN, J.

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94 Cal. 212

PEOPLE v. MURRAY. (No. 20,848.)

(*Supreme Court of California.* March 31, 1892.)

MOTION FOR NEW TRIAL—TESTIMONY OF JURORS.

Where defendant was convicted of murder, and, on appeal, the supreme court reversed the order of the court below denying a new trial, with instructions to the lower court "to rehear the motion, allowing defendant to introduce the evidence excluded on the former hearing, and the people to rebut the same by other evidence, if it is desired," and the motion was again heard, and defendant was permitted to introduce evidence that the jury read newspaper articles during the trial which, it was claimed, tended to influence their verdict, the trial court properly permitted the people to show by the jurors themselves that the newspaper articles had not influenced their verdict. DE HAVEN and HARRISON, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

J. M. Murray was convicted of murder, and appeals from an order of the court below denying a new trial. Affirmed.

Hunsaker, Britt & Goodrich, for appellant. *Atty. Gen. Hart*, for the People.

FOOTE, C. The defendant was tried and convicted of the crime of murder. He appealed to this court from the judgment rendered in the premises, and from an order refusing a new trial. The judgment was affirmed, but the order denying a new trial was reversed. The case is reported in 85 Cal. 350-361, 24 Pac. Rep. 666, where it was said, among other things: "The order denying the defendant a new trial is reversed, with instructions to the court below to vacate the same and rehear the motion, allowing the defendant to introduce the evidence excluded on the former hearing, and the people to rebut the same by other evidence, if it is desired." Accordingly the motion for a new trial was again heard, and the evidence which showed that the jury had read newspaper articles during the trial which, it is claimed, had a tendency to influence their verdict, was allowed to be introduced in the defendant's behalf. The people then showed, over the objections of the defendant, by the jurors themselves, that the reading of those articles had not tended to nor had influenced them in any way prejudicial to the defendant in rendering their verdict. The admission of this rebutting evidence is urged by the defendant as prejudicial error; and upon the determination of that question the whole matter turns.

In the former decision this court said: "An attempt on the part of any person, whether through the medium of a newspaper, or otherwise, to influence a jury by any improper means to bring in a verdict against a defendant is a palpable violation of his right to a fair and impartial trial, and if it appears to the court to have had such an effect a new trial should be granted. There can be no doubt as to the intention or palpable effect of the articles above set out. It was the clear intention of the publishers of this paper to intimidate the jury, and, by abusing other jurors who had returned verdicts of acquittal, to induce them to find the defendant guilty, and impose upon him the extreme penalty of the law. Whether they had that effect upon the jury or not was a question that the defendant had a right to have determined by the court on his motion for a new trial. The defendant should have been allowed to make the proof, with leave to the people to show, if possible, that these particular articles were not read by the jury, or, if they were, that they were not in any way influenced by them. People v. Goldenson, 76 Cal. 328, 353, 19 Pac. Rep. 161." The evidence of the jurors was in support of their verdict, and it is plainly evident the appellate court intended that the trial court should permit the defendant to introduce the evidence he did on the hearing of the motion, and that the people might show, if they could, either that the prejudicial articles in the newspaper were not read by the jury, or that, if they had read them, that "they were not in any way influenced by them." In obedience to this command of the superior tribunal, the court below allowed the people to rebut what might be a presumption that the jury were influenced by the articles which they had read, and to show by their evidence, if it could be done, that the jury had not been thus influenced, and thus sustain their verdict. This view of the matter is in accordance with the case of People v. Goldenson, 76 Cal. 352, 19 Pac. Rep. 161, and cases cited, where it is said: "One of the grounds upon which defendant asked for a new trial was that the jury had been guilty of misconduct, by which a fair consideration of the case had been prevented. The substance of the misconduct charged consisted in the jurors having disobeyed the admonition of the court about reading newspaper articles, during the trial, which reflected on the defendant. All of the jurors filed affidavits denying fully the charge of misconduct preferred, and insisting that no admonition of the court had been disobeyed, and that no newspaper articles, or anything else, save the evidence and the charge, influenced them in finding their verdict. These affidavits were allowable, and are conclusive upon the point made. People v. Hunt, 59 Cal. 430; People v. Dye, 62 Cal. 523." In thus following the views of the appellate court we perceive no prejudicial error on the part of the court below, and advise that the order denying a new trial be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. The order denying a new trial is affirmed.

GAROUTTE, J. I concur in the judgment.

We dissent: DE HAVEN, J.; HARRISON, J.

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94 Cal. 180

FRANCISCO v. AGUIRRE, Sheriff, *et al.* (No. 13,956.)

(*Supreme Court of California.* March 30, 1892.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF ASSIGNEE—BILL OF SALE—CHANGE OF POSSESSION.

1. E., being indebted to sundry persons, executed a bill of sale of certain furniture to defendant in satisfaction of an existing debt, and at the same time received from defendant a lease of the furniture for a given term, at the expiration of which, E. refusing to deliver possession, defendant seized the property under claim and delivery. On the morning of the same day, and before seizure, E. executed an assignment of "all her property" to plaintiff for the benefit of creditors, which was filed for record before the seizure, but plaintiff did not attempt to take possession until several days thereafter, when he found the sheriff in possession under defendant's suit, and sued the sheriff and defendant for conversion. *Held*, that while defendant's title could not be asserted against E.'s creditors, in the absence of an "actual and continued change of possession," as required by Civil Code, § 3440, yet such title being good as against E., and plaintiff being merely E.'s representative, he obtained no greater rights than those possessed by E. at the time of the assignment, and could not recover, the statute concerning assignments conferring no special power on the assignee. BEATTY, C. J., and PATERSON, J., dissenting.

2. The sheriff, being only the agent of defendant in the seizure under claim and delivery, is not liable in the absence of defendant's liability.

In bank. Appeal from superior court Los Angeles county; J. W. MCKINLEY, Judge.

Action by Francisco against Aguirre, sheriff, and another. Judgment for plaintiff. Defendants appeal. Reversed.

Anderson, Fitzgerald & Anderson, for appellants. *Thomas J. Carran* and *James M. Damron*, for respondent.

HARRISON, J. In October, 1888, Mrs. M. E. Edmonston, being the owner of certain household furniture then situate in the Ramsay House, at Los Angeles, executed a bill of sale thereof to Martha O'Hara for the sum of $825, and at the same time received from her a lease of the same furniture until February 1, 1889, that being the date at which a lease of the Ramsay House would expire. On the 1st day of February, 1889, Mrs. O'Hara made demand of Mrs. Edmonston for the possession of the furniture, and, upon being refused such possession, on the next day began an action of claim and delivery therefor. At the time of making the bill of sale Mrs. Edmonston was indebted to various parties, and on the morning of February 2d made an assignment to the plaintiff for the benefit of her creditors, which was filed for record in the recorder's office at 10 minutes after 9 o'clock of that morning. The plaintiff did not, however, take possession of the furniture on that day, and later in the day the defendant Aguirre, as the sheriff of the county, took the property under directions therefor given by the plaintiff in the action of Mrs. O'Hara, and, "when the plaintiff went there two or three days later," he found the sheriff in possession under those proceedings. The defendant in that action not having demanded a redelivery of the property, the sheriff, on the 9th of February, turned the property over to Mrs. O'Hara. The present action was brought by the plaintiff against the sheriff and Mrs. O'Hara for a conversion of the property, in which a verdict and judgment was rendered in his favor, and from which and an order denying a new trial the defendants appealed. The question presented upon the appeal is the validity of the sale from Mrs. Edmonston to Mrs. O'Hara, and the right of the plaintiff to question such validity. At the trial the court instructed the jury as follows: "In this case, if you should find from the evidence that the transfer made by Mrs. Edmonston to Mrs. O'Hara was in fact an actual sale of the property in question, but that the vendor, Mrs. Edmonston, did not make an immediate and actual delivery of the property so sold to the vendee, or if such delivery, then that the same was not followed by an actual and continued change of the possession of the property so sold, then such a transfer would be wholly void as against this plaintiff, and would not affect any rights acquired by him as assignee of the said Mrs. Edmonston. If the jury should find from the evidence that the instrument executed by Mrs. Edmonston to Mrs. O'Hara, and designated as a 'bill of sale,' was in fact made for the purpose of securing an indebtedness then existing between the parties and to become due thereafter, then such a transaction would not constitute an actual sale of the property, but would be more in the nature of a mortgage. In that event, unless it appears to your minds that such mortgage was given to secure the purchase price of the property so mortgaged, then the transfer would be void as to this plaintiff." Other instructions of the same import were given by the court.

Upon the execution of the bill of sale to Mrs. O'Hara, the title to the property therein described vested in her, and, although without an actual delivery and a continued change of possession, such title could not be asserted by her against the creditors of her vendor, yet, as between the parties to the instrument, she could at any time maintain an action to recover the possession from her vendor, irrespective of such non-delivery. The plaintiff, as the voluntary assignee of Mrs. Edmonston, acquired no greater right in the property than she had at the time of the assignment. As the statute stood at the date of this assignment to the plaintiff, an assignee for the benefit of creditors was selected by the assignor, and, subject to the statutory restrictions, acquired only those powers or rights in reference to the property assigned which were embraced in the instrument of assignment.

Upon the principle that an assignor cannot confer upon his assignee any greater right than he himself had in the property, it is held in an almost unbroken line of authorities that, in the absence of any statute giving such power, the assignee cannot maintain an action to recover property that had been conveyed by his assignor in fraud of his creditors. This rule rests upon the ground that the assignee is merely the representative of his assignor, and does not represent the creditors, and that notwithstanding the assignment they are not bound to accept its provisions, but may themselves subject such property to the satisfaction of their debts. This right is held by them, not as beneficiaries under the assignment, or by virtue of any of its provisions, but as creditors of the assignor, and wholly independent of its provisions. "Under the common law of assignments the assignee stands in the place of the assignor, and can assert no claim to property which the assignor might not. The assignment, therefore, does not carry with it to the trustee the title to property which the assignor has previously transferred in fraud of his creditors, for the purpose of hindering, delaying, and defrauding them." Burrill, Assignm. § 110. See, also, Wait, Fraud. Conv. § 115; Brownell v. Curtis, 10 Paige, 219; Estabrook v. Messersmith, 18 Wis. 551; Hawks v. Pritzlaff, 51 Wis. 160, 7 N. W. Rep. 303; Vandyke v. Christ, 7 Watts & S. 373; Marks' Appeal, 85 Pa. St. 233, Housel v. Cremer, 13 Neb. 298, 14 N. W. Rep. 399; Keller v. Smalley, 63 Tex. 520; Heinrichs v. Woods, 7 Mo. App. 236; Browning v. Hart, 6 Barb. 91; Leach v. Kelsey, 7 Barb. 470; Warner v. Jaffray, 96 N. Y. 254; Flower v. Cornish, 25 Minn. 473; Wakeman v. Barrows, 41 Mich. 363, 2 N. W. Rep. 50; Stewart v. Platt, 101 U. S. 739; Wilson v. Randall, 14 R. I. 621. The question has been presented more frequently in cases in which the assignee has sought to recover property held by way of a mortgage executed by the assignor, but which was invalid by reason of failure to observe some of the requirements of the statute in reference to such mortgages. In these cases the same principles have been asserted as in other transfers which are declared fraudulent as against creditors, since it is only by reason of a statutory exception that personal property can be transferred by mortgage, and, unless the statutory requirements are followed, the transfer is subject to the general provision requiring a delivery and change of possession. In Van Heusen v. Radcliff, 17 N. Y. 580, the owner of certain furniture had made a chattel mortgage, which was not recorded as required by statute, and afterwards made a general assignment to the defendant for the benefit of his creditors; but the court held that the defendant was not a *bona fide* purchaser, and could not retain the proceeds of the property for the benefit of the creditors of his assignor, saying: "When a conveyance is said to be void against creditors, the reference is to such parties when clothed with their judgments and executions, or such other titles as the law has provided for the collection of debts. The beneficiaries under the voluntary assignment to the defendant are not in a condition to claim the rights of creditors, or to question the prior dispositions of their debtor, which he could not himself have avoided." In some states provision has been made by statutes giving express authority to the assignee to maintain actions for the recovery of property that had been disposed of by his assignor in fraud of his creditors, and declaring that for such purposes the assignee shall represent the creditors. See Burrill, Assignm. § 395. In other states the assignee has been held to have such right, upon the ground that by virtue of statutory provisions the assignment partakes so far of the nature of a proceeding in bankruptcy that the assignee succeeds to the same rights as does an assignee in bankruptcy. In New Jersey this rule is upheld upon the ground that the statutes provide that the assignor shall receive a full discharge and release as to all of the creditors who come in under the assignment, (Pillsbury v. Kingon, 33 N. J. Eq. 299,) although in that state it is held that, except in cases of actual fraud, the assignee is in the same position as his assignor, and that he cannot avail himself of a mere statutory fraud, such as a failure to have a chattel mortgage properly recorded. Shaw v. Glen, 37 N. J. Eq. 32. The statutes of this state concerning assignments for the benefit of creditors give no special power to the assignee, and expressly declare that the assignment is to be subject to the provisions of the Code respecting fraudulent transfers. One of these provisions is that which requires an actual delivery and continued change of possession,[1] thus placing the assignment upon the same footing as any other transfer of personal property. Whether the plaintiff herein could have successfully defended an action against him by Mrs. O'Hara had he taken possession of the property at the time of the assignment, need not be determined. He did not take such possession, but merely "went down to the house, and looked through the house at the furniture, and left Mrs. Edmonston in possession." This was consistent with his recognition of the rights of Mrs. O'Hara, since the assignment from Mrs. Edmonston purports to assign to him only "all of her property;" and, if the plaintiff had intended to claim this, he, by leaving her in possession, did the same act which he now charges upon the defendant as fraudulent. The plaintiff is not himself a creditor of Mrs. Edmonston, and, instead of having succeeded to the interest of any of her creditors, his relation to her estate as assignee for their benefit would itself preclude him from succeeding to their interest. Neither is he a person upon whom her estate has devolved for the benefit of others than himself. An estate is said to "devolve" upon another when by operation of law, and without any voluntary act of the previous owner, it passes from one person to another; but it does not devolve from one person to another as the result of some positive act or agreement between them. The word is itself of intransitive signification, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor. Instances of its appropriate use are found when speaking of the succession of estates upon death, or upon a change of official incumbents; also in proceedings in bankruptcy or insolvency, where by the act or operation of law the estate of the bankrupt devolves upon his assignee. Merrill v. Hurlburt, 63 Cal. 494; Brown v. Bank of Napa, 77 Cal. 544, 20 Pac. Rep. 71.

The question presented in this case did not arise upon the facts presented in Ingram v. Smith, 83 Cal. 234, 23 Pac. Rep. 298. The assignee in that case was in possession of the property that had been assigned to him, and was seeking to defend that possession against a promissory note in the hands of Smith, which had been executed by Smiley without any consideration therefor. Smiley could himself have maintained the same action, as the note in Smith's hands, having been given without consideration, was not enforceable against him, and Ingram, as his assignee, had the same right that Smiley had to protect the estate received by him under the assignment against a claim upon this note, either by a defense to a suit thereon, or by an action for its cancellation. There is a manifest difference between defending against a fraudulent claim property that has been actually received under the assignment, and seeking to recover property to which the assignor could assert no title, even though his creditors might subject it while in his possession to the payment of their debts against him. The statement in Ingram v. Smith that the estate of Smiley had devolved upon the plaintiff for the benefit of the creditors was but a *dictum*, since the right of Ingram to maintain the action did not depend upon the mere fact that he was the assignee of Smiley, but arose from the fact that, being in possession of property under a trust which he had assumed, he was bound to protect it for the benefit of the beneficiaries, and had the same right to defend it against a false claim as if it had belonged to himself. In Manuf'g Co. v. Wright, 22 Fed. Rep. 631, it was held that although the assignee had no right to recover property that had been fraudulently conveyed by his assignor, yet he had the right to resist a fraudulent claim against property in his hands, the court saying: "It is the duty of the assignee in the performance of his trust to defend this property against all unjust adverse claims. He takes the property, not as a purchaser, but subject to all rights and equities subsisting against it in favor of third parties, and in that sense he is said to succeed only to the rights of his assignor. The right of creditors to attack a mortgage as fraudulent, growing out of equities existing in their behalf, does not pass to the assignee in the absence of statutory provisions to that effect, and none such are found in the statutes of Iowa. In the present case the right of the assignee to defend against a foreclosure of the mortgage is not based upon a transfer of the rights and equities of the creditors, but upon the fact that the title of the property has been vested in him in trust for the creditors, and that, having accepted the trust, he is charged with the duty of protecting the property against all fraudulent claims."

As the plaintiff had no right to the furniture, as against the claim of Mrs. O'Hara, he could not maintain an action against her for its conversion. The sheriff was only her agent in the matter, and, in the absence of any liability on her part, was not himself liable to the plaintiff. The judgment and order denying a new trial are reversed.

We concur: McFarland, J.; Sharpstein, J.; Garoutte, J.; De Haven, J.

Beatty, C. J. I dissent.

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[1] Civil Code, § 3440, provides that "every transfer of personal property * * is conclusively presumed, if made by a person having * * * possession * * * and not accompanied by immediate delivery, and followed by an actual and continued change of possession, * * * to be fraudulent, and therefore void, against * * * creditors while he remains in possession, * * and against any person on whom his estate devolves in trust for the benefit of others than himself. * * *"

PATERSON, J., (*dissenting*.) I am unable to concur in the views expressed by the majority in this case. I think the judgment should be affirmed.

It is not denied that the conveyance was void as to creditors under section 3440 of the Civil Code; but it is claimed that the assignee acquired no greater right than the assignor had in the property at the time of the sale,—that the assignee is merely the representative of his assignor, and does not represent the creditors. It must be admitted that under the common law of assignments the assignee stands in the place of the assignor, and can assert no right to the property which the assignor did not have; but the rule of the common law is not applicable here; the rights of the parties are to be determined under the statute relating to assignments for the benefit of creditors. The duties and powers of assignees under the statute are very different from the duties and powers of assignees at common law.

Section 3449, Civil Code, provides that an insolvent debtor may execute an assignment of property to one or more assignees, in trust for the satisfaction of his creditors, subject, however, to the provisions of the Code relative to trusts and fraudulent transfers; and section 3439 provides that "every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." It cannot be questioned that the estate of the debtor in this case devolved upon the assignee in trust for the benefit of others than the debtor himself. The case is, therefore, within the letter and spirit of the statute. The transfer of the property was fraudulent,—it was absolutely void as to creditors,—and, as the statute declares, it was void as to the assignee upon whom all the estate of Mrs. Edmonston devolved.

In Ingram v. Smith, 83 Cal. 237, 23 Pac. Rep. 298, the court said that the note there under consideration was "void against all of Smiley's creditors, and also the plaintiff, upon whom the estate of Smiley devolved for the benefit of the creditors." It may be that this statement was mere *dictum*, but it is evidently in accord with the letter and the spirit of our statute. In Hanes v. Tiffany, 25 Ohio St. 552, the court said: "It is, however, contended that, as the mortgage is good against the mortgagor, it is also good against the assignee for the benefit of creditors; that the latter stands in no better situation than his assignor. The correctness of this position at common law is admitted, but not so under the statute. The mortgagee not having possession of the mortgaged property, the statute declares the mortgage void as against the creditors of the mortgagor. The assignee took the property under the assignment, and held it for the exclusive benefit of creditors. The mode of providing for creditors by way of assignment, in trust for their benefit, is recognized and regulated by statute; and we see no good reason why their rights may not be as effectually asserted through the assignee as they could be by judgment and execution in case there had been no assignment." In Pillsbury v. Kingon, 33 N. J. Eq. 287, Mr. Justice DEPUE considered the leading cases bearing upon the question, and, among other things, said: "No rule of law is better settled than that a conveyance in fraud of creditors is good as between the parties to it. * * * It is equally clear that such conveyances are also unassailable by those who hold a derivative title from the fraudulent grantor, and, in virtue of their title, become simply representatives of his interest. * * * The material question for present consideration is whether those who hold by a title derived from the grantor, but who in virtue of that title become the representatives of the creditors of the grantor as a class,—as, for instance, the executors or administrators of an insolvent estate or an assignee for the benefit of the grantor's creditors,—will not be allowed, in the interest of creditors, to have a standing in court, to avoid the fraudulent grants and conveyances of the debtor for the benefit of his creditors. * * * In none of the cases was the decision placed on any language in the statute specially empowering the assignee to avoid the fraudulent conveyance of the assignor. In fact, neither of those statutes contained any express provision for setting aside conveyances of the assignor in fraud of creditors, and that fact was unsuccessfully pressed upon the attention of the court by the counsel who argued against the authority of the assignee to exercise that power. The capacity of the assignee to appear in court for that purpose was in express words, or inferentially adjudged on the ground that the assignee of an insolvent was a representative of creditors, and, as such, was entitled to take, for their benefit, the same advantage of the statute of Elizabeth as the creditors might have taken. * * * In Bayard v. Hoffman, 4 Johns. Ch. 450, Chancellor KENT decided that an assignment of all the debtor's estate, real and personal, in trust for all his creditors, included stock which the debtor had before that voluntarily assigned, to the injury of his creditors, and that the assignee might file a bill to set aside the fraudulent transfer for the benefit of the creditors. * * * An assignment under the act of the legislature of this state differs in most important particulars from an assignment made by a debtor at common law for the benefit of his creditors. Its title indicates the legislative purpose to establish a system for securing an equal and just division of the estates of debtors among their creditors, and that purpose is clearly evinced by the provisions of the act. At common law, a debtor might assign the whole or a portion of his property for the benefit of all or a part of his creditors. By our statute, an assignment under the act transfers all the property of the assignor, whether it be described in the inventory or not; * * * and all preferences of one creditor over another are forbidden. At common law an assignment by a debtor to his trustee to pay his debts might be rescinded by the mutual consent of the debtor and the trustee, where the creditors had not directed the assignment or assented to it, or changed their situation in consequence of it. A deed of assignment, under the statute executed, delivered and accepted by the assignee, creates, *ipso facto*, a trust for the benefit of creditors, not to be surrendered or destroyed except by their consent, and a court of equity will execute it by appointing new trustees, if necessary. Under such an assignment, the trustee at common law was compelled to use the assignor's name in suits to recover the property, or upon the choses in action assigned. By the statute the assignee may bring suit in his own name. * * * Regarding the substantial nature of the transaction, the doctrine of the English courts, with respect to the representative character of the assignee of an insolvent, may very properly be applied in favor of an assignee under the assignment act, and the latter be regarded as representing creditors so far as to enable him to take proceedings in their behalf, to set aside conveyances in fraud of creditors, where such property is needed for the payment of debts. * * * Nor will any embarrassment be experienced in the fact that the property which has fraudulently been conveyed away may be in excess of what is required for the payment of debts. As is indicated in the opinion of this court in Miller v. Mackenzie, 29 N. J. Eq. 295, such fraudulent conveyances will be set aside no further than is necessary for the satisfaction of the demands of creditors, and the surplus, if there be any, will not be restored to the fraudulent debtor, but will be returned to the grantee to whom the fraudulent conveyance was made." The statutes of New Jersey seem to be identical with our own on this subject. The reporter, in a note added to the report of the case just referred to, has collated a large number of authorities bearing on the subject, and shows that the preponderance of judicial opinion is in favor of the views expressed by the court. There is nothing in Shaw v. Glen, 37 N. J. Eq. 32, indicating an intention to overrule Pillsbury v. Kingon. On the contrary, the court spoke approvingly of the decision, but distinguished it from the case then under consideration, saying: "But in cases unaffected by fraud, he [the assignee] is bound by the equities to which the property assigned was liable when it came to his hands from his assignor."

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94 Cal. 225

VENZKE v. VENZKE. (No. 14,485.)

(*Supreme Court of California.* March 31, 1892.)

DIVORCE—CRUELTY—EVIDENCE.

In an action for divorce on the ground of extreme cruelty plaintiff's testimony that defendant charged her with infidelity, called her vile names, and communicated to her a loathsome disease, was sufficiently corroborated, as required by Civil Code, § 130, by a letter written by defendant to plaintiff, charging her with having committed adultery with a certain person; by the testimony of a witness that plaintiff came to his store, crying, and saying that defendant had threatened her, and called her vile names; that he (witness) sent for defendant, and informed him of his wife's complaints and charges, and that defendant did not deny them; and by the testimony of a physician that he treated plaintiff for the disease which she claimed defendant communicated to her.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Action by Carrie S. Venzke against Frederick W. Venzke for divorce. Judgment for plaintiff. Defendant appeals. Affirmed.

Jo. Hamilton and *Geo. W. Hamilton*, for appellant. *John M. Fulweiler* and *Ben P. Tabor*, for respondent.

VANCLIEF, C. Action for divorce on the ground of extreme cruelty, in which the judgment was in favor of the plaintiff. The defendant appeals from the judgment and from an order denying his motion for a new trial. The complaint charges that the cruelty was inflicted upon the plaintiff by calling her vile and opprobrious names, and charging her with infidelity to her marriage vows, and by communicating to her a loathsome venereal disease, which for a long time caused her great and grievous bodily suffering and injury. Among others the court made the following finding: "(5) That the defendant, for more than two years before the commencement of this action, had been guilty of extreme cruelty towards the plaintiff, and treated her in a cruel and inhuman manner, calling her vile and opprobrious names, and charging her with infidelity to her marriage vows."

The only point urged here by appellant's counsel is that the finding numbered 5 is not justified by the evidence; not, however, because the testimony of the plaintiff did not sufficiently tend to prove it, but because her testimony in that respect was not corroborated. The sole question, therefore, to be determined is, was the plaintiff's testimony, as to cruelty, corroborated? I think defendant's letter to the plaintiff of May 2, 1889, tends to corroborate her testimony as to his having charge her with adultery with one Phelps. The witness Dixon testified, that in November, 1888, the plaintiff came to his store, crying, and saying that defendant had threatened her, and called her vile and opprobrious names, whereupon the witness sent for defendant, and informed him of the complaint his wife had made against him, and explained to him fully what his wife had charged him with doing and saying to her; and that defendant did not deny the truth of his wife's complaint or charges against him. This testimony, though indefinite as to the character of the threats, and as to what names he had called her, yet tends to prove that he had called her vile names, and had threatened her with some degree of punishment, and thereby, in a slight degree, at least, corroborates her testimony as to his cruel treatment. Dr. Reuda testified that as plaintiff's physician he had treated her for gonorrhea, with which she was afflicted, in August, 1887. This sufficiently corroborated her testimony that she had that disease. As to this disease, the plaintiff testified that she did not know what it was until defendant informed her, and advised her to be treated for it by Dr. Reuda, telling her at the same time that he had consulted the doctor and found that he had the same disease. The defendant, on cross-examination, while testifying in his own behalf, admitted that he had the disease, and that he had consulted Dr. Reuda in regard to it, and did not deny that he had advised his wife to consult the doctor, but said he had taken the disease from his wife. When plaintiff's counsel asked Dr. Reuda what he knew about defendant's case defendant objected, under section 1881 of the Code of Civil Procedure, and refused to consent to the doctor's examination as to any information acquired while treating him. The degree of corroboration required by section 130 of the Civil Code has never been defined; and it has been said that "in the very nature of the case it would be impossible to lay down any general rule as to the degree of corroboration which will be requisite. Hence the statute only requires that there shall be some corroborating evidence." Evans v. Evans, 41 Cal. 104; Cooper v. Cooper, 88 Cal. 45, 25 Pac. Rep. 1062. According to these cases, I think the testimony of the plaintiff as to extreme cruelty was sufficiently corroborated, and that the judgment and order should be affirmed.

We concur: FOOTE, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(94 Cal. 227)

ANDERSON v. YOAKUM *et al.* (No. 14,289.)

(*Supreme Court of California.* March 31, 1892.)

QUITCLAIM DEED—CONSTRUCTION—AFTER-ACQUIRED TITLE.

A grantor in a quitclaim deed, who at the time of the execution thereof had simply filed his application to purchase the land from the state, had no interest subject to transfer, and his after-acquired title did not vest in his grantee, even though the deed purported to convey to the grantee all the "estate, right, title, and interest which the grantor might thereafter acquire in and to" the premises.

Department 1. Appeal from superior court, Tulare county; W. W. CROSS, Judge.

Action by Mary E. Anderson against J. E. Yoakum and others to quiet title. Judgment for defendants. From an order denying her motion for a new trial plaintiff appeals. Affirmed.

Justin Jacobs, for appellant. *Chas. G. Lamberson*, for respondents.

GAROUTTE, J. This is an action to quiet title. Plaintiff appeals from the judgment and order denying her motion for a new trial. Respondents are successors in interest of one McKenna. At the time McKenna prepared his application to purchase the land involved in this litigation from the state, and prior to the filing of such application, he remised, released, and quitclaimed his interest in the property to appellant by deed duly executed and acknowledged. The *habendum* clause in said deed was as follows: "To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns, forever; and also any estate, right, title, or interest which the said party of the first part may hereafter acquire in and to the above-described premises." Subsequently to the date of said deed, McKenna's application to purchase was approved, a certificate was issued to him, and his assignee of such certificate obtained the patent which now rests in the respondents. The only question involved in this appeal is, did the deed of McKenna to plaintiff vest his after-acquired title in her? In other words, did the certificate of purchase to McKenna inure to the benefit of plaintiff by reason of her deed? In Cadierque v. Duran, 49 Cal. 356, it was expressly decided that a party who has simply filed his application to purchase has no interest in the realty subject to transfer, and to the same effect is People v. Blake, 84 Cal. 614, 22 Pac. Rep. 1142, and 24 Pac. Rep. 313. In Morrison v. Wilson, 30 Cal. 344, it was held that words used in a deed conveying the property in fee-simple absolute will be construed to convey only the present interest of the grantor, and not to pass an after-acquired title, if a clause is inserted declaring that as to title it is only a quitclaim deed; and to the same effect is Montgomery v. Sturdivant, 41 Cal. 290. While these cases sustain the principle that the legal effect of words of conveyance may be limited and restricted by subsequent recitals in a deed, we have been referred to no case holding that a covenant by a grantor in a deed of quitclaim and release, that any after-acquired title shall vest in the grantee, has the effect, of itself, to vest such title in the grantee upon its acquisition by the grantor. The *habendum* clause of a deed refers to and acts upon the interest conveyed, most frequently limiting and qualifying such interest, but, as we have already shown, the grantor here had no interest whatever in the realty at the date of his deed to plaintiff; and it follows that no title, either present or future, vested in her through this conveyance. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

(96 Cal. 623)

SAN GABRIEL VALLEY LAND & WATER CO. v. WITMER BROS. CO. (No. 14,324.)[1]

(*Supreme Court of California.* March 31, 1892.)

RIGHTS OF MORTGAGORS—TAXES ON MORTGAGEE'S INTEREST—PAYMENT.

1. In an action to recover taxes assessed to defendant on its mortgage interest, but which plaintiff, as owner, paid to prevent becoming delinquent, the validity of the tax was questioned on the ground that the description of the mortgaged land varied from that contained in the mortgage. The mortgage, dated March 8, 1887, described the land according to the government survey. The land had afterwards been divided by plaintiff into blocks and town lots, and the subsequent assessment described the land as such blocks and lots. It was agreed that the land assessed constituted the identical land described in

[1] Rehearing granted.

the mortgage, and no more, and that the assessment was in substantial conformity with the statute, and in proper form for the assessment of a mortgage interest in town lots. *Held,* that the description was sufficient.

2. Pol. Code, § 3627, which gives the owner of the property the privilege of deducting the amount of the taxes so paid from the mortgage, is permissive, and not mandatory, and does not prohibit an action to recover the same.

3. Under Pol. Code, §§ 3627, 3628, which required the mortgage to be assessed to the person who owned it on the first Monday of March, where defendant owned the mortgage on that day, the subsequent assignment thereof did not relieve defendant of its liability for the payment of the taxes. HARRISON and PATERSON, JJ., dissenting.

4. Pol. Code, §§ 1837, 2654, required road taxes and special school taxes to be levied by the supervisors, and to appear on the assessment book, and section 3789 made such book *prima facie* evidence of the assessment, and of the amount of unpaid taxes, and of the fact that all the forms of law in relation to the assessment and levy had been complied with. *Held,* that where the assessment book, in due form, was in evidence, and there was no evidence tending to overcome such *prima facie* evidence, there was sufficient proof of the validity of such road and school taxes.

In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by the San Gabriel Valley Land & Water Company against Witmer Bros. Company to recover taxes paid by plaintiff, but which had been assessed to defendant. From a judgment for plaintiff and an order refusing a new trial defendant appeals. Judgment and order affirmed.

Dooner & Burdett, for appellant. *Judson, Hester & Russell,* for respondent.

PER CURIAM. When this case was pending in department, an opinion was prepared by Commissioner VANCLIEF. After full consideration in bank, we adopt that opinion, and the conclusion therein reached; and for the reasons therein given the judgment and order appealed from are affirmed. The said opinion is as follows:

"The plaintiff having paid the taxes, amounting to $185.12, assessed to the defendant on its mortgage interest in land, brought this action in a justice's court to recover the sum so paid from the defendant. The cause was properly transferred to the superior court for trial, and judgment passed for plaintiff. The defendant appeals from the judgment, and from an order denying its motion for a new trial. The material facts found by the court and stipulated by the parties are as follows: One Sanborn, being the owner of two hundred and forty acres of land, situate in Los Angeles county, mortgaged the same on the 14th day of March, 1887, to Hall and Stilson to secure the payment of $20,000; and the mortgage was duly recorded. On May 7, 1888, Hall and Stilson assigned the mortgage and debt thereby secured to the defendant, and defendant continued to own them until June 7, 1889, when it assigned them to the State Loan & Trust Company, a corporation. Before the taxes were assessed upon the land or mortgage for the year 1889, the plaintiff became the owner of the land subject to the mortgage, and divided it into blocks and lots. While the defendant was the owner of the mortgage, to-wit, on March 4, 1889, the taxes in question were assessed to defendant on its mortgage interest. On July 24, 1889, the plaintiff, as successor in interest of the mortgagor, paid the mortgage debt in full to the State Loan & Trust Company, without any deduction or provision on account of the taxes on the mortgage interest assessed to defendant. On December 19, 1889, the tax collector demanded the taxes ($185.12) of the defendant by sending it a bill for the amount. On the following day the defendant inclosed the bill in a letter to the plaintiff, stating that it (defendant) had no interest in the mortgaged premises. Thereupon the plaintiff requested the defendant to pay the taxes assessed to it, but defendant refused, and failed to pay the same or any part thereof. On December 30, 1889, the plaintiff, to prevent the taxes from becoming delinquent, and to remove the lien thereof from its land, paid them.

"1. The validity of the tax is questioned upon the ground that the description of the mortgaged land varies essentially from that contained in the mortgage. The mortgage describes it as 'the north-west quarter, and the west half of the north-east quarter, of section thirteen, (13,) township one (1) south, of range twelve (12) west, of the San Bernardino meridian, containning two hundred and forty (240) acres.' As the land had been divided by plaintiff into blocks and town lots before the assessment of the taxes for 1889, it is so described in the assessment book. It is agreed, however, that the blocks and lots assessed to the defendant constitute the identical land described in the mortgage, and no more; and that the assessment was in substantial conformity with the requirements of section 3651 of the Political Code, and in proper form for the assessment of a mortgage interest in town lots. As the taxes were paid before they became delinquent, they were not increased by costs of advertisement or sale in lots. I think the assessment described the mortgaged land in accordance with the statute, and with such particularity and certainty as to afford the defendant the means of identification, and so as not to mislead him. This was sufficient. Cooley, Tax'n, 282-286.

"2. It is claimed that respondent's exclusive remedy was to deduct the amount of the taxes from the mortgage at the time of payment, on the basis of the levy of the preceding year, in pursuance of section 3627[1] of the Political Code. But the statute giving that privilege is permissive, and not mandatory, in its terms. It has been expressly decided by the circuit court of the United States for the district of California that, under section 4, art. 13, of the constitution of California of 1879, it is the duty of the mortgagee, and not of the mortgagor, to pay the taxes levied on the mortgage interest; that the constitution and statute give the mortgagor the right to pay the tax, and deduct it from the debt; but that he is not bound to do so; and that if the mortgagee dispute the tax, and decline to allow it, and the whole mortgage debt is paid by the mortgagor, without deduction of the tax, the mortgagor, if afterwards compelled to pay it to relieve his property of the lien, may recover the amount paid from the mortgagee, whose debt it is. Blythe v. Luning, 7 Sawy. 506, 507, 14 Fed. Rep. 281. The principle of this decision is in accordance with the well-settled rule, that 'where the plaintiff, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money, not officiously, which the defendant ought to have paid, a count in *assumpsit* for money paid will be supported.' Bailey v. Bussing, 28 Conn. 462; Exall v. Partridge, 8 Term R. 310. In such case, 'the law implies a request on the defendant's part, and a promise to repay, and the plaintiff has the same right of action as if he had paid the money at the defendant's express request.' Nichols v. Bucknam, 117 Mass. 491; Nutter v. Seydenstricker, 11 W. Va. 535. The right of contribution or reimbursement for money necessarily paid for another's benefit does not necessarily depend upon contract, but may arise from the equity of the case. Freem. Co-Ten. § 322. See, also, Hay v. Hill, 65 Cal. 383, 4 Pac. Rep. 378.

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[1] Section 3627 provides that the owner of the premises may pay the taxes levied on the land, and such payment shall constitute a payment on the mortgage debt.

"3. It is also insisted that there is no proof of the validity of the 'road-tax' or of the 'special school-tax' which were included in the sum sued for. Each of these is required to be levied by the supervisors and to appear upon the assessment book, (Pol. Code, §§ 1837, 2654;) and the assessment book itself is *prima facie* evidence, not only of the assessment and of the amount of the unpaid taxes, but also of the fact that all the forms of law in relation to the assessment and levy have been complied with. (Pol. Code, § 3789; Modoc Co. v. Churchill, 75 Cal. 172, 16 Pac. Rep. 771.) The assessment book in due form was in evidence, and there was no evidence tending to overcome the *prima facie* case proved by it.

"(4) It is further claimed that the liability of the defendant to pay the tax was discharged by his assignment of the mortgage before the levy of the tax. But the law required the mortgage to be assessed to the person who owned it on the first Monday of March, (Pol. Code, §§ 3627, 3628;) and such person could not escape the obligation to pay the tax by mere assignment of the mortgage. The personal obligation to pay taxes does not depend upon the continued ownership of the property assessed until after the levy of the tax, or until the time for payment arrives. I think the judgment and order should be affirmed.

"We concur: BELCHER, C.; FITZGERALD, C."

HARRISON, J., (*dissenting.*) 1. Although the interest in the land represented by the mortgage was assessed as of the first Monday of March, 1889, and the tax which was afterwards levied upon that interest became by relation a lien upon the land as of that date, yet until the tax was levied there was no liability or obligation for its payment created against either the property or its owner. This tax was levied on the first Monday in October of that year, (Pol. Code, § 3714;) but prior to that date the plaintiff had paid the mortgage debt and caused the mortgage to be canceled. The constitution, (article 13, § 4,) and the statute passed in pursuance thereof, (Pol. Code, § 3627,) authorizing the assessment of a tax upon the mortgage, provide that, "if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a free discharge thereof; provided that, if any such security or indebtedness shall be paid by any such debtor or debtors after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year." There is no provision in the constitution or statute which gives to the mortgagor the right to be reimbursed for this payment in any other mode, and under the familiar rule that, when the right and the remedy are purely statutory, the remedy provided by the statute is the only mode of preserving the right, if the plaintiff would insist upon this right he should have deducted the amount of the tax from the debt at the time that he paid the debt. In the absence of the constitutional provision there would be no obligation upon the mortgagee, as between him and the owner of the land, to pay the tax upon the mortgage, and the owner of the land would not be able to compel such payment by him. The obligation created by such tax exists only in favor of the state, and the tax is a charge upon the property against which it is assessed, and not a personal obligation against the mortgagor. With the exception of poll-taxes, taxes are always levied upon property, and not against individuals, and the mortgage tax is a tax upon the security, and not against the mortgagee. The mortgage is made by the constitution "an interest in the property affected thereby," and the entire tax against the property is divided between the mortgagee and the owner. The provision that the value of the security shall be assessed and taxed to the "owner thereof" creates no different obligation upon the mortgagee from that which is created upon the owner of the property by the provision requiring the value of the property to be taxed to the "owner of the property." The tax is not a debt, and there is no personal obligation created by it. It is a burden imposed by the state upon property within its limits; but that burden is a charge against the property, and not against the individuals who own the property, and follows the property through all changes in its ownership, and is eventually paid by the individual who is the owner when the tax is collected. "A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes; it is not founded upon contract; it does not establish the relation of debtor and creditor between the tax-payer and the state; it does not draw interest; it is not the subject of attachment, and it is not liable to set-off. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the tax-payer. It operates *in invitum.*" Perry v. Washburn, 20 Cal. 350. Nor is its character affected by the fact that the statute authorizes a personal action to be brought for its recovery. Such procedure is merely the statutory method prescribed for its collection, and does not create a debt or personal obligation against the individual to whom it is assessed. Meriwether v. Garrett, 102 U. S. 514. In the absence of statutory authority, an action for the recovery of a tax cannot be maintained; (City of Camden v. Allen, 26 N. J. Law, 398;) whereas, if the tax was a debt or personal obligation, its collection could be enforced by suit without statutory authority. See, also, City of Augusta v. North, 57 Me. 392; Shaw v. Peckett, 26 Vt. 482; Peirce v. City of Boston, 3 Metc. (Mass.) 520.

2. The taxes levied against the property are divided between the mortgagee and the owner, and become a lien upon both the land and the security as of the first Monday in March, and remain a lien thereon until paid. If the owner of the land parts with the property during that period, he is exonerated from any liability to the state for the payment of this tax, and the individual who is the owner of the land when the tax becomes payable must discharge the lien, if he would save it from sale by the collector. The purchaser may pretect himself against this lien by proper covenants in the deed from his grantor, as he would against any other lien or incumbrance; but, if his conveyance is a naked quitclaim, he cannot call upon his vendor for remuneration for the amount of the tax so paid, any more than for the payment of any other incumbrance which was not a personal obligation against the vendor. The tax against the mortgage is in all respects identical in character with the tax against the land. It is levied and assessed in the same manner and at the same time, is a lien upon the same property, and collected by the same means. The same results, therefore, must follow the transfer of the security as follow the transfer of the land. The vendor is thereby absolved from all obligations for the tax previously levied thereon, and when the tax is payable it must be paid by the individual who is at the time the owner of the security. By the transfer, all relations between the mortgagee and the owner of the land terminate, and the assignee of the mortgage is substituted in the place of the mortgagee, with all the rights and obligations previously resting upon the mortgagee. The provision in the constitution that "the taxes so levied may be paid by either party to such security" refers to this assignee, and not to the original mortgagee. It is only the "owner" of the security that is permitted to pay the tax levied upon the property, and have the amount so paid become a part of the debt secured, but, if the original mortgagee to whom the mortgage has been assessed has assigned the mortgage, he is not the "owner" of the security, or of any debt to be increased by the payment of such tax, and consequently is not the "party" to the security referred to in the above provision of the constitution. For the same reasons the provision in the constitution that a payment by the owner of the property of the tax levied on the security shall constitute a payment thereon, and to the extent of such payment a full discharge thereof, is applicable only to the holder of the mortgage in case of an assignment, and not to the original mortgagee. Consequently, if such payment be made by the owner of the property after assessment and before the tax levy, his right to reimbursement can be enforced only against the holder of the mortgage, and not against the original mortgagee, and only in the mode pointed out in the constitution.

3. If it can be maintained that, by virtue of his relations to the land, there was an implied obligation upon the mortgagee to discharge the lien thereon created by the tax upon his security, that obligation by the transfer of the security became only a secondary obligation upon him. The primary obligation for the tax is upon the security itself, and the owner of that security is the individual to whom the owner of the land must look primarily for the discharge of the lien. The constitution refers to him alone, and the provision that, if the debtor pays the indebtedness "after assessment and before the tax levy," the amount of the tax may be "retained" by him, implies that he must "retain" it from the holder of the security, or lose the right to proceed against any other person for reimbursement. The owner of the land, having in his custody this fund—the mortgage debt—out of which to discharge the lien of the tax, must, in equity, apply it to that purpose, or lose any right he may have to resort to other securities. The most favorable position which the owner can claim that the original mortgagee holds towards him in reference to this mortgage tax is that he is under some obligation to ultimately discharge this lien, but this is only the position of a surety, and as a surety he is entitled to have this fund applied to the payment of the tax, or be discharged therefrom. Civil Code, §§ 2840, 2849. The payment by the plaintiff of the mortgage debt, without making any deduction for the mortgage tax, was a voluntary surrender by him of a security which he held for the purpose of protecting himself and his property against the burden of the tax, and such payment must be regarded as a release by him of any liability which he would claim against the defendant. In Blythe v. Luning, 7 Sawy. 506, 14 Fed. Rep. 281, the mortgagor sought to avail himself of the very remedy pointed out by the constitution, by deducting the estimated amount of the mortgage tax, but the mortgagee refused to cancel the mortgage, except upon payment of the full amount of the mortgage debt. In that case the mortgagor and

mortgagee were the respective owners of the land and of the security at the time of the assessment, as well as at the time of the payment, and there was no question presented involving the right or liability of any other person than the mortgagor and mortgagee, and the court held that the payment of the tax by the mortgagor, under the circumstances of that case, was made under duress, and could be recovered in an action therefor. In my opinion, the judgment and order should be reversed.

Paterson, J. I concur in the views expressed by Harrison, J.

(94 Cal. 255)

People v. Dixon. (No. 20,880.)

(*Supreme Court of California.* April 1, 1892.)

Evidence of Conspirators—Declarations—Cross-Examination—Striking Out Answer.

1. Where, in a trial for horse stealing, D. and S. were jointly charged with defendant, and a witness testified to facts showing a conspiracy between these parties, a statement made by D., as a co-conspirator, before the commission of the crime was complete, in the absence of defendant, was properly admitted in evidence against defendant.

2. The rule that, where no objection is made to an interrogatory, a motion to strike out the answer will not be entertained, does not apply where the answer is not responsive to the question put to the witness.

3. A witness cannot testify to the acts and declarations of third parties (in the absence of defendant, and unauthorized by him) in attempting to influence the witness to leave the country so as to avoid testifying in the case.

4. Where it was attempted to show by such witness that he was induced to leave home to avoid testifying, defendant had a right to ask him, on cross-examination, if the true reason why he left home at that time was not on account of his father.

5. Such witness, together with several associates of defendant, were, several weeks subsequent to the alleged larceny, arrested for horse stealing in Oregon, and defendant exerted himself to secure the liberty of the witness. *Held*, that declarations of defendant concerning his determination to release such witness, and concerning his arrangements to break into jail for that purpose, were not admissible, being too remote.

In bank. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Ellery Dixon was convicted of grand larceny, and appeals. Reversed.

A. L. Shinn, R. P. Clement, and *Clark & Jones*, for appellant. *Atty. Gen. Hart*, for the People.

Garoutte, J. Defendant was convicted of the crime of grand larceny, and appeals from the judgment upon a bill of exceptions. Counsel for appellant relies upon many alleged errors of law committed by the trial court for a reversal of the judgment. The assignments of error, based upon the orders of the court refusing to set aside the information, resetting the case for trial, and denying the application for a continuance, are not well taken. The court committed no error in admitting the evidence of the witness Buckmaster as to the statement of Otis Dixon, made in the absence of the defendant. Otis Dixon was jointly charged with the defendant and one Arthur Sylvester with the crime of grand larceny in stealing the horses described in the information. The witness had already testified to facts tending to show a conspiracy between these parties, and his subsequent testimony pointed in the same direction. The evidence of conspiracy was sufficient to go to the jury, and, the commission of the crime not yet being complete, any statement of a co-conspirator was admissible against the defendant. In People v. Geiger, 49 Cal. 649, this court said: "We think there was sufficient evidence of the conspiracy between Alexander and the defendant to justify the court in admitting in evidence the declarations of the former, made previous to the alleged killing. The question of conspiracy was then submitted to the jury with instruction to disregard the declarations of Alexander unless the conspiracy was satisfactorily proved. This was the proper practice." See, also, People v. Collins, 64 Cal. 295; People v. Bentley, 75 Cal. 409, 17 Pac. Rep. 436. Otis Goodlow testified that Joshua Buckmaster and Henry Goodlow arrived at the ranch of witness' father in Oregon. The next morning he (the witness) went out into the field, and saw the horses alleged by this information to have been stolen. "Question. What did you do? You drove them up? Answer. Yes, sir; and I asked 'Josh whose horses them was, and he said they were Ellery Dixon's." Counsel for appellant made no objection to the question, but moved to strike out the answer as incompetent and hearsay, which motion the court denied. This ruling was error. Buckmaster's statements to the witness could not be admitted in evidence against the defendant, Dixon. It has been decided by this court that, where no objection is made to an interrogatory, a motion to strike out the answer comes too late. People v. Long, 43 Cal. 446; People v. Samario, 84 Cal. 485, 24 Pac. Rep. 283. The rule is a salutary one, and should be upheld unless good cause to the contrary appears. In this case the reason of the rule is not present, and appellant should have the benefit of its exception. The answer of the witness was not responsive to the question addressed to him, and for that reason the principle laid down in the foregoing cases has no application. It was attempted to be shown by the evidence of the witness Goodlow that the defendant Dixon and Otis and Ira Dixon persuaded and induced him to leave that section of the state. It was shown by the witness that Ira Dixon and one Sylvester each gave him money, presumably to be used in leaving the country. This character of evidence, to the extent that it showed the acts and declarations of the defendant, was admissible, but as to any evidence of acts or declarations of third parties in attempting to influence the witness, not in the presence of the defendant, and unauthorized by him, it was error to admit it. Upon cross-examination the witness was asked "if the reason why he left home that time was not on account of his father." An objection was sustained to the question, which ruling is error. If it was proper to show, by the examination of the witness in chief, that the defendant induced him to leave the country for the purpose of escaping the effect of his evidence as a witness at the trial, then the question asked by the defense was in the direct line of cross-examination as tending to neutralize and dissipate the effect of the previous testimony of the witness as to the cause of his absence. Some weeks subsequent to the date of the alleged larceny charged in the information, "Josh" Buckmaster, Arthur Sylvester, a half-brother of defendant, and others were arrested in Oregon for stealing horses there, and while in confinement, pending examination and trial, the defendant, Dixon, earnestly exerted himself in various ways in attempting to secure Buckmaster's liberty. Under objection of defendant his statements to various persons, made at that time, "that he had promised a party one thousand dollars to release 'Josh' from jail;" "that he had made arrangements to break into the jail and get him away;" and much more to the same effect,—were offered in evidence. This character of evidence placed the defendant in a bad light, and tended strongly to prejudice the minds of the jurors against him; but it appears to be entirely too remote to be admitted in the case. It is only upon the conjecture that his deep interest in the escape of Buckmaster from prison was owing to his fear that the prisoner might reveal his (defendant's) previous criminal history that the evidence could be in any manner admissible. It could as readily be conjectured that his conduct was attributable to the unwise and unscrupulous zeal of an overzealous friend, or that his contemplated assistance to Buckmaster was occasioned by his desire thereby to indirectly assist his brother, who at that time was charged with the same crime. The evidence was damaging to defendant, and in its nature so remote and conjectural that the objection to its admission before the jury should have been sustained. During one of those conversations to which allusion has just been made, a witness testified that he asked the defendant "if he did have anything to do with that horse-stealing business or handling of the horses." "He said he did, and I asked him why it was he did it, and he said, 'Well, he had been running a real-estate office in Bieber, and that he had been running behind, and was in debt some, and was superintendent of a Sunday school, and that nobody would suspicion him, and that was just as good a way to make money as he knew of.'" These statements of the defendant to the witness, if they referred to the "horse-stealing business" for which Buckmaster was then in jail, were clearly incompetent. If the questions and answers referred to a general scheme or plan of horse stealing, or to horse stealing as a business, then the evidence was properly admitted. The record is not clear as to the exact connection in which the statements were made, although it does appear that at this time the public had no information as to the larceny of the horses involved in the charge against defendant, and even the owner thereof did not at that time know that his horses were stolen.

We see no error in the instructions of the court. One of the charges given to the jury at the request of the people is in the nature of a hypothetical question, embracing practically the prosecution's theory of the case. It includes a large portion of the evidence, and is necessarily long drawn out, and somewhat obscure and unsatisfactory. While we cannot say that it is erroneous, the practice of giving such instructions is not to be commended. It is not calculated to enlighten the jury upon the law which should guide them in their deliberations in the jury-room, and as a general rule such instructions furnish ample grounds for the reversal of judgments in criminal cases. Let the judgment be reversed, and the cause remanded for a new trial.

We concur: McFarland, J.; Sharpstein, J.; Paterson, J.; Harrison, J. De Haven, J.

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94 Cal. 297

Goodlett v St. Elmo Investment Co. *et al.* (No. 14,427.)

(*Supreme Court of California.* April 2, 1892.)

Mortgages — Foreclosure — Deficiency Judgment—Associations.

1. In a suit to foreclose a mortgage of land, given to secure notes of an association for the purchase money of such land, the complaint in the caption named the association and the individual members as defendants, and process was served respectively on the association and on each of its members, and a general appearance was entered by each. The complaint did not clearly indicate whether proceedings were intended merely against the association or against its members personally, and it concluded with the prayer "that plaintiff have judgment against the persons personally liable for said debt for any deficiency that may remain after such sale." The answers of defendants admitted the genuineness and due execution of the articles of association, and did not deny the existence of the partnership relationship among them. *Held*, that plaintiff was entitled to a deficiency judgment against those persons who were members of such association at the date of the execution of the notes in suit.

2. Where the decree and pleadings do not clearly show who were the members of the association when such obligation was incurred, the court will not modify the decree, but remand the cause for further proceedings.

3. A plaintiff in a foreclosure suit does not, by causing a sale under the decree of foreclosure before taking an appeal, thereby waive his right to appeal from that part of the decree fixing personal liability for a deficiency of proceeds of such sale.

In bank. Appeal from superior court, San Bernardino county; C. W. C. Rowell, Judge.

Suit by J. B. Goodlett against the St. Elmo Investment Company and others, as partners, for foreclosure of mortgage of lands given to secure notes issued in respect of a sale of such lands. The decree ordering foreclosure and sale thereunder further ordered, in event of a deficiency, that judgment be docketed against the St. Elmo Investment Company for that amount. Against this order plaintiff appeals. Reversed.

Byron Waters, for appellant. *Barclay, Wilson & Carpenter, Willis & Cole, Samuel Minor*, and *Fredick & Rose*, for respondents.

Beatty, C. J. This is a suit to foreclose a mortgage. The cause was tried in the superior court without a jury, and findings expressly waived by the parties. The court made and entered a decree in favor of the plaintiff, adjudging, among other things, "that there is due to plaintiff upon the mortgage debt mentioned in the complaint, and still remains unpaid, the sum of $12,683.07 in gold coin of the United States, for principal and interest of said debt, together with the sum of $624.15, attorneys' fees, fixed by the court, aggregating a total sum of $13,307.22 due and unpaid to plaintiff upon said notes and mortgage, and that the defendant the St. Elmo Investment Company, an association composed of Robert N. C. Wilson, Charles R. Redick, A. M. Thornton, F. H. Lowell, and Samuel Merrill, and transacting business under said name as St. Elmo Investment Company as a common name, is personally liable therefor, and for all of the said debt, to-wit, the sum of $13,307.22. It is further ordered and adjudged that the hereinafter described property be sold according to law, and that the proceeds of such sale be applied to the payment of the cost of this action incurred by plaintiff, taxed at $80.71, and to the payment of the expenses of such sale, and to the payment to plaintiff of the said sum of $13,307.22 so adjudged to be due as above stated, and that any overplus of said proceeds which may remain after such application be paid to the defendant the St. Elmo Investment Company. Upon the other hand, if such proceeds of such sale are insufficient to pay all of said sums, that, upon the return of the execution herein showing such insufficiency, that the clerk of this court docket a judgment in favor of plaintiff and against the said association defendant the St. Elmo Investment Company for the amount of such deficiency." From this judgment the plaintiff appeals, claiming that it is erroneous on its face in not ordering the deficiency judgment to be docketed against the individuals composing the St. Elmo Investment Company, as well as against the association itself, and asking that the decree be modified so as to grant that relief.

The record upon which the appeal is presented consists of the amended complaint of the plaintiff, the demurrers and answers of the several defendants, and the decree, without any bill of exceptions. The judgment, therefore, cannot be held erroneous unless it conflicts with or falls short of the uncontradicted allegations of the complaint, or is self-contradictory. We see nothing in the judgment, considered by itself, and without reference to the pleadings, that is erroneous. It is evidently based—as regards the deficiency—upon section 388 of the Code of Civil Procedure, but the contention of appellant that neither that section nor section 414 has any application to an action to foreclose a mortgage is not sustained by the decision which he cites,—Bowen v. May, 12 Cal. 351. There was no question in that case as to the proper form of a deficiency judgment against the parties personally liable for the secured debt, and we see no reason why, if an association of persons transacting business under a common name contracts a debt which is secured by the mortgage of one or more of the associates or of a third person, the mortgagee in his action to foreclose may not, if he chooses to do so, proceed against the association under section 388 for the purpose of obtaining a deficiency judgment binding only the joint property of the associates. The question, therefore, is whether this appellant did, as contended by respondents, sue the St. Elmo Investment Company, or, as he contends, sue the individuals composing that association. To solve this question, recourse must be had to the amended complaint, the caption of which is as follows: "J. B. Goodlett, Plaintiff, vs. The St. Elmo Investment Company, Robert N. C. Wilson, Charles R. Redick, F. H. Lowell, Samuel Merrill, and F. H. Lowell, trustee of said St. Elmo Investment Company, and H. A. Barclay, Defendants." The allegations which follow, so far as they are material to the present inquiry, are: "That on the 17th of March, 1887, Samuel Merrill, Robert N. C. Wilson, Charles R. Redick, A. M. Thornton, and F. H. Lowell formed a syndicate of themselves for the purpose of acquiring, subdividing, and selling in small lots and parcels the whole of said property hereinafter mentioned, with other lands adjacent thereto; and with a view to that end entered into articles of agreement, in form and substance," etc. As to the contents of this agreement, which is set out at length in the complaint, it is sufficient to say that it shows that the persons by whom it is subscribed —being the same persons above named—have associated themselves in business for the purpose of subdividing and selling certain tracts of land previously contracted for by different members of the association, (one of said tracts being the land of this plaintiff, which was subsequently conveyed to the trustee of the St. Elmo Investment Company, and by him mortgaged to plaintiff to secure the deferred installments of the purchase price, which mortgage this suit is brought to foreclose;) that they have each subscribed $3,000 to the capital of the association; that it is to be known as the "St. Elmo Investment Company;" that for the purpose of transacting its business Charles R. Redick shall act as chairman, A. F. Thornton as secretary, F. N. Lowell as treasurer and general manager, subject to the advice of all the members acting as a board of directors; that the shares of the association shall be represented by certificates of $1,000 each, to be issued by the treasurer on receipt of the money subscribed, which certificates may be transferred by the holder, whose assignee shall be entitled to all the rights of the original holder; that the capital may be increased to any extent deemed proper by the members; and that on the consummation of its objects the capital of the association and a ratable share of the profits shall be refunded to the members. It is next alleged in the amended complaint that on the 4th of May, 1887, F. H. Lowell, acting for and on behalf of said association, and as its trustee, obtained a conveyance of plaintiff's land, and at the same time executed the notes of the association for the deferred installments of the purchase money, securing the same by a mortgage of said land. The only remaining allegations of the complaint that need be stated here are contained in paragraphs 11 and 12, which are as follows: (11) "That the defendants have or claim to have some interest in and to said mortgaged premises as purchasers, mortgagees, judgment creditors, or otherwise, which interest or claim is subsequent to and subject to the lien of plaintiff's mortgage." (12) "That all of the defendants other than said St. Elmo Investment Company have acquired, and now own, some interest in or to the shares and certificates of ownership in said St. Elmo Investment Company, mentioned in said articles of association." The prayer of the complaint is, in general terms, "that plaintiff have judgment against the persons personally liable for said debt for any deficiency that may remain after such sale."

From this statement of the contents of the amended complaint it will be seen that it leaves the intention of the pleader in some doubt. It presents some indications, especially in the caption, of an intention to proceed against the association as a separate defendant; but, on the other hand, there is nothing in the body of the complaint clearly indicative of an intention to proceed under section 388 of the Code of Civil Procedure, or to forego the right of plaintiff to a deficiency judgment against the individual members of the association. We think, however, that it is not very material what the intention of the pleader may have been with respect to this matter. The real question is whether, upon the uncontradicted allegations of the complaint, the plaintiff was entitled to a deficiency judgment against the individual members of the association, all of them having been duly served with process, or, what amounts to the same thing, having appeared, and answered to the merits. The answers of the defendants do not put in issue the genuineness and due execution of the articles of association of the St. Elmo Investment Company as set out in the complaint; in other words, the formation of the company, its date, its original membership, and the terms of association are admitted, and it does not seem to be controverted that the members sustain towards each other the relation of partners, and were jointly liable as such to third persons upon obligations of the company, incurred while they were such members. The defendant Merrill alone alleges that he assigned his shares, and ceased to be a member of the company as soon as its shares were issued; but he does not make it clear that this was prior to the execution of the notes and mortgage in suit. The authority of Lowell to make the notes sued on in the name or on behalf of the company is denied in the several answers, but the judgment of the court distinctly and necessarily implies that he had such authority, and that the notes bound the company, and therefore bound its members. We think that on the findings implied in the decree and the admissions in the pleadings the plaintiff was entitled to a deficiency judgment against those persons who were the members of the St. Elmo Investment Company at the date of the execution of the notes in suit, and that, if the defendants Wilson, Redick, Merrill, Lowell, and Thornton were such members, the court had jurisdiction, by reason of their general appearance in the action, to render such judgment against them. But we do not think it clear, either from the decree or the pleadings, or both combined, who were the members of the association when the obligation was incurred, and therefore we are not inclined, upon the record before us, to modify the decree as requested. We think it safer to reverse the judgment for the error of the court in failing to order that deficiency docketed against the members of the St. Elmo Investment Company, and to remand the cause for further proceedings.

Our attention has been called to the fact that plaintiff, before taking this appeal, caused execution to be issued and the mortgaged premises sold, and it seems to be claimed that this is a waiver of his right to appeal from the judgment. We do not think that this action amounts to a waiver. Plaintiff's right to sell the mortgaged property was absolute, and could be exercised without prejudice to his right to appeal from that part of the decree fixing the personal liability for a deficiency of the proceeds of such sale.

The judgment of the superior court, so far as it directs the docketing of a deficiency judgment against the St. Elmo Investment Company, is reversed; in other respects it is affirmed. The cause is remanded, with directions to the superior court to find upon the evidence before it, and such other evidence as the parties may submit, who were the members of the St. Elmo Investment Company at the date of the execution of the notes in suit, and to order the docketing of a deficiency judgment accordingly.

We concur: DE HAVEN, J.; SHARPSTEIN J.; MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.

PALMER v. ST. ELMO INVESTMENT CO. *et al.* (No. 14,410.)

(*Supreme Court of California.* April 2, 1892.)

In bank. Appeal from superior court, San Bernardino county, C. W. C. ROWELL, Judge.

Suit by S. E. A. Palmer against the St. Elmo Investment Company and others, as partners, for foreclosure of mortgage of lands, and to recover amounts of certain notes. The decree ordering foreclosure and sale thereunder further ordered, in event of deficiency, that judgment be docketed against the St. Elmo Investment Company for that amount. Against this portion of decree plaintiff appeals. Reversed.

Byron Waters, for appellant. *Barclay, Wilson & Carpenter, Willis & Cole, Samuel Minor*, and *Fredick & Rose*, for respondents.

BEATTY, C. J. This case is in all essential respects the same as the case of Goodlett v. Investment Co., (No. 14,427,) 29 Pac. Rep. 505, (this day decided,) and on the authority of that case the judgment of the superior court, so far as it directs the docketing of a deficiency judgment against the St. Elmo Investment Company, is reversed; in other respects it is affirmed. The cause is remanded, with directions to the superior court to find upon the evidence before it, and such other evidence as the parties may submit, who were the members of the St. Elmo Investment Company at the date of the execution of the notes in suit, and to order the docketing of a deficiency judgment accordingly.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; McFARLAND, J., HARRISON, J.; GAROUTTE, J.

(94 Cal. 260)

GLASSELL v. COLEMAN *et al.* (No. 14,277.)

(*Supreme Court of California.* April 2, 1892.)

VENDOR AND VENDEE—RESCISSION OF CONTRACT BY VENDOR—LIABILITY OF VENDEE'S GUARANTORS.

1. Where plaintiff contracts to sell land, and the intending vendee executes an installment note for the price, but fails to perform his part of the contract, whereupon plaintiff notifies him that he (plaintiff) has elected to rescind the contract, plaintiff has no longer a right of action on the contract or on such installment note, but only a right of action for the breach of the contract.

2. Where defendants guarantied the payment of part of the installment note, such payment "to be made only in the event that" plaintiff "shall have the right to revert to * * * these guarantors by reason of the failure" of the vendee to comply with his part of the contract, plaintiff, on such rescission by him, has no right of action against defendants, their liability being subsidiary to that of the intending vendee.

3. Notice by plaintiff to the vendee, after his notice that he elected to rescind the contract, that he elected to consider the whole of the principal sums named in the installment note as immediately due and payable as provided therein, did not affect defendant's liability.

In bank. Appeal from superior court, Los Angeles county, LUCIEN SHAW, Judge.

Action by Andrew Glassell against N. D. Coleman and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Smith, Winder & Smith, for appellant. *A. M. Stephens, Jas. G. Garrison*, and *Gibson & Creighton*, (*Frank G. Burnett*, of counsel,) for respondents.

HARRISON, J. The plaintiff and the defendant Wilson entered into an agreement, bearing date September 1, 1888, by which the plaintiff agreed to sell and Wilson to purchase a tract of land in Los Angeles county for the sum of $182,000, payable in installments, of which the second, of $50,000, was to be paid on or before 10 years from the date of the agreement, and the third, of $125,000, on or before 15 years from said date. Said installments were to bear interest at the rate of 6 per cent. per annum, payable yearly; but it was provided that of said interest Wilson need pay only $1,000 for the first year and only $3,000 for each of the second and third years. Other provisions, not necessary to be mentioned here, were made in the contract in reference to the payment by Wilson of interest and taxes, and for the expenditure by him of money in improving the land, and its subdivision and sale in parcels. The agreement provided that a writing "somewhat in the form of a promissory note" should be executed by Wilson, "expressing the terms of the obligation as to the payment of the second and third installments," separate from and in addition to the contract, as "an additional evidence" of such obligation, and in pursuance of this clause Wilson executed to the plaintiff the following instrument: "Los Angeles, Cal., September 1, 1888. This obligation witnesseth as follows: On or before ten (10) years after this date, for value received, I promise to pay to Andrew Glassell, of this city, or order, at this city, the principal sum of fifty thousand ($50,000) dollars, and also on or before fifteen years after this date, for value received, I promise to pay to said Glassell, or order, at said city, the further principal sum of one hundred and twenty-five thousand ($125,000) dollars, with interest on both sums from date until paid at the rate of six per cent. (6 per cent.) per annum; interest to be paid yearly, except as hereby modified, to-wit: For the first year only one thousand ($1,000) dollars of the accruing interest on said two sums shall be required to be paid within that year. * * * [Other provisions relating to the payment of interest omitted.] If default be made at any time for the space of six months in the payment of the interest as herein provided, the whole principal sum shall thereupon become due at the option of Glassell. This note is given as an additional security for the payment of the second and third installments of purchase price, payable as per contract between the parties hereto, of the same date herewith, for sale, etc., of land in Los Angeles county, Cal., and any and all payments made by said Wilson to said Glassell on said second and third installments, as required by said contract, shall be considered, for all intents and purposes, as credits upon this obligation." At the same time the respondents herein executed to the plaintiff their obligation, written upon the same sheet of paper, and immediately after the above obligation of Wilson, as follows, to-wit: "For value received, the undersigned jointly and severally guaranty the payment of this note according to its terms and conditions, but only to the extent of the sum of twenty-five thousand ($25,000) dollars, and interest on said twenty-five thousand ($25,000) dollars at the rate of six per cent. (6 per cent.) per year from the date of this note, or from the date of the last payment of the accrued interest on this note, if any such payments of interest shall be made; the payments of said twenty-five thousand ($25,000) dollars, and interest thereon, however, to be made only in the event that the within mentioned Glassell shall have the right to resort to this note and these guarantors by reason of the failure of the within mentioned H. T. D. Wilson to comply with his obligation, as expressed in the contract for the purchase and sale of land between him and said Glassell, of even date with this note, and therein referred to, and of the forfeiture consequent upon such failure." The agreement between the plaintiff and Wilson provided that the plaintiff should convey the land to Wilson upon his payment of the entire purchase price of the whole tract, and performance of the other obligations assumed by him, and contained also the following clause: "It is further agreed that time is of the essence of this contract, and in the event of a failure to comply with the terms hereof by the said party of the second part the party of the first part shall be released from all obligations in law or equity to convey said property, and said party of the second part shall forfeit all right thereto, and to all moneys, promissory notes, or other considerations therefor paid or delivered to said first party under this contract; * * * and said first party shall especially have the right to retain and own * * * the above-mentioned written money obligation of the said second party to the said first party for the payment of the principal and interest of said second and third installments referred to in the contract, and designated second and third installment note, together with the right to enforce the collection thereof as against said Wilson and the guarantors on said note, but only to the extent as expressed in the guaranty indorsed said note." The plaintiff and the defendants herein had made an agreement in September, 1887, for the purchase and sale of the said tract of land at a much higher price, but owing to the collapse of the "boom" during that year the vendees thereunder were desirous of being released from its obligations, and, as the result of negotiation therefor between them and the plaintiff, he executed to them a full release and discharge therefrom; and, at the same time, in consideration thereof, the foregoing instruments were executed by the defendants as a substitute for the agreement of 1887. Wilson failed to make the expenditures agreed by him, or to pay the taxes on the land, or any of the interest provided by the installment note, and the plaintiff, on the 10th of September, 1889, and again January 20, 1890, gave him a written notice in the following terms: "I have elected, and do elect, to claim and insist, and do hereby claim and insist, on the absolute forfeiture of all your interests, claims, and rights mentioned in or provided for in said contract, and you are especially notified that I now claim to be released from all obligations in law or equity to convey the real property mentioned in said contract, and that I claim that you have forfeited all right thereto, and to all moneys, promissory notes, and considerations therefor or for said contract paid or delivered to me under or pursuant to said contract, and that I retain and have and claim absolutely all the rights, property, and privileges provided for in said contract for my benefit in the event of your complete forfeiture therein provided for." The plaintiff also, "upon the expiration of six months from and after the said September 1, 1889," notified Wilson that he chose and elected to consider the whole of the principal sums named in the installment note as immediately due and payable. It is also alleged in the complaint that by reason of the failure of Wilson to comply with its obligations, as expressed in said agreement, the plaintiff has been damaged to the extent of $50,000, and that he notified the respondent of such failure, and has demanded of them the payment of $25,000, for which he prays judgment against all of the defendants. The respondents herein (the defendants other than Wilson) demurred to the complaint for its insufficiency upon the ground that it stated no cause of action against them, and, the court having sustained their demurrer, judgment was entered dismissing the action, from which plaintiff has appealed.

1. The allegations in the complaint in reference to the agreement of September, 1887, cannot be considered for the purpose of determining whether the plaintiff has any cause of action against the respondents arising out of the breach of the agreement of September, 1888. It is alleged in the complaint that the agreement of 1887 was canceled, and that those of 1888 were executed as a substitute for it. Even if its cancellation was upon the consideration that the others should be executed, the parties to the latter are bound only by the obligations which they have therein assumed.

2. The liability of the respondents is limited by the terms of their guaranty. Being only guarantors for Wilson, their liability can under no contingency be greater than his, or greater in extent than that which they have themselves assumed. Unless he is liable upon the contract which they have guarantied, they cannot be held liable thereon, nor are they liable upon any contract or obligation which he may be under to the plaintiff that is not within the terms of their guaranty.

3. Upon the election by the plaintiff to rescind the contract by claiming a forfeiture by Wilson of all his rights under the contract, the contract itself, and each of its provisions or terms, ceased to be a subsisting or enforceable obligation against Wilson. The only right of action against him then remaining to the plaintiff was for damages for his breach of the contract. The plaintiff could not have a right of action on the contract and at the same time one for its breach. An action for damages for the breach of a contract necessarily implies that the contract has been terminated. Wilson's liability to the plaintiff upon his agreement to pay the purchase price for the land ceased with the plaintiff's rescission of his right to receive the land upon such payment. Whether his obligation for such purchase money was expressed in the contract of sale, or in the promissory note executed contemporaneously therewith, is immaterial. Each instrument was executed as a part of the same transaction, and the forfeiture of his right to the land wrought an entire failure of the consideration for his promise to pay for the land, irrespective of the instrument in which the promise was contained. The writing "somewhat in the form of a promissory note," which the contract provided should be executed by Wilson to the plaintiff, was by the terms of the contract to be only an "addi-

tional evidence of the obligation" to pay the second and third installments; and the installment note itself purports in terms to be given only "as additional security for the payment" of those installments.

4. By the terms of their agreement the respondents "guarantied the payment of this note according to its terms and conditions," to the extent of $25,000, but limited this liability to the condition that the plaintiff should have "the right to resort to this note" and to them by reason of the failure of Wilson to comply with his obligations as expressed in the contract "referred to in the note," and of the forfeiture consequent upon such failure. The only provision in the contract relating to the right of the plaintiff to "resort to this note" is the one which provides that upon a rescission of the contract of purchase, and the forfeiture of all Wilson's rights under the contract, the plaintiff may "retain and own" the note, and also "the right to enforce the collection thereof as against said Wilson and the guarantors on said note;" but only to the extent as expressed in the guaranty. Neither by this provision in the contract, nor by the installment note itself, was there imposed upon Wilson any other obligation than to pay the purchase money for the land therein named; and the plaintiff's "right to enforce the collection thereof" terminated with Wilson's obligation to pay such purchase money. "The right to enforce its collection" was only a right correlative to the obligation to pay it, and did not create a right to collect from Wilson any liability other than that which rested upon the consideration for which the note was given. The plaintiff had no right of action on the note for any damages sustained from Wilson's breach of his agreement to purchase. Wilson's liability for such damages, as we have seen, was independent of and inconsistent with any liability on the note. The obligation of the respondents, being subsidiary to that of Wilson, and being limited to such portion of his liability on the note as they had guarantied, it follows that upon the termination of his liability thereon by virtue of the forfeiture claimed by the plaintiff all liability of the respondents to the plaintiff ceased at the same time. The plaintiff's right of action against Wilson for damages arising from the breach of the contract of purchase is entirely independent of his right of action on the note, and, as the respondents have not guarantied any liability of Wilson for such damages, the plaintiff has shown no right of action against them.

5. The notice by the plaintiff to Wilson, after his notice that he elected to rescind the contract, that he elected to consider the whole of the principal sums named in the installment note as immediately due and payable, had no other effect than to hasten the maturity of the installments therein provided for, and did not affect the liability of the respondents. Upon the maturity of the forfeiture at the expiration of the six months' grace allowed by the contract after such notice their liability upon the note terminated with the liability of Wilson thereon.

We are of the opinion that the complaint fails to state a cause of action against the respondents, and that the court below correctly sustained their demurrer. The judgment is affirmed.

We concur: McFARLAND, J.; DE HAVEN, J.; SHARPSTEIN, J.; PATERSON, J.; GAROUTTE, J.

(64 Cal. 249)

CARMAN v. ROSS.[1]

(*Supreme Court of California.* Oct. 24, 1883.)

ACTION TO RECOVER PERSONAL PROPERTY—PLEADING—TRIAL—CONTRADICTORY FINDINGS.

1. An averment in an action to recover possession of personal property, that "plaintiff was and is the owner and in the possession of the property sued for," does not state a cause of action.

2. An answer in an action to recover personal property, which denies an averment in the complaint that plaintiff is the owner, is not demurrable for not stating facts sufficient to constitute a defense.

3. Where a demurrer to an answer was sustained generally, and defendant did not amend, a trial by the court, as if issues of fact had been joined, was irregular and erroneous.

4. In an action for the recovery of personal property, findings that each party was in possession of the property are so contradictory that a judgment thereon must be reversed.

Appeal from superior court, Stanislaus county.

Action by John Carman against Frank H. Ross to recover possession of personal property. Demurrer to complaint overruled. Demurrer to answer sustained. Judgment for plaintiff. Defendant appeals. Reversed.

Wright & Hazen, for appellant. *Maddux & Simmons*, for respondent.

PER CURIAM. The demurrer to the complaint should have been sustained. This action is to recover possession of specific personal property, and it is averred in the complaint that the plaintiff was and is the owner and in the possession of the property sued for. This is an averment that the plaintiff was in the possession of the property sued for when this action was commenced. This being the case, the plaintiff had no cause of action. We do not think that this is cured by any other averment in the complaint.

The answer was demurred to on the ground, among others, that it did not state facts sufficient to constitute a defense. The demurrer was sustained generally. We are of opinion it was not well taken, on the general ground above stated, for the answer does deny that the plaintiff is the owner of the property described in the complaint. The other ground of demurrer is so indefinitely stated that we cannot tell to what portion of the answer it relates, and therefore say nothing in regard to it.

The defendant refused to amend his answer. Nevertheless, the court below proceeded to try the case as if issues had been joined in it by proper pleading. This trial was entirely irregular and erroneous. The cause seems to have been tried as if issues of fact had been made up, when in fact no such issues had been joined.

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[1] This case, filed October 24, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

The findings are contradictory. The court, in effect, found that each party was in possession of the property sued for when the action was commenced. We cannot see how any judgment could have been pronounced on such a contradiction. Judgment reversed, and cause remanded for proceedings in conformity with this opinion.

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64 Cal. 110

BUTTE COUNTY v. BOYDSTON.[1]

(*Supreme Court of California.* Aug. 29, 1883.)

EMINENT DOMAIN — COMPENSATION — PROCEDURE.

1. Code Civil Proc. § 1248, provides that, in condemnation proceedings, the court, with or without a jury, must ascertain and assess (1) the value of the land; (2) the damage by reason of severance; and (3) the benefit. *Held*, that these elements of compensation must be separately assessed, and that until such assessment a judgment of condemnation is void.

2. The fact that subdivision 4 of the same section requires that, when lands are condemned for a railroad right of way, the cost of fencing the line shall be assessed as damages, does not, by implication, preclude an assessment for the cost of fencing in other cases, if fences are rendered necessary by the taking.

3. Although there was a "No-Fence Law" (St. 1873–74, p. 310) in the county, under which no person is bound to fence land, the cost of fencing the remainder of land, for restraining the cattle of the owner and other purposes, by one whose land has been condemned, may be considered as an element of injury.

4. A finding of facts which supports all the material allegations of the complaint is insufficient to support a judgment of condemnation, when the complaint itself contains no allegations of value, damages, or benefits, and no findings are made on the question of damages.

Appeal from superior court, Butte county.

Action by Butte county against R. W. Boydston to condemn land. From a judgment for plaintiff defendant appeals. Reversed.

Reardan & Freer, for appellant. *F. C. Lusk*, for respondent.

MCKEE, J. The case in hand arises out of a proceeding under title 7, pt. 3, Code Civil Proc., to condemn part of a tract of land belonging to the defendant for a private way. Assuming that the appropriation of private property for such a purpose is a taking for public use, for which the power of eminent domain may be exercised, (Sherman v. Buick, 32 Cal. 255,) and that the county in which such a road is to be opened represents the use, yet the power must be exercised in the manner provided by the Code of Civil Procedure, under which the proceeding has been commenced. By section 1248 of that Code it is provided that the court in which the proceeding has been brought must hear, with or without a jury, such legal testimony as may be offered by any of the parties to the proceeding; and upon such testimony ascertain and assess (1) the value of the land sought to be condemned, and of any improvements upon it at the date of the issuance of the summons in the proceeding; (2) the damages which may accrue to the remaining land by reason of its severance from the part sought to be condemned, and the opening of the road in the manner proposed by the plaintiff; and (3) the benefit, if any, which the opening of the road may be to those portions of the defendant's land which may be severed from the part to be appropriated. These constitute the elements of the compensation to which an owner of land is entitled, where his land, or any part of it, is proposed to be taken and appropriated for a public use. And, when these things shall have been judicially ascertained and assessed, if the benefit shall be less than the damage, the former must be deducted from the latter, and the remainder shall be the damages assessed. On the other hand, if the benefit shall exceed or be equal to the damage, the owner shall be entitled only to the value of the land to be taken. But the value of the land, the damage, if any, and the benefit, if any, must be separately assessed, in order that the compensation may be adjudged and paid. Until such an assessment, adjudication, and payment or tender of compensation, the owner cannot be deprived of his land, and any judgment of condemnation rendered against him would be illegal and void. Sections 1251–1253, Code Civil Proc. In the proceeding under review the law was not complied with. There is not in the record of the case any assessment of damage, nor any finding that no damage was sustained. There is a finding of facts which, it is admitted, "sustains all the material allegations of the complaint," but the complaint itself contains no allegations of value, damage, or benefit. Upon this finding the court held, as a conclusion of law, that that portion of defendant's land sought to be condemned was necessary for the road, and that it should be condemned upon payment to the defendant of $150, each party paying his own costs. It is stipulated that this sum of $150 was found as damages; but whether the sum was for the value of the land to be appropriated to the road, or for damage for any injury to the remaining land, or for the excess of damage over benefit, nowhere appears in the findings or by an assessment. The defendant was entitled to have his compensation ascertained and assessed according to law, and for that purpose the mode designated by the law must be pursued. Without an assessment, as far as practicable, for each source of damage separately, and without payment or tender of the compensation assessed, no judgment of condemnation could be legally entered. Section 1248, subd. 5, and section 1253, supra. The judgment is therefore erroneous, and must be reversed. But a question arises out of the record, which will again come up at another trial, and we are asked to pass upon it.

It appears that at the hearing of the evidence the defendant offered to prove that the opening of the road would divide his farm in such a way as to make it necessary for him to fence his remaining land. To this the plaintiff objected; the objection was sustained by the court upon the ground that the cost of fencing was not an element of damage; and that ruling is assigned as error. It is contended that the ruling was correct, because the cost of fencing is excluded by law, as an element of damage, in all condemnation proceedings, except where a railroad company seeks to condemn land for the purpose of its railroad. In such a proceeding the court is required "to ascertain and assess the cost of good and sufficient fences along the lines of the railroad, and of cattle-guards where fences may cross the line of the road," (section 1248, subd. 4, supra;) but it is not required to do so in any other case, and therefore it is insisted the defendant was not entitled to prove the necessity or the cost for fencing his land. But this provision as to railroad companies does not affect the right of the owner to the compensation to which he is entitled. The object of the provision was to secure the performance of a duty imposed by law upon railroad companies on land taken for the purpose of their roads. Section 485, Civil Code. That duty the state enforces by a special assessment in the condemnation proceedings, and the duty must be performed either by the railroad company or the land-owner. The assessment may be paid to the land-owner by the company, or it may elect to give bond in double the amount of the assessment, for the building of such fences and cattle-guards as may be needed upon the land taken for the road within 18 months after the railroad is built on the land. Section 1251, Code Civil Proc. If the company fails to build, the land-owner may sue upon the bond. But if payment of the assessment be made to the land-owner, and he fails to build and maintain such fences, etc., the law makes him liable to the company for any injuries which may be sustained by reason of his animals running at large upon the railroad, and relieves and exonerates the company from any damage or loss arising out of the killing or maiming of his cattle, trespassing upon the road, unless it be proved that the loss or damage was caused wholly by the fault or negligence of the company. Section 485, Civil Code. The special assessment in a railroad case is therefore made in the line of a duty imposed by law, and not in the way of damages to the land-owner for an injury to his land.

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[1] This case, filed August 29, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

But in the present proceeding there can be no assessment against the plaintiff for the enforcement of a legal duty, for the county of Butte is not bound to fence public or private roads. Any assessment made in the proceeding must therefore be made to the defendant in the way of damages for an injury; and there is no law known to us which excludes a defendant in a case from the right of showing by legal testimony the extent of an injury which is the subject for ascertainment and assessment. All the provisions of the law under consideration must be read and construed so as to correspond with section 14, art. 1, of the constitution, which provides that "private property shall not be taken or damaged for public use without compensation having been made or paid into court for the owner." That constitutional provision is broad enough to include all cases in which private property is attempted to be taken under the power of eminent domain. And the legislature, in carrying out the provision, has established the rule that, where you take all a man's property for the public use, you must pay him its value; but where only a part of it is taken you must pay the value of that part and the damages, less benefits, for the injury which the taking and appropriation of the part may cause to his remaining land. Injury to what remains is therefore a proper subject of compensation. The right of ownership is unlimited except by the right of the state as regulated by the constitution and laws; and, when the state exercises its right, the owner has the legal right to prove, by legal testimony, any of the acts or things which may constitute injury to what remains of his land by the act of appropriation. It is argued that the cost of fencing cannot be considered as a element of such injury, because the plaintiff has what is called a "No-Fence Law," (St. 1873-74, p. 310;) and therefore neither plaintiff nor defendant is bound to fence. But under such a statute, as at the common law, while no man was bound to fence his lands against the cattle of another, there may be a necessity or fencing in his own cattle, or otherwise protecting his land, (Rust v. Low, 6 Mass. 94;) and, if the act of taking from him part of his land for the public use forces upon him the necessity of protecting what remains, he should be entitled to show it. You cannot take a man's land for a public highway, to run in such a way as to expose his remaining land to unlawful or other encroachments, and arbitrarily say to him, "There is no necessity for protecting your land by fences or otherwise." In the language of the supreme court of Illinois, "the injuries which the proprietor suffers by having his farm divided so as to make it inconvenient to pass to and from its different parts, and to compel him to erect additional fences, and all other injuries of a like character occasioned by the construction of a public work through it, are as proper subjects of inquiry, in estimating the damages sustained thereby, as is the value of the land actually appropriated to public use." Railroad v. Carpenter, 14 Ill. 192. "What the public take," says the supreme court of New Hampshire, "is not simply the land covered by the road, but the right to make and maintain the road; and the injury to the whole tract may much exceed the value of the land actually taken. The land may be inconveniently divided, and additional fencing may be required. A just and fair compensation for the right taken would be the actual damage done to the whole land, and such is the compensation which in equity the landowner ought to receive." In re Washington Road Co., 35 N. H. 134. So where a committee had been appointed, under a statute of Massachusetts, to locate a road adjudged to be necessary, and to estimate the damages any person may sustain in his property by the laying out of the road, it was held that in estimating the damages the committee were not confined to the value of the land covered by the road and the expense of fencing the ground, etc., but the owner was entitled to show any other actual damage, and the estimation ought to be according to the damage which he will in fact sustain in his property by the opening of the road. Com. v. Coombs, 2 Mass. 489; Cooley, Const. Lim. 566; Railroad Co. v. Scott, 1 Penny. 503. Taking part of a man's land for public use may not, in fact, force upon him the necessity to fence the remainder of his ground; but he has the legal right to show that such a necessity will arise out of the appropriation, and, if the necessity shall be proved as a fact, the expense incident to it is a matter for the court in estimating the damage to which the owner is entitled. The court erred in excluding the evidence. Judgment and order reversed, and cause remanded for a new trial.

Ross, J., Sharpstein, J., McKinstry, J., Myrick, J., and Thornton, J., concurred.

(94 Cal. 333)

Ex parte ABBOTT. (No. 20,923.)

(*Supreme Court of California.* April 18, 1892.)

PUNISHMENT FOR CONTEMPT.

St. 1891, p. 52, (amending Pen. Code, § 1205,) providing that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, does not apply to cases of contempt; section 11 providing that the Penal Code "does not affect any power conferred by law upon any * * * tribunal or officer, to impose or inflict punishment for contempt."

In chambers. Appeal from superior court, Los Angeles county; B. N. SMITH, Judge.

Amos Abbott was convicted of contempt of court, and appeals. Affirmed.

Mr. Stephens, for petitioner. *Mr. York*, for respondent.

BEATTY, C. J. Petitioner was duly convicted in the superior court of Los Angeles of a contempt of its authority, and sentenced to pay a fine of $400, and, in default of payment, to be imprisoned in satisfaction of the fine one day for every $2 of the fine unpaid. In pursuance of said judgment he has been committed to, and is imprisoned in, the county jail. He asks to be discharged upon the ground that, since the recent amendment of section 1205 of the Penal Code, (St. 1891, p. 52,) the superior courts have no power in contempt cases to imprison the defendant in satisfaction of a fine for a longer period than five days.

The whole question to be decided is whether this amendment to the Penal Code applies to cases of contempt. In my opinion it does not. Section 1205 of the Penal Code, since the amendment referred to, is, as it was before, to be read in connection with section 11 of the same Code, which expressly declares that "this Code does not affect any power conferred by law upon any * * * tribunal or officer, to impose or inflict punishment for a contempt." The power to punish for contempt of court, and its limitations, must, therefore, be sought elsewhere than in the Penal Code, and they are found in the Code of Civil Procedure, § 1209 et seq. The limit of punishment there prescribed is a fine not exceeding $500, or imprisonment not exceeding five days, or both. Section 1218, Code Civil Proc. The power conferred by this section is not affected by any of the provisions of the Penal Code. In Ex parte Crittenden, 62 Cal. 535, it was held that the court imposing a fine for contempt has the power to make and enforce a judgment such as that in question here, and that, as I understand the decision, without reference to or aid from section 1205, or any other provision of the Penal Code. That decision has never been overruled or questioned, to my knowledge, and remains the law by which I must be bound in deciding this application. The prisoner is remanded.

(94 Cal. 192)

SCHALLERT-GANAHL LUMBER CO. *et al.* v. NEAL *et al.* (No. 14,788.)

(*Supreme Court of California.* March 30, 1892.)

APPEALABLE ORDER — MODIFIED JUDGMENT—MECHANICS' LIENS — ALLOWANCE OF ATTORNEY'S FEE.

1. Under Code Civil Proc. § 1195, providing that, in actions to enforce liens, the superior court must allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorneys' fees in the superior and supreme court, such costs and attorneys' fees to be allowed to each lien claimant whose lien is established, attorneys' fees in the supreme court are not costs, within Sup. Ct. Rule 24, providing that, where an order of reversal or modification contains no directions as to costs of appeal, the clerk will insert in the *remittitur* a judgment that appellants recover the costs.

2. Under section 1195, the allowance of attorneys' fees in lien cases is in the hands of the superior court, and though, on appeal from a judgment allowing a lien, the superior court is directed to modify the judgment as to a certain item, it may still allow the lien claimant attorneys' fees in the supreme court.

3. Where, after the modification by the superior court, in accordance with the directions of the supreme court in the *remittitur*, of a judgment allowing a lien, an order is made allowing the lien claimant an attorney's fee in the supreme court, an appeal will not lie from the judgment as modified, as such order is a special order after final judgment, and itself appealable.

In bank. Appeal from superior court, Los Angeles county.

Action by the Schallert-Ganahl Lumber Company and others against James A. Neal and others. From an order allowing plaintiffs an attorney's fee, and from the judgment as modified, defendants appeal. Appeal from judgment dismissed.

Telfair Creighton and *John W. Mitchell*, for appellants. *H. A. Barclay*, for respondents.

GAROUTTE, J. This is a motion to dismiss an appeal, and the facts are as follows: Plaintiffs are material men, and brought this action to foreclose certain liens for materials furnished defendant Neal. Judgment was recovered as prayed for in the complaint, and, upon an appeal to this court, that judgment was affirmed in all respects except as to an item of $43.50, and to that extent the trial court was directed to modify the judgment. Upon the filing of the *remittitur* in the lower court, the judgment was modified in accordance with the directions therein, and the court also by an order allowed the attorneys for respondents a fee of $100 for services in defending the cause in this court, which amount was added to the judgment. It is from this order, and the judgment as modified, that defendants have now appealed, and the motion to dismiss such appeal is the matter under investigation; respondents insisting that in such case there is no appeal authorized by law. It seems quite clear that the court had the power to make an order allowing the successful party in this action a reasonable attorney's fee for services rendered in this court. Section 1195 of the Code of Civil Procedure contains this provision: "The court [meaning the superior court] must also allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorneys' fees in the superior and supreme courts, such costs and attorneys' fees to be allowed to each lien claimant whose lien is established," etc., It needs but a cursory examination of the foregoing provision of the statute to determine that the attorney's fee referred to is not considered a part of the costs, but as a matter separate and distinct therefrom. Still it bears some resemblance to costs, inasmuch as it is an incident to the judgment. This is the view of the matter taken by this court in Rapp v. Gold Co., 74 Cal. 532, 16 Pac. Rep. 325, and in McIntyre v. Trautner, 78 Cal. 449, 21 Pac. Rep. 15, and is undoubtedly the true principle.

It would seem from the foregoing views that rule 24 of this court, which provides that, "in all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no direction as to costs of appeal, the clerk will enter upon the record and insert in the *remittitur* a judgment that appellants recover the costs of appeal," has no application to the case at bar; for this is not a question of costs, and, in addition thereto, said section 1195 of the Code places the matter in the hands of the superior court. In the case of West Coast Lumber Co. v. Newkirk, 80 Cal. 281, 22 Pac. Rep. 231, and in other recent decisions, this court directed the lower court, upon the return of the *remittitur*, to allow respondent a reasonable attorney's fee, under section 1195 of the Code of Civil Procedure, for services in this court; but such order would appear to be without the power of this court to make, and therefore not binding upon the trial court. The matters which we have referred to possibly are not directly involved in the merits of this motion, but they are to some extent connected therewith, and, we think, necessitated some notice. The appeal in this case is taken from the order allowing the attorney's fee, and also from the judgment as modified. The order modifying the judgment, by adding thereto the sum of $100, was, in effect, the same order as the one allowing an attorney's fee of $100, for such order of itself modified the judgment to that extent. The appeal from the modified judgment should be dismissed, for the order made by the court for the allowance of an attorney's fee of $100 is a special order, made after final judgment, upon which the defendant is entitled to an appeal to this court. It stands upon the same plane as an order made upon a motion to retax costs; and in Dooly v. Norton, 41 Cal. 442, this court, by Justice SPRAGUE, said: "The motion to retax costs is, in effect, a motion to modify the judgment, and, however the order may be considered when it is made before the entry of judgment, it seems clear to me that when it is made after the entry of judgment it is an order after final judgment as fully in every sense as an order modifying the judgment in any other respect." See, also, Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. Rep. 810. This question is reviewed *in extenso* by Mr. Hayne in his work on New Trial and Appeals, (volume 2, § 197,) where the decisions of this court bearing upon the question are all cited, and the principles announced in Dooly v. Norton, supra, are declared by the author to be the true rule. For the foregoing reasons let the motion to dismiss the appeal from the modified judgment be granted, and the motion to dismiss the appeal from the order denied.

We concur: SHARPSTEIN, J.; HARRISON, J.; MCFARLAND, J.; DE HAVEN, J.

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94 Cal. 159

BLAKESLEE v. HALL, (WHITWORTH *et al.*, Interveners. No. 13,974.)

(*Supreme Court of California.* March 30, 1892.)

APPEAL—ABATEMENT BY DEATH—SUBSTITUTION OF PARTIES.

In ejectment, plaintiff claimed under a deed by which the land had been conveyed to him and to his successor in the office of bishop of a certain church. There was judgment for the defendant in the trial court; and, after an appeal therefrom had been perfected, plaintiff died, and his successor as bishop was substituted. It was not contended that the bishop was a corporation sole. *Held*, that the appeal would be dismissed, as such successor had no interest therein; plaintiff's personal representatives alone being entitled to be substituted as plaintiffs.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Ejectment by George A. Blakeslee against H. C. Hall. Whitworth and others intervened. Judgment for defendant and interveners. Plaintiff appeals. Appeal dismissed.

J. D. Bicknell and *E. L. Kelly*, for appellant. *Smith, Winder & Smith*, for respondents.

MCFARLAND, J. This is an action of ejectment against defendant, Hall, to recover certain land in the city of Los Angeles. Whitworth and others intervened. Judgment was rendered against plaintiff, and he appealed from the judgment and from an order denying a new trial. Plaintiff claimed title under a certain deed of conveyance of the land in contest executed by Lydia Rebbeck on

February 3, 1886. The only language in the deed which designates the grantee, or the purposes of the grant, is the following: "I, Lydia Rebbeck, of the county of Los Angeles, state of California, widow, grant to George A. Blakeslee, of Galien, Berrien county, Michigan, and to his successor in office as bishop of the Reorganized Church of Jesus Christ of Latter Day Saints, all that real property," etc. By the deed there was reserved to said Lydia the possession and rents and profits of the land during her life, and also a lease to defendant, Hall, which expired March 15, 1889. On March 23, 1887, the said Lydia died, and upon the distribution of her estate the said land went to the interveners, unless it went to the present appellant through said deed to Blakeslee. Defendant, Hall, is in possession under said interveners. The court below found that the deed was procured from said Lydia,—who was sick at the time with an incurable disease, from which she afterwards died,—by the undue influence of one Mills, who was her pastor and spiritual adviser, both being members of said Reorganized Church, and also found that there was no corporation, sole or otherwise, to which the deed was made; that there was no grantee, etc. We need not examine into the correctness of all the rulings of the court below, as they appear in the statement on motion for new trial, because we think, for the reasons hereinafter stated, that respondents' motion to dismiss the appeal should be granted.

After the appeal had been perfected, and the cause was in this court, counsel for appellant suggested the death of said plaintiff, Blakeslee; and, on their motion, E. L. Kelly, who had been elected as bishop of the said Reorganized Church, was substituted as appellant in the action, whereupon respondents moved to dismiss the appeal, upon the ground that said Kelly has no interest in the litigation. (It is asserted in respondents' brief on the motion, and not denied in the brief of appellant, that appellant declined to substitute the personal representatives of Blakeslee.) If the deed was made to Blakeslee as a natural person, then the personal representatives are alone interested in the litigation, and are alone entitled to be substituted as appellants. If the deed is to be construed as intending to run to Blakeslee as bishop, and to his successor in office as bishop, then the word "successor" is valueless, and does not convey to or continue in said Kelly any estate in the land, unless the bishop of said church was and is a corporation sole. But there is no pretense that there was or is any such corporation. Such a corporation could be created in this state only by compliance with the provisions of the Civil Code on that subject, (section 602;) and it does not appear that there is any different law in the state of Illinois, or that there is any law there at all for the formation or existence of such a corporation. At all events, it is not contended that said bishop was a corporation. If, therefore, the use of the word "successor" in the deed excludes the intent of the grantor to convey a fee to Blakeslee and his heirs, he took at best but an estate for life. Under any view, therefore, Kelly has no estate in the land, and no interest in the litigation. The appeal is dismissed, with a stay of *remittitur* for 30 days.

We concur: De Haven, J.; Paterson, J.; Garoutte, J.; Harrison, J.; Sharpstein, J.

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94 Cal. 146

Whitney v. Kelley *et al.* (No. 14,531.)

(*Supreme Court of California.* March 30, 1892.)

Setting Aside Judgment—Who may Sue.

The grantee in a deed purporting to convey land then in possession of defendant, under a judgment in favor of defendant against the grantor, rendered in an action to which such grantee was not a party, cannot sue to set aside the judgment.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by W. W. Whitney against Robert Kelley and others to set aside a judgment ousting them from their title to certain real estate. Judgment for defendants. Plaintiff appeals. Affirmed.

Sprigg & Barber, for appellant. *Parrish, Mossholder & Lewis, Works, Gibson & Titus*, and *Luce & McDonald*, for respondents.

Garoutte, J. This is an appeal from a judgment dismissing an action, a demurrer to the complaint having been sustained, and the plaintiff declining to amend. In September, 1886, some of the defendants and the grantors of others, claiming title to the land involved in this suit, brought an action against the grantors of plaintiff to establish by judicial decree the true boundary line between the lands of the respective parties to that suit. The judgment therein rendered determined the boundary line, and adjudged the plaintiffs to be the owners of the tract of land involved in the present action. Plaintiff, as grantee of the defendants in that action, now files his complaint to set aside that judgment, upon the ground that it was procured through certain frauds practiced upon the defendants therein, the plaintiff's grantors. The complaint further alleges that "said lot was duly conveyed to plaintiff for value, before the commencement of this action, and that he is now the owner and entitled to the possession thereof," and further adding that the defendants herein have no title thereto other than that obtained by said judgment. This is an action to set aside a judgment upon the ground of fraud, brought by a plaintiff, who was not a party to the suit in which the judgment was rendered, but is a grantee of the defendants in said action. It is insisted that as such he has no standing before a court of equity, and, if that be true, the judgment must be affirmed. The question here presented is one of importance, and, as far as we are advised, one not directly adjudicated upon in this state. Owing to the fact that there is not an entire uniformity in the decisions upon the question, it is enveloped in some doubt, but we believe the better rule and the weight of authority support the principle of law as adduced in Freeman on Judgments, (section 512,) where it is said: "No person will be permitted to proceed in equity against a judgment or decree to which he was not a party, and which did not at its rendition affect any of his rights. If the parties to an adjudication are satisfied with it, no outside persons will be permitted to intermeddle with it, at law or equity." Judge Story, in his work on Equity Jurisprudence, (section 1040*g*,) speaking upon this subject, says: "So an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void, as contrary to public policy, and as savoring of the character of maintenance. * * * Indeed, it has been laid down as a general rule that, where an equitable interest is assigned in order to give the assignee a *locus standi in judicio* in a court of equity, the party assigning such right must have some substantial possession and some capability of personal judgment, and not a mere naked right to overset a legal instrument or to maintain a suit." The principle here announced is supported in Cross v. Bank, 66 Cal. 462, 6 Pac. Rep. 94; Sanborn v. Doe, (Cal.) 28 Pac. Rep. 105; French v. Shotwell, 5 Johns. Ch. 565; Marshall v. Means, 12 Ga. 61; Prosser v. Edmonds, 1 Young & C. 496; Graham v. Railroad Co., 102 U. S. 154; Crocker v. Bellangee, 6 Wis. 667.

The case of Prosser v. Edmonds, supra, is the leading case, and the principle there involved is practically the same as is involved here. In that case the lord chief baron said: "But in a case where a party assigns his whole estate, and afterwards makes an assignment generally of the same estate to another person, and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor himself making no complaint of fraud whatever, it appears to me that the right of the second assignee to make such claim would be a question deserving of great consideration. * * * In such a case a second assignment is merely that of a right to file a bill in equity for a fraud. * * * In the present case it is impossible that the assignee can obtain any benefit from his security, except through the medium of the court. He purchases nothing but a hostile right to bring parties into a court of equity, as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. * * * Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, whether at law or equity." In Graham v. Railroad Co., supra, a case where subsequent creditors attempted to set aside a conveyance secured by fraud practiced against the debtor, Justice BRADLEY, in the opinion of the court, said: "It seems clear that subsequent creditors have no better right than subsequent purchasers to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right;" also quoting from French v. Shotwell, wherein Chancellor KENT said: "If the party himself, who is the victim of fraud or usury, chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him to recall and assume the remedy for him. If a judgment was fraudulent by collusion between the parties to it, on purpose to defraud a subsequent purchaser, the case would present a very different question. But if the judgment was fraudulent only as between the parties, it is for the injured party alone to apply the remedy." In this case of Graham v. Railroad Co. the learned justice entered into an exhaustive review of the authorities upon the question, and approved the case of Crocker v. Bellangee, supra, wherein it is expressly held that a subsequent purchaser cannot attack a conveyance made by his grantor upon the ground of fraud practiced upon such grantor. Prosser v. Edmonds is also approved; and after reviewing the case of Dickinson v. Burrell, L. R. 1 Eq. 337, the opinion continues: "Surely there is here no overruling of Prosser v. Edmonds, even if such overruling could avail against the Wisconsin decisions." The cases of Dickinson v. Burrell, supra, and McMahon v. Allen, 35 N. Y. 403, upon a careful examination, seem to some extent to be opposed to the principle announced in the text-books and authorities cited; but the true doctrine, based upon reason and authority, appears to be that the right to complain of fraud should not be recognized by a court of equity as a marketable commodity. Indeed, the leading case of Dickinson v. Burrell and the decisions following in its wake recognize that principle as correct; but Lord ROMILLY in the Dickinson Case attempts this distinction. He says: "If James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A. B., to maintain this bill; but if A. B. had bought the whole of the interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed." It is difficult to appreciate the distinction thus attempted to be drawn in the two cases. The one is an assignment of a right to acquire property by setting aside a fraudulent conveyance of it, and the other a conveyance of the property, with an incidental right of setting aside the prior fraudulent conveyance. But the conveyance of the property in its then *status* is neither more nor less than an assignment of a right of action for the fraud; for at that time the grantor had no other interest in or pertaining to the property.

Applying these principles to the facts of the case at bar, what will be the result? It may be conceded that the right to set aside this judgment by the plaintiff, upon the ground of fraud, rests upon the same plane as if it were a conveyance rather than a judgment. In the former case the judgment decreed the defendants herein to be the owners of the land. In the absence of any showing to the contrary, it must be assumed that the pleadings justified such a decree, and, in addition thereto, we have the allegation here that plaintiff is entitled to the possession of the land, and that it was conveyed to him for value. We then have this plaintiff as the grantee of parties against whom a judgment existed, declaring them to have no title in a tract of land; not being in possession, bringing this action years after the rendition of such judgment, to set it aside, upon the ground of fraud practiced against his grantors in the securing of it. In Prosser v. Edmonds, supra, Lord Abinger said: "Where an equitable interest is assigned, it appears to me * * * the party assigning that right must have some substantial possession,—some capability of personal enjoyment." And again he says: "Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill." As we have already seen, this principle was indorsed by Judge Story; and in the present case it can well be said that plaintiff's grantors, when they conveyed, were in possession of nothing but a mere naked right, and could obtain nothing without filing a bill. If plaintiff's grantors had nothing but a mere naked right to file a bill to set aside this judgment, then this plaintiff, their grantee, can have no title. It is essential that a party complaining in equity should have some present substantial interest in the subject matter of the suit. He must have a direct interest in the result of the litigation, and his complaint must clearly indicate that fact. The plaintiff here has no interest in this land, for his grantors had no interest when they transferred to him. If the court should set aside the judgment, plaintiff would get no title thereby, and consequently he stands here upon a bare naked right to bring an action to set aside a judgment upon the ground of fraud practiced upon his grantors, and no case in the books can be found to sustain such position. This judgment is not void, but only voidable at the desire and motion of the parties defrauded, and can only be avoided by a decree of a competent court. The conveyance to the plaintiff did not avoid the effect of the judgment. The title and all the title still remained in the judgment plaintiffs, and a *bona fide* purchaser from them would have obtained a perfect and complete estate. As the grantors had no interest to convey, the grantee received nothing by the conveyance. The grantors had the right, by appealing to the proper court, to secure a decree whereby the title would return to them, but by neglect or desire they could lose or waive such right. There is nothing in this complaint to indicate but that these grantors prior to the conveyance expressly waived their right to bring an action to set aside the judgment upon the ground of fraud. If they chose to waive that right, it is neither justice nor sound policy that a subsequent purchaser, with notice of the judgment, should be allowed to investigate the merits of the original transaction. The one fact that they conveyed to the plaintiff is no sufficient negative of the existence of such waiver. Such conveyance might not even indicate hostility to the judgment. It certainly had no weakening effect upon the title created and declared by the judgment. Plaintiff's grantors had no power, by conveyance or otherwise, to nullify the effect of this judgment, except by a direct assault upon it in a court of equity. They had the right to make the assault, and that is all the right they possessed. They had neither the title, the possession, nor the right of possession; and, under such circumstances, their conveyance to plaintiff carried nothing but a mere naked right to bring an action to set aside a judgment for a fraud practiced upon them. A plaintiff with such a right has no equity, and is not entitled to recognition in a court of equity. Let the judgment be affirmed.

We concur: De Haven, J.; McFarland, J.; Paterson, J.; Sharpstein, J.

Harrison, J. I concur in the judgment. The plaintiff cannot maintain an action to set aside the judgment complained of, unless the defendants in that action had such right, and it is incumbent on him to set forth his right of action as fully as it would be for them, had they sought such relief. In an action to set aside a judgment for fraud, the plaintiff must not only show by his complaint the facts constituting the fraud which give him his right to the relief, but must also show that he has a defense to the original action upon the merits, and that he is able to present to the court the evidence constituting that defense. It is not sufficient to merely allege these matters as ultimate facts, or to aver them in the form of an affidavit of merits, but the facts themselves—those constituting the fraud, those constituting his defense, and those constituting his ability to present them to the court—must be incorporated into his complaint, so that the court may determine that, if his allegations are admitted by the other party, the plaintiff would have been entitled to a judgment in his favor in the original action. "A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached." 2 Daniel, Ch. Pr. *1585; Story, Eq. Pl. § 428. "The bill should state particularly the facts to be proved, the names of the witnesses, and show the bearing and relevancy of the proposed proofs. It should also show when and how the facts discovered came to the knowledge of the plaintiff, and why no motion for a new trial was made in the court trying the case." Mulford v. Cohn, 18 Cal. 46. If the plaintiff seeks to maintain the action upon the grounds of newly-discovered evidence, he "must describe the new evidence very distinctly and specifically, and state when it was discovered, and its bearing on the decree. It is not sufficient that he expects to prove certain facts; he must state the exact evidence to establish them." 1 Daniel, Ch. Pr. *1578, note 1; Dexter v. Arnold, 5 Mason, 312; Livingston v. Noe, 1 Lea, 55; Butler v. Vassault, 40 Cal. 76. An action of this nature must be brought within the time prescribed for an appeal from the original judgment, (Allen v. Currey, 41 Cal. 318; Evans v. Bacon, 99 Mass. 213;) and all who were parties to the original judgment must be made parties to the action to set it aside, (Harwood v. Railroad Co., 17 Wall. 78.) The complaint herein is defective in all of the foregoing requisites. The former judgment, and "the proceedings which led to it," are not set forth, either generally or specifically. There is but a single reference to the judgment, wherein its effect is averred, but the form of the judgment is not presented in the complaint. The complaint also fails to show whether the court had jurisdiction of the defendants; the averment that one of them "received" no summons is not inconsistent with the fact that the court may have had jurisdiction over him. The fraud which is alleged consists of averments that the complaint was drawn "with the intent" that the defendant should not suspect the real object of the action, and that the plaintiffs "represented to Lilian Cullen and other defendants" that they were joined as defendants therein as a matter of form only, and that they need not appear or answer therein. Not only is this averment defective in not setting forth the original complaint itself, so that the court can determine whether the "intent" with which it was drawn is such as the plaintiff alleges, and in not showing in what manner the plaintiffs therein made the "representations" charged, but the entire averment is made upon information and belief, without setting forth the sources of the information or the grounds for the belief. Other averments essential to his cause of action are also made upon information and belief.

In an action of this nature it is incumbent upon the plaintiff to make his averments with such definiteness and certainty, particularly those relating to the fraud which is charged, that the court will be able to determine whether he has the right to have its former judgment set aside. The solemn judgment of a court is not to be set aside upon the mere allegations of a defendant that he has been informed and believes that it was fraudulently obtained. The court must be informed whether his information was reliable, or only a street rumor, and the information must be set forth in his complaint, so that it may be known whether his belief had a substantial basis, or was only the result of excessive credulity. It is not a sufficient answer to this rule that the Code permits a complaint to be made upon information and belief. The provision of the Code that causes in equity, as well as those at law, are to be presented under the same form of pleading, has not changed the principles under which equitable relief shall be granted. When a plaintiff's right to such relief depends upon facts which are *quasi* jurisdictional in their nature, such as his personal *status*, his freedom from negligence or laches, the fraudulent or inequitable conduct of the party against whom that relief is sought, or matters in respect to which the court may exercise its discretion, or which it must determine have an existence before it can entertain his complaint, it is as essential under the present system as under any other that those matters should be presented by such positive and verified allegations that the court may determine their sufficiency. The plaintiff cannot substitute his own judgment for that of the court, and a complaint in which these jurisdictional facts are rested upon the information and belief of the plaintiff does not state facts sufficient to show that he has a right of action.

The plaintiff does not show that he has sought this relief with sufficient promptness. He does not allege when he acquired any interest in the land, or from whom he acquired it; his averment being that it was duly conveyed to him for value, "before the commencement of this action." Such an allegation is consistent with a conveyance before the former action, or from persons other than the defendants in that action. Neither does the plaintiff allege when he received the information which is the basis of this action, or, indeed, that he knows or can produce any evidence which will vary the former judgment; his only averment being that in September, 1889, it was "intimated" to him that the land could be identified by one Wheeler, and that, if the judgment is set aside, he can produce his evidence; but he does not show, except by recital, the nature or effect of the evidence that he expects to produce. Under the foregoing principles the complaint failed to state a cause of action, and the demurrer was properly sustained. Upon the question discussed by Mr. Justice GAROUTTE I express no opinion.

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94 Cal. 217

SOUTHERN CALIFORNIA LUMBER CO. v. OCEAN BEACH HOTEL CO. (No. 14,536.)

(*Supreme Court of California.* March 31, 1892.)

EXECUTION—TIME OF SALE.

Code Civil Proc. §§ 681, 683, provide that a person in whose favor judgment is given may have a writ of execution for its enforcement returnable at any time not less than 10 nor more than 60 days. Section 684 provides that, when a judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, and directing the sale. *Held*, that a writ issued under said section 684 is not an execution, and the sale, therefore, is not invalidated by being made after the time limited for the return.

In bank. Appeal from superior court, San Diego county; E. S. TORRANCE, Judge.

Suit by the Southern California Lumber Company against the Ocean Beach Hotel Company, to foreclose a material man's lien upon a block of land. Plaintiff obtained judgment, and a sale of the land. From an order afterwards made upon defendant's motion to vacate the sale, plaintiff appeals. Reversed.

Wellborn, Stevens & Wellborn, for appellant. *Works, Gibson & Titus*, for respondent.

HARRISON, J. On December 1, 1888, the plaintiff obtained a judgment against the defendant, foreclosing a material man's lien upon a block of land in the city of San

Diego, and directing a sale of the property, and the application of the proceeds to the payment of the amounts adjudged to be due. On October 8, 1889, a writ for the enforcement of this judgment was issued, and placed in the hands of the sheriff of the county. By the writ the sheriff was commanded to proceed to advertise for sale and sell the property, and to make and file his report of the sale with the clerk of the court within 60 days after his receipt thereof. In obedience to this command the sheriff published and posted notice that he would sell the property on a day named, and within the time limited for the return of the writ, but no sale was ever made pursuant to that notice; "action thereon having been indefinitely postponed pursuant to an agreement by the parties, plaintiff and defendant, that there should be no sale prior to February 24, 1890." The sheriff retained the writ, and subsequently again published and posted notice that he would sell the property thereunder on February 24, 1890; and on that day he sold the whole block to the plaintiff for the sum of $451.40. The block sold consisted of 54 lots, as shown by an official plat on file in the office of the county recorder, and at the time of the sale was of the value of $5,000. On February 21, 1891, the defendant moved the court to vacate and set aside the sale made by the sheriff, as aforesaid, upon two grounds: (1) Because the property consisted of 54 lots, and was sold as a whole. (2) Because the property was advertised for sale and sold after the return day of the writ. The court overruled the motion on the first ground, and sustained it on the second ground, and thereupon made and entered its order vacating the sale. From this order the plaintiff appeals

The Code of Civil Procedure, in the chapter headed "The Execution," provides: "Sec. 681. The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. Sec. 682. The writ of execution must be issued in the name of the people," etc. "Sec. 683. The execution may be made returnable at any time not less than ten nor more than sixty days after its receipt by the sheriff," etc. "Sec. 684. * * * When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale, and applying the proceeds in conformity therewith." The only process provided in this state for the enforcement of a judgment foreclosing a lien upon specific property is that prescribed by the section of the Code last quoted. The writ here in question was issued in the name of the people, and pursuant to the provisions of that section. It is, however, claimed by appellant that a writ so issued is not an execution, within the meaning of section 683, and hence that there is no limitation of time within which it must be made returnable. A writ of execution is defined to be "process authorizing the seizure and appropriation of the property of a defendant for the satisfaction of the judgment against him." And. Law Dict. When issued upon a judgment running generally against the property of the defendant, it is an authority to the sheriff to seize of the property of the defendant a sufficient amount to satisfy the judgment. As the judgment itself does not specify the property which is to be taken, none of the property of the defendant is affected thereby, or charged with the lien of the judgment, until it is taken by the sheriff under the writ. "Until a levy, property is not affected by the execution." Code Civil Proc. § 688. As the sheriff cannot justify an interference with the possession by the defendant of any of his property, except upon the production of a writ therefor, it is incumbent upon him to show that a seizure of the particular property is within the scope of his writ, and if, by the terms of the writ, such seizure is authorized only within a limited period of time, a seizure after that time has expired is unauthorized, and the sheriff is liable for a trespass. If, however, the sheriff has taken the property within the lifetime of the writ, it has then become lawfully subject to be applied in satisfaction of the judgment, and a sale thereof may be made at any time thereafter. Ror. Jud. Sales, § 872. "Wherever some statute does not provide otherwise, an officer who has entered upon the execution of the writ before the return day thereof by a seizure of or levy upon property may, after the return day, and after the actual return, continue to hold the property, and may prosecute such further proceedings as may be necessary to convert such property, whether it be real or personal, into money for the purpose of satisfying the judgment." Freem. Ex'ns, § 100. The levy may be made at any time during the last day of the writ, and the property will be thereafter legally held by the sheriff against any claim or complaint of the judgment debtor. A writ of *venditioni exponas* is sometimes issued, but its issuance is not necessary to justify a sale, as the writ itself is only a direction to perform a duty which already exists, and the sheriff acquires no additional authority from its issuance. "By the levy a lien is created whose duration is not limited to the return day of the writ, and from the it must necessarily follow that the officer has authority, notwithstanding the passage of such return day, to make his levy productive by a sale of the realty levied upon; and this authority is not dependent on the issuing of a *venditioni exponas*, for this writ does nothing more than to compel performance of a pre-existing duty." Freem. Ex'ns, § 58. This rests upon the principle that the levy is the essential act by which the property is set apart for the satisfaction of the judgment, and taken into the custody of the law, and that, after it has been taken from the defendant, his interest is limited to its application to the judgment, irrespective of the time when it may be sold. A decree or a decretal order for the sale of certain specific property, made by a court of equity, differs materially from a common-law judgment. Instead of running against the entire property of the judgment debtor, it specifies the property which the court directs to be sold for the purpose of carrying its judgment into effect; and the officer, in executing this order, acts under the direct mandate of the court, without the power or necessity of taking any property from the possession of the defendant. Such a judgment under the chancery system was not carried into effect by a writ of execution, but a certified copy thereof was furnished to the master as his authority for making the sale, and the master was at liberty to exercise his discretion in regard to the time and place at which the sale should be made. Wilt. Mortg. Forec. § 517; Blossom v. Railroad Co., 3 Wall. 208. This practice prevailed in many parts of this state until the amendment in 1874 to section 684, Code Civil Proc. Heyman v. Babcock, 30 Cal. 367.

In 1874, by an amendment to section 684, Code Civil Proc., authority was for the first time given for the issuance of anything in the nature of a process for the purpose of enforcing a judgment directing a sale of real property. In the amendment thus made there is preserved the distinction between the mode of executing a common-law judgment and a decree in equity. The process by which the decree is to be enforced is not termed a "writ of execution," as is that which is to enforce the ordinary money judgment, but the section provides: "When the judgment requires the sale of property, the same may be enforced by a 'writ' reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith." This writ is neither styled an execution, nor is it such in its nature, and the provision of section 683, Code Civil Proc., requiring the execution to be made returnable within 60 days, is inapplicable. Even though the process thus authorized should, under the provisions of section 681, Code Civil Proc., be termed a writ of execution, it does not follow that the same incidents attend it as attend the process issued to enforce a common-law judgment. The character of the writ is to be determined by the functions to be performed under its authority, rather than by its name. In order to enforce the writ of execution which is issued upon a common-law judgment, it is necessary for the officer, before he can sell the property of the defendant, to indicate by some act of his the particular property which he intends to appropriate for that purpose. This act is called a "levy," and, as we have seen, must be made in the lifetime of the writ. When, however, the judgment itself designates the property which is to be sold, there is no occasion for a levy. "The only object of a levy is to create a lien upon the land, or, in other words, to subject the lands to the payment of the plaintiff's debt. If this has already been done, a levy is supererogatory. If the sale has been ordered by a court of chancery in a suit in which all the parties in interest were before the court, there is no need of any levy, for the right to sell the land has attached as a consequence of the proceedings in the suit. Hence, under a decree foreclosing a mortgage, no levy need be made on the mortgaged premises." Freem. Ex'ns, § 280. The officer, in making the sale, is only executing the directions of the court, and his act is attended with the same result as his sale after a levy under a common-law execution. In both cases the property has been specifically impressed with the burden of satisfying the judgment, and the judgment debtor is not affected by the time within which this sale shall be made. The same reasons which uphold the validity of a sale by the sheriff after the return day of the writ, where the levy was made in its lifetime, uphold a sale in cases where no levy is required. Having the right to subject the property to a sale for the satisfaction of the judgment, the time within which it may be done is but directory, and under the control of the court. The court has at all times such control of its process as to prevent it from becoming a source of injury, but, in the absence of some showing that injury has resulted from a delay in making the sale, it should not be set aside merely because it was not made before the return day of the writ. As the ground upon which the respondent herein asked to have the sale set aside was that it was made after the return day of the writ, and as this was the only ground upon which the court made the order, it should be reversed. It is so ordered.

We concur: DE HAVEN, J.; PATERSON, J.; GAROUTTE, J.

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94 Cal. 229

WILLAMETTE STEAM MILLS CO. *et al.* v. LOS ANGELES COLLEGE CO. *et al.* (No. 13,639.)

(*Supreme Court of California.* March 31, 1892.)

MECHANICS' LIENS—CONTRACT VOID FOR WANT OF RECORD—PRACTICE—FILING CLAIM.

1. Under Code Civil Proc. § 1195, authorizing any number of persons claiming liens on the same property to join them in one action, after such consolidation they should be treated as a single action, and the decision be embodied in a single set of findings and judgment, rather than a separate finding and judgment on each claim.

2. Code Civil Proc. § 1183, provides, *inter alia*, that where the amount to be paid for any building exceeds $1,000 the contract shall be in writing, signed by the parties, and "shall, before the work is commenced, be filed in the office of the county recorder." *Held*, that where a contract provided for the erection of a building "conformable to drawings and specifications * * * hereto annexed," but the drawings and specifications were not filed with the contract, the contract was void, and cannot serve as a basis in determining the rights of those claiming mechanics' liens on the building.

3. The contract is void, also, where it provides that "the last payment shall be made 35 days after completion of the work," without specifying the amount of such payment, since Code Civil Proc. § 1184, requires that "at least twenty-five per cent. of the whole contract price shall be made payable at least 35 days after the completion of the contract."

4. Code Civil Proc. § 1187, as amended in 1887, (St. & Amend. 1887, p. 154,) provides that every person save the original contractor, claiming a lien, must within 30 days after the completion of the building file his claim with the county recorder. *Held* that, where the contract between the owner and contractor was void because not properly filed, mechanics' liens filed be-

fore the actual completion of the building were premature, and cannot be enforced.

In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by the Willamette Steam Mills Company and others against the Los Angeles College Company and others. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Modified.

Graves, O'Melveny & Shankland and *R. H. F. Variel*, for appellants. *Johnson & Borden, Conrey & Swanwick, J. W. Mitchell, R. Dunnigan, Reymert, Orfila & Reymert*, and *C. McFarland*, for respondents.

HARRISON, J. Action for the foreclosure of several mechanics' liens. The Los Angeles College Company entered into an agreement with W. E. Lane, bearing date September 8, 1887, for the erection of a college building for the sum of $23,000; but the agreement was not executed until October 6th, on which latter day it was filed in the office of the county recorder for Los Angeles county. The document then filed made reference to certain drawings and specifications as "hereunto annexed," but they were not filed in the recorder's office. Lane entered upon the performance of the contract, but abandoned it March 6, 1888; and thereupon the college company took possession of the premises, occupied and used the same continuously thereafter, and caused the building to be completed on the 21st of April. At various dates, the earliest being March 19th and the latest May 8th, claims for mechanics' liens were filed by the respective respondents herein, and afterwards eight separate actions were commenced for their enforcement. When the causes came on for trial the court made an order that they be consolidated, and their trial was had under such order; but the court made separate findings for each cause, and rendered a separate judgment for each plaintiff for the sale of the premises to satisfy the amount of his claim. The actions are brought here upon an appeal by the college company from the several judgments, and an order denying a new trial, and are presented in a single record, embracing the several judgments, and a single statement of the case, prepared and settled for all the actions.

1. The practice adopted by the court below in making separate findings and judgments is not only inconsistent with its order consolidating the actions, but is itself attended with great inconvenience, and the possibility of serious complication. The provision of section 1195, Code Civil Proc., authorizing such consolidation, is placed in the same category with that permitting the several claimants to join as plaintiffs in one action; and after the order of consolidation had been made the court should thereafter have treated the actions as a single action by the respective plaintiffs against the defendants, and embodied its decision in a single set of findings, upon which a single judgment should have been entered. By this course the court would have very greatly abridged the record, and facilitated its examination here, and would also have avoided certain inconsistencies in the findings of fact which it has made upon the same evidence. In five of the cases the court has found that the building was occupied by the owner on the 7th of March, but in one it finds such occupancy to have been on the 6th of March, and in two it makes no finding whatever upon the subject. Inasmuch, however, as, under the view we take of the case, the time when such occupancy began is immaterial, these inconsistent findings do not constitute a reversible error. A more serious objection, however, is presented by the fact that separate judgments were entered in favor of the respective claimants at different dates ranging from March 21st to May 1st. If upon these judgments sales of the property should be made at different times, there might be different purchasers, and the respective titles acquired by such purchasers would necessitate further litigation, for the purpose of determining which was the superior. As the court had tried the causes as a single action, it should have incorporated into its findings all the facts that were in issue, directing, if necessary in any particular case, an amendment of the pleadings, for the purpose of having them conform to the proofs, and thereafter should have rendered a single judgment, directing a sale of the property, and the application of its proceeds to the satisfaction of the amounts to which it found that the claimants were respectively entitled.

2. The contract between Lane and the college company is in the form of an ordinary building contract, and provides that the contractor will do the work contracted for "conformably to the drawings and specifications made by R. B. Young, architect, and signed by the parties, and hereto annexed." The insertion of this clause in the contract made the drawings and specifications an essential part thereof, as material as was the price of the work or the terms of payment, and until they were "annexed" to the contract, so that its entire terms could be ascertained by mere inspection and without oral testimony, the contract was only inchoate and not complete, and could not form the basis of a recovery. Worden v. Hammond, 37 Cal. 63. Being by virtue of its terms a part of the contract itself, it was necessary for the parties thereto, or one of them, if it was desired that the contract should be the basis of his liability or the measure of his right of recovery, to cause the same to be filed in the recorder's office; and a failure to do so destroyed the validity of the contract. Holland v. Wilson, 76 Cal. 434, 18 Pac. Rep. 412. It is quite as important for the owner as for the contractor to see that the contract is so filed, since without it his liability has no contractual limit. It does not appear from the record whether the drawings and specifications were in fact annexed to the original contract, but it is stipulated that they were not filed in the recorder's office, and consequently the contract itself was not filed. In 1887 the legislature amended section 1183, Code Civil Proc., by providing that instead of filing the entire con-

tract in the recorder's office, as had been previously required, there might be filed a memorandum thereof, "setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable." After this amendment was made, the owner or the contractor could satisfy the statute by filing either the contract or such memorandum; but if he filed the contract he must still file the whole of it, including the drawings and specifications, if they were made a part thereof, while, if he preferred to file the memorandum, such memorandum must contain all the matters which are prescribed in the statute as the equivalent of the contract. Section 1184, Code Civil Proc., declares: "The contract price shall by the terms of the contract be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work, provided that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. * * * In case such contracts and alterations do not conform substantially to the provisions of this section the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." The contract in the present case fails to conform to the requirements of this section. Instead of providing that at least 25 per cent. of the whole contract price shall be payable at least 35 days after the final completion of the contract, its provision is, "the last and final payment to be made thirty-five days after completion of the work according to contract," without specifying the amount of that payment. It is previously provided in the contract that "seventy-five per cent. of the cost of material and work completed at the time of payment is to be paid on the first and third Saturdays of each month, as the work progresses;" but there is no provision that at least 25 per cent. shall be made payable 35 days after the completion of the contract. There is a manifest difference between setting forth the "amount" that is to be paid at any particular date, and stating that a certain percentage of the "cost" will be so paid. Although the "cost" and the "contract price" of the work contracted for may be the same, yet there is no necessary connection between the two. It is easy to see that a contract might be entered into at such a figure for the entire work that a payment of 75 per cent. of the cost of the material and work completed at stated times, as the work progressed, would exhaust the entire contract price at or before the completion of the building, so that there would be nothing with which to meet the liens that might be filed within 30 days thereafter. It is sufficient, however, to say that the statute requires this provision in the contract, and that a failure to observe this requirement is followed by a failure to receive the benefits provided by the statute.

Whether the document which was filed in the recorder's office is to be regarded as the original contract, or as a memorandum thereof, is immaterial. A memorandum of the contract can have no higher force than the contract itself, and if the contract fails to comply with the requirements of the statute the memorandum itself must be equally insufficient. As a memorandum, merely, the document so filed was insufficient by reason of its failure to set forth "a statement of the general character of the work to be done;" the only statement in that regard being that it is to be "conformable to the drawings and specifications made by R. B. Young, architect, and signed by the parties, and hereto annexed," and that it is to be "three stories high." It does not set forth the material of which the building was to be constructed, or any item from which its "general character" can be ascertained; and the reference to the drawings and specifications which in another part thereof it states "are intended to co-operate so that any works exhibited in the drawings, and not mentioned in the specifications, or *vice versa*, are to be executed the same as if they were mentioned in the specifications and set forth in the drawings," without having the specifications and drawings filed, renders the document as ineffective for a memorandum as for the contract itself. The finding of the court that there had not been filed in the recorder's office a contract or memorandum containing the statements required by the statute was therefore correct, and the effect of such finding, under the provision of section 1183, Code Civil Proc.,[1] was to render the contract "wholly void" for all purposes. It cannot be the basis of a recovery by the contractor against the owner, nor can it be looked to for the purpose of determining the amount for which the owner is liable, or when any payment is to be made. In any action against him by a laborer or material man, their rights are to be determined by other rules, and irrespective of any provision of such contract.

3. It is provided in section 1183 that the laborers and material men "shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished, whether at the instance of the owner or of any other person acting by his authority," and also that "every person having charge of * * * the construction of any building

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[1] Code Civil Proc. § 1183, provides, *inter alia*, that where the amount to be paid for any building by the owner to a contractor exceeds $1,000 the contract shall be in writing, subscribed by the parties thereto, and "shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated; * * * otherwise, it shall be wholly void."

* * * shall be held to be the agent of the owner for the purposes of this chapter." The same section provides a mode in which the owner may limit his liability, viz., by causing the contract to be filed in the recorder's office; but it is only "in case of a contract for the work," duly filed, that the amount of the lien is limited by the contract price, and such limitation remains even though the contractor "shall fail to perform his contract in full, or shall abandon the same before completion." Section 1200, Code Civil Proc. If, however, the owner does not choose to avail himself of this mode of limiting his liability, "the labor done and materials furnished by all the persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner; and they shall have a lien for the value thereof." In order, however, that the laborer or material man may preserve and enforce this lien, he must file his claim therefor in the recorder's office, with as much specification and within the same time as if he had himself made a direct contract for such labor or material with the owner. Lumber Co. v. Schmitt, 74 Cal. 625, 16 Pac. Rep. 516. Section 1187, declares that "every person, save the original contractor, claiming the benefit of this chapter, must within thirty days after the completion of any building" file his claim of lien with the county recorder. If the contract is "wholly void," there is neither a "contract" nor an "original contractor;" and in such case every person claiming a lien must file his claim within 30 days after the completion of the building, as he is required to do whenever he makes a direct contract with the owner in person. Sparks v. Mining Co., 55 Cal. 389; Schwartz v. Knight, 74 Cal. 432, 16 Pac. Rep. 235. The filing of a claim before the completion of the building is premature, and confers no right. Roylance v. Hotel Co., 74 Cal. 273, 20 Pac. Rep. 573. In the absence of any statutory qualification or definition of the term "completion," there would be no room for its construction by the court, but it would be construed to mean actual completion, and would be a question of fact to be determined in each case. The statute has, however, provided that a substantial completion is all that is required in any case, whether the work be done at the direct instance of the owner or under the provisions of a contract between him and an original contractor, by declaring that a "trivial imperfection" shall not be deemed such a lack of completion as to prevent the filing of a lien. Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. Rep. 686. What constitutes a trivial imperfection is still a question of fact in each instance. So, too, the provision that "cessation from labor for thirty days" shall be deemed equivalent to a completion is by the express terms of the statute made applicable to an "unfinished contract" as well as to an "unfinished building." These are the only universal exceptions to the rule requiring that the lien shall not be filed until after completion of the building.

The statute has, however, in a limited class of cases, made another exception to the rule which requires actual completion of the building before the claim of lien can be filed. In this exception, however, it has placed a limitation to the extent of the exception, making it applicable only in certain designated cases, so that, if any one would avail himself of the exception, he must show that he is within the limited class for which the exception was made. It is provided in section 1187 that "in case of contracts" the occupation or use of the building by the owner, or his acceptance of the building, shall be deemed conclusive evidence of completion. This exception to the general rule is by its terms of limited application, and can be invoked in behalf of the claimant only "in case of contracts;" and the "contract" which is here referred to is the one between the owner and him who is termed the "original contractor," under which, and subject to whose terms, the laborer and the material man must enforce their liens. One object of this provision is apparent,—that the owner and the contractor shall not, by a secret agreement between themselves, abandon the original contract before its completion, or dispense with the completion of the building according to its original plan, and thereby, by being able to show that the building has never been in fact completed, prevent the laborer and material man from enforcing their liens. Another reason for the provision is found in the requirement of the statute that in all contracts the owner shall retain 25 per cent. of the contract price until the expiration of 35 days after the time fixed in the contract for its completion; and, in order that the 30 days within which others than the contractor may file their claims of lien shall commence at the same time with the 35 days, it is provided that his occupancy or use of the building shall be conclusive evidence of such completion. Such occupancy or use would moreover be as notorious a fact, and more readily established by the claimant, than the fact of actual completion. The occupation or use, however, which under the statute is to be deemed conclusive evidence of completion, must be open, entire, and exclusive, and not of such a character as would be consistent with a continuance by the contractor in the completion of his contract; and whether, in any particular case, there has been such occupation or use, must be determined from the facts of that case, as in the ordinary case must be determined the fact of actual completion. The owner must be shown to have acted towards the contractor, and in reference to the building, in such a way as by necessary implication to give notice that the building had been accepted by him in satisfaction of the contract. A continuance by the contractor in the work of completing his contract, while the building or a portion thereof should be occupied by the owner, or even used by him for the purpose for which it was intended, would prevent such occupation or use from being regarded as conclusive evidence of completion. The provision of the statute that this conclusive evidence of completion shall be applicable only "in case of contracts" makes it essential that the claimant who would invoke the provision in support of his claim of lien, filed before the actual completion of the building, shall show that, at the time of such occupation or use by the owner there was a subsisting and valid contract under which the building was being constructed. If there was no original contract for its construction, or if the one which had been actually entered into had become "wholly void," the condition which the statute has prescribed for the application of the exception did not exist, and the claim could not be filed until after the actual completion of the building, or until after there had been a cessation from labor for 30 days upon the unfinished building. The court finds in the present case that the college building was not actually completed until the 21st of April; and it finds that the notices of lien, with the exception of those filed on behalf of the plaintiff Willamette Steam Mills Company, the plaintiff Thompson, and the plaintiffs McLeod & O'Leary, were filed prior to that date. It follows, with the exception of the three plaintiffs above named, that judgment should have been rendered in favor of the appellants.

4. The motion on the part of the college company to amend its answer was properly refused, for the reason that the matters sought to be presented in such amendments were immaterial. Inasmuch as, by a failure to file the contract in the recorder's office, it became wholly void, it was not available as a defense for any purpose, either to determine the amount of the contract price, or to limit the liability of the appellant, or as the foundation of a right to complete the building according to its terms.

The judgment and order denying a new trial are reversed as to the respondents the Los Angeles Planing Mill Company, the California Door Company, the Harper-Reynolds Company, B. A. Breakey, and Charles B. Tidball et al., and the court is directed to enter judgment upon its findings in favor of the appellant, as against the said respondents; and as to the respondents Willamette Steam Mills Lumbering & Manufacturing Company, Robert Thompson, and McLeod & O'Leary, the order denying a new trial is affirmed, and the court below is directed to enter its judgment, directing a sale of the premises described in the action, and the application of the proceeds thereof to the satisfaction of the amounts for which it finds that the said respondents, respectively, are entitled to liens thereon.

We concur: GAROUTTE, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

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94 Cal. 205

WILLAMETTE STEAM MILLS CO. *et al.* v. KREMER *et al.* (No. 13,690.)

(*Supreme Court of California.* March 31, 1892.)

MECHANICS' LIENS—CONTRACT VOID FOR WANT OF RECORD—DESCRIPTION OF PROPERTY — PLEADINGS.

1. Where a contract for the erection of a building is void, under Code Civil Proc. § 1183, for not having been recorded, claims for mechanics' liens thereon may be filed within 30 days after the actual completion of the building, irrespective of previous acceptance or occupancy by the owner. Willamette Steam Mills Co. v. Los Angeles College Co., (Cal.) 29 Pac. Rep. 629, followed.

2. Code Civil Proc. § 1187, requires that claims for mechanics' liens on a building be filed with the county recorder, containing "a description of the property to be charged, sufficient for identification." *Held*, that where a claim described the property as "lot 6 in block 28 of the Huber tract, said lot situate at the southwest corner of Hope and Eighth streets," the description was sufficiently definite, though the building was partially on lot 6 and partially on lot 7 of the block, and was at the "northeast" corner of Hope and Eighth streets.

3. Where the complaint for the foreclosure of a lien alleged that the building was situated on "lot 6," and the proofs showed that a portion stood on lot 7, the complaint should have been amended to conform to the proofs, and a decree should not have been entered for a sale only of that portion of the building on lot 6.

4. Code Civil Proc. § 1185, provides that "the land upon which any building is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment," is subject to the lien. *Held* that, where one claims a lien on more land for its convenient use than that occupied by the building, appropriate allegations thereof must be made in the complaint.

In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by the Willamette Steam Mills Company and others against M. Kremer and another to foreclose mechanics' liens. Plaintiffs had judgment, and defendants appeal. Reversed.

Wells, Guthrie & Lee, for appellants. *Johnson & Borden, Barclay, Wilson & Carpenter*, and *Adams & Rhodes*, for respondents.

HARRISON, J. In August, 1887, the appellants made a contract in writing with one Lane for the construction of a frame building. Lane commenced work under the contract in August, but the contract was not filed in the recorder's office until October. The court finds that the building was completed February 23, 1888, and also that in January it had been accepted by the architect as finished, and that upon such acceptance it had been occupied by the appellants prior to its actual completion. Claims of lien in behalf of the three plaintiffs herein were filed in the recorder's office on the 8th, 15th, and 17th days of March, respectively; and, the said claimants having thereafter begun separate actions for their enforcement, the three actions were consolidated, and upon their trial judgment was rendered in favor of the plaintiffs, from which, and from an order denying a new trial, the defendants have appealed.

The lot of land upon which the building was constructed is situated at the northeast corner of Hope and Eighth streets, in Los Angeles, and is a portion of block 28 of the Huber tract, having a frontage on Hope street of about 70 feet. Block 28 has a frontage of 300 feet on Hope street, and had been mapped into 6 subdivisions, with a frontage of 50 feet each upon that street. Kremer had at one time owned the whole of the block, but, prior to making the contract with Lane, had sold and conveyed all except this lot, embracing lot 6 and a part of lot 7 of the original subdivision. The building in question was placed about 24 feet north from Eighth street, and was of such dimension that it covered portions of lot 6 and lot 7. In the claim of lien filed by the California Door Company, one of the plaintiffs herein, the lot upon which the building was constructed is described as "lot 6 in block 28 of the Huber tract, said lot being situate at the southwest corner of Hope and Eighth streets, in said city;" the description in the other claims locating the lot at the northeast corner of these streets.

1. The failure to file the contract in the recorder's office before the work was commenced rendered the contract "wholly void," (Code Civil Proc. § 1183;) and under the principles announced in Willamette Steam Mills Co. v. Los Angeles College Co., (Cal., No. 13,639,) 29 Pac. Rep. 629, the plaintiffs could file their claim of lien at any time within 30 days after the actual completion of the building, irrespective of its previous acceptance and occupancy by the owner.

2. The time at which the building was completed was a question of fact, to be determined by the trial court. Upon this question the evidence before it was conflicting, and we must accept its determination as correct. Whether the items of work which were done after the date at which the appellant claims the building was completed were a "trivial imperfection" was also a matter of fact, to be determined by that court. Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. Rep. 686. It cannot be said, as matter of law, that any failure of completion is a "trivial imperfection."

3. The statute (Code Civil Proc. § 1183) provides that material men and laborers performing labor upon, or furnishing materials to be used in the construction of, a building, etc., shall have a lien "upon the property upon which they have bestowed labor or furnished materials;" and section 1187 requires that every person claiming the benefit of the chapter shall, within 30 days after the completion of the building, file for record with the county recorder of the county in which such property is situated a claim containing "a description of the property to be charged with the lien, sufficient for identification." In the present case the "property" upon which the plaintiffs bestowed labor and furnished materials, and upon which they claim a lien, is the "building" which was constructed under the contract with Lane; and the description of that "property" which they are required to give, in their claim of lien, is only such a description as would be "sufficient" for identification. We are of the opinion that the description of the property in the claim of lien filed by the California Door Company is a sufficient compliance with the statute. It is stated therein that the materials had been furnished and used in a building which Kremer had caused to be constructed under a contract with Lane "upon lot 6 in block 28 of the Huber tract," in Los Angeles. The further statement that said lot was "situate at the southwest corner of Hope and Eighth streets in said city," instead of at the northeast corner, was immaterial, and would have been rejected as a false call in a deed of conveyance. As it did not appear that the appellants had caused the construction of any other building at the intersection of Hope and Eighth streets than the one at the northeast corner, the further statement that the building was in block 28 of the Huber tract fully identified its location. Nor was the sufficiency of the description impaired by the statement that the building was on lot 6 in that block. The greater portion of it was in fact upon that lot; and the building intended was thus sufficiently identified, notwithstanding it extended a short distance beyond the line of division between the two lots. If there had been a building upon each of the lots, and the plaintiff had stated that the building upon which he claimed the lien was upon lot 6, he might have been precluded from enforcing a lien against the one upon lot 7, but in the absence of any ambiguity or uncertainty the statement must be held sufficient whenever it can be determined from it what building was intended; and as a general rule the sufficiency of the description is a question of fact, to be determined by the trial court. The claimant is not required, before filing his claim of lien, to make an accurate survey of the lot upon which the building stands, at the risk of losing his lien if he makes a slight mistake in giving its boundaries; nor is he even required to give the boundaries of the lot. Mr. Phillips, in his treatise on Mechanics' Liens, (section 379,) says: "The best rule to be adopted is that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to set aside a mechanics' claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise." See, also, Kennedy v. House, 41 Pa. St. 39; McClintock v. Rush, 63 Pa. St. 205; Northwestern Cement & Concrete Pavement Co. v. Norwegian-Danish, etc., Seminary, 43 Minn. 449, 45 N. W. Rep. 868; Cleverly v. Moseley, 148 Mass. 280, 19 N. E. Rep. 394; Seaton v. Hixon, 35 Kan. 663, 12 Pac. Rep. 22; Hotaling v. Cronise, 2 Cal. 60; Tredinnick v. Mining Co., 72 Cal. 78, 13 Pac. Rep. 152.

4. In an action to foreclose the lien, it is, however, necessary that the property which the plaintiff seeks to subject to a sale therefor should be definitely described, and that the judgment should specifically designate the property affected by the lien and directed to be sold; otherwise the officer executing the judgment can neither point out the property which he offers for sale, nor place the purchaser in possession thereof, and the deed which he may execute will not convey any title; and, as the judgment must follow the complaint, it is essential that the complaint should itself contain such specific description. In

the complaint of the Los Angeles Planing Mill Company it is alleged that the building is "upon that certain lot or parcel of land situate in the city of and county of Los Angeles, state of California, at the northwest corner of Eighth and Hope streets." A conveyance in which that was the only description would be void for uncertainty. In the complaints of the other plaintiffs the lot is described as "lot six (6) in block twenty-eight (28) of the Huber tract in said city;" one of said complaints stating that said lot is "situate at the corner of Hope and Eighth streets, in said city," and the other, that it is at the northeast corner of said streets. The court, however, found that the building is upon the lot in said city "on the northeast corner of Eighth and Hope streets; said lot being more particularly described as lot 6, and the southerly ten feet of lot 7, block 28, of the Huber tract." In its decree it, however, directs that only that part of the building which is upon lot 6 shall be sold. In this respect the court erred. The statute gives a lien upon the entire building for any portion of the labor done or materials furnished therefor; and there is no provision for a lien upon a portion of a building, or for the sale of a part of a building to satisfy a lien upon the whole. We have already seen that the claims of lien, as filed, were sufficient to embrace the entire building, and when it was shown that the building was upon more land than was described in the complaint, the court should have directed amendments to be made to the complaints, so that they might conform to the proofs, and should then have directed a sale of the entire building, and such land as it should determine to be required for the convenient use and occupation thereof.

5. The statute (Code Civil Proc. § 1185) provides that "the land upon which any building is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment," is also subject to the lien. The amount of land thus to be made subject to the lien is an issuable fact, (Green v. Chandler, 54 Cal. 626,) and can be determined by the court only when such issue is presented by the pleadings. The land upon which the building is constructed is necessarily subject to the lien, to the extent of the owner's interest therein; but if the plaintiff would claim that more than that is required for the convenient use and occupation of the building, and have the same sold in satisfaction of his lien, he must make appropriate averments therefor. Although the finding of the court that the southerly 10 feet of lot 7, and the northerly 39 feet of lot 6, are required for the convenient use and occupation of said building, was in accordance with evidence introduced therefor, neither of the complaints made any averment; and before making such finding the court should have directed the complaints to be amended therefor.

The judgment and order denying a new trial are vacated, and the court below is directed to permit the plaintiffs to amend their complaints in the matters indicated in this opinion, and thereupon to enter its judgment in their favor upon the findings already made.

We concur: GAROUTTE, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

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94 Cal. 241

GAGE *et al.* v. DOWNEY *et al.* (No. 14,411.)

(*Supreme Court of California.* March 31, 1892.)

JUDGMENT—CONTRADICTION—RES JUDICATA—LIMITATION OF ACTIONS AGAINST ADMINISTRATOR—ADVERSE POSSESSION.

1. Where a court inadvertently determines two matters standing in such opposition as to be incapable of an harmonious construction, as, for instance, that the same property belongs absolutely to each of two persons, the decision is of no effect.

2. A widow sued her husband's administrator for land, which she alleged was known as the "Valle de San Jose and Agua Caliente," and was comprised in the Pico and Warner grants. It was alleged, also, that the property included in the said mortgage was the same set apart as a homestead to Warner and his family; and that, when the mortgage was foreclosed, the husband bought the property in his own name. The court decreed that the husband's title to certain land, known as "Warner's Ranch," should vest in the plaintiff as her separate estate, being the same land set apart as a homestead, the same included in the sheriff's deed to the husband under foreclosure, and being the Rancho de Valle de San Jose and Agua Caliente, excepting the Moss league. It was stipulated by the parties that the Moss league was included in a patent known as the "Portilla Patent," and that all the balance of the land included therein had been set apart for the Warner homestead, together with the land included in the Warner patent. The land in the sheriff's deed was described as the "Valle de San Jose and Agua Caliente," the latter being a part of the former. The Warner grant was of the Valle de San Jose, and comprised the entire valley, including Agua Caliente, being bounded by the mountain on all sides. The decree further described the land as "Warner's Ranch," and declared what was included therein. It appeared also by the report of the commissioners appointed to set apart the Warner homestead that the Valle de San Jose was known as "Warner Ranch," and the parol evidence tended strongly to the same point. Plaintiff also admitted it in her pleadings in subsequent litigation. At the date of the decree there was no land other than the Valle de San Jose or the Warner homestead to which the description "Warner's Ranch" could apply. *Held*, that the decree included all the land covered by the Warner homestead.

3. Code Civil Proc. § 1573, declaring that an action for the recovery of any estate sold by an administrator must be brought within three years after final settlement, does not apply where the sale was invalid, and the purchaser had never gone into possession.

4. Where a person who obtains an interest in land from a cotenant does not go into actual possession, but relies upon the possession of the tenant, his possession cannot be deemed adverse to the other tenant, especially where there is nothing to show that the latter knew he was claiming adversely.

In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Ejectment by Henry T. Gage and others against John G. Downey and others. There was judgment for defendants, and plaintiffs appeal.

Henry T. Gage, Smith, Winder & Smith, and *Glassell, Smith & Patton*, for appellants. *Levi Chase, Bicknell & White,* and *O'Brien & Morrison,* for respondents.

Garoutte, J. This is an action of ejectment. Judgment went for the defendants, and this appeal is prosecuted from such judgment and the order denying plaintiff's motion for a new trial.

The facts of the case are set forth in detail in 79 Cal. 140, 21 Pac. Rep. 527, 855, when the cause was previously before this court, and it will not be necessary to recite them here. The decision of this court at that time settled the rights of the parties to a large portion of the lands involved in this litigation, and then remanded the cause for a new trial as to a one fourth interest of the land included in the Portilla patent, such one fourth being the interest claimed by plaintiffs as having passed to the children of John Rains at the time of his decease, by virtue of being community property and he dying intestate. At the subsequent trial of this cause in the lower court, that court very properly confined itself to an examination of the single question presented to it for investigation, and the only matter which will occupy our attention here will be as to the correctness of the determination of that question by the trial court.

It is very much to be regretted that the former decision of this case by this court, found in 79 Cal., 21 Pac. Rep., supra, is not more explicit and more satisfactory as to some matters there considered and determined. At the first trial it was stipulated (and the stipulation is in the present record) that the Moss league was afterwards embraced in the Portilla patent, and that "all the balance of the land included in the Portilla grant was set off to Warner as a homestead, together with the land included in the patent of the United States to J. J. Warner." It will thus be seen that under this stipulation we have all the land included in the Warner patent and all the land included in the Portilla patent, except the Moss league, set apart to Warner as a homestead.

At the time of the death of John Rains the title to the Warner grant stood in his name. Subsequent thereto the widow, Mrs. Rains, brought an action in San Bernardino county against the administrator of the estate and the children, claiming said land as her separate property. This court in its previous opinion, construing the complaint in that case, said, "The language used amounts to stating that the right involved and claimed here is the right to the tract set apart as a homestead described in the pleadings;" and again, "The title to the land was in controversy as between the personal representative and the children of John Rains on the one hand, and his widow on the other, and it was determined in favor of the widow." The question as to the effect of the San Bernardino decree is further considered at length by the court, but we have sufficiently noticed it for present purposes. We then have the stipulation of counsel that the Warner homestead included all the land embraced in both patents, save the Moss league; and we have the decision of this court that all the land included in the Warner homestead was adjudged to be the separate property of Mrs. Rains (the widow) by the San Bernardino decree, which would only leave the title to the Moss league standing in the heirs of John Rains. In a subsequent portion of the opinion of the court this language is used: "The defendants acquired one half of the land granted and afterwards patented to Portilla. The other half belonged to John Rains. He died intestate, and it was acquired during coverture, and therefore community property. The title to one fourth of the land embraced in the Portilla patent thus vested in the surviving children of John Rains." This conclusion is absolutely inconsistent with the decision of the court in a former part of the opinion, wherein it is determined that the San Bernardino decree gave Mrs. Rains good title to all of the property covered by the Warner homestead, to wit, all of the Warner grant and all of the Portilla grant except the Moss league. If Mrs. Rains had title to the Portilla grant except the Moss league, then the surviving children of John Rains, deceased, could not have had title to one fourth of the Portilla grant. Counsel representing both sides of the case, very properly in the interest of their respective clients, now claim the law of the case upon this question to be established in their favor. We can only say that where a decision of the court by inadvertence determines two principles of law, standing in such opposition to each other as to be incapable of an harmonious construction, effect can be given to neither, and as to such matter the law of the case has not been established.

As already suggested, the lower court having explicitly followed the directions of this court given upon the previous appeal, and having thereby limited the investigation at the last trial to the *status* of the one fourth interest in the Portilla grant, claimed to have passed to the children of John Rains at his decease, it would seem that its determination as to such matter could properly be the only subject for review upon this appeal. Such being the fact, whatever interest the plaintiff Cornelia de Foley now claims by virtue of her deed from her mother, Mrs. Carillo Rains, dated June 6, 1883, is a matter entirely immaterial at this time, for it involves an interest in the Portilla grant outside of the limits placed for this investigation. Again, counsel have at great length devoted themselves in their argument to the proper construction of the deed from Mrs. Carillo Rains to defendants' grantors, which deed is dated December 3, 1868. We think the matter of minor importance, the investigation being limited as already suggested. If the consideration of plaintiff Foley's title under the deed from her mother was the matter at issue, then the construction of this deed from Mrs. Carillo Rains to defendants' grantors would be very material, as showing that at the date of the Foley deed Mrs. Carillo Rains had no interest in the land, having previously parted with it under her deed as aforesaid. Plaintiffs must recover upon the strength of their own title, and the presence or absence of title in defendants is not material, and whatever interest the plaintiffs have here is such interest as was not cut off by, but survived, the San Bernardino decree. We are entirely satisfied with the previous decision of this court as to the effect of the Santa Clara judgment, to wit, that it resulted only in setting aside certain deeds, etc., and thereby placing Mrs. Carillo Rains in the same position she found herself immediately subsequent to the date of the San Bernardino decree, and the deed made by the administrator thereunder. Consequently these plaintiffs now have all the interests of the children of John Rains, deceased, (unless since lost by operation of law,) to this one fourth of the land inclosed in the Portilla patent, unless the San Bernardino decree adjudicated it against them. If the plaintiffs' interest survived that decree, Mrs. Carillo Rains' deed to defendants' grantors did not carry it. It would seem, therefore, the effect and scope of this decree is a matter of great importance to a proper solution of the merits of the pending appeal.

Whatever rights the plaintiffs have in this land came to them as heirs at law of John Rains; for whatever interest he may have had in this property at the time of his death, it having accrued to him by purchase during coverture, and he having died intestate, one half thereof would pass to the surviving children. It is now conceded that under the San Bernardino decree the plaintiffs have no rights by virtue of the Warner patent. Whatever interest the widow Rains or the Rains estate had in the Portilla grant came by reason of a deed from Vicente Carillo (who owned the grant at the time) to John Rains for an undivided one half interest thereof. We will then proceed to an examination of that decree, to ascertain what portion, if any, of the Portilla grant was there adjudicated to be the separate property of Mrs. Rains, the widow.

That was an action brought by Mrs. Rains against Dunlap, the administrator of the estate of John Rains, deceased, and the children of John Rains, for the purpose of obtaining a decree that certain property claimed by Dunlap, as administrator of said estate, was her separate property. The complaint alleged that on the 29th of November, 1858, John Rains loaned to Jonathan J. Warner the sum of $1,800, and as a security took a mortgage from Warner and wife to that certain tract of land situated in the county of San Diego, Cal., known as the "Valle de San Jose and Agua Caliente," and being the lands granted to Jose Antonio Pico by Juan B. Alvarado, governor of the department of the Californias, by deed of grant of June 8, 1840, and to John J. Warner by Manuel Micheltorena, governor as aforesaid, by deed of grant of date November 28, 1844; the property and right included in said mortgage being the land set off and partitioned as a homestead by commissioners for that purpose in the case of J. Mora Moss v. Jonathan J. Warner and Anita Gale Warner. The complaint further alleged that said money loaned was her separate property, that said mortgage was foreclosed, and said Rains bought the property at sheriff's sale for the amount of the judgment, and received the deed therefor in his own name. After trial the court rendered the following judgment: "And it is ordered, adjudged, and decreed that all right, title, and interest, claim and demand, whatsoever, which the said John Rains had and held at the time of his death, of, in, and to a certain tract of land situate in the county of San Diego, state of California, known as 'Warner's Ranch,' and hereinafter described, do rest and vest in the plaintiff Maria Merced Williams de Rains, as her separate and undivided property, free of all claim and demand and incumbrances whatsoever created by her said husband, John Rains, in said tract of land, being the same set apart as a homestead for said Jonathan J. Warner and wife by commissioners appointed for such purpose by the district court of the first judicial district of the state of California for San Diego county in the case of J. Mora Moss v. J. J. Warner et al., which partition by said commissioners was filed in said court and approved and confirmed on September 24, 1856, and being the same lands included in the deed of the sheriff of San Diego county to John Rains of date September 8, 1861, recorded in the county recorder's office of San Diego county, on September 12, 1861, at 10 o'clock A. M., and said lands being all that part of the Rancho de Valle de San Jose and Agua Caliente granted to Jose Antonio Pico by Juan B. Alvarado, governor of the department of the Californias, by grant of January 8, 1840, and to the said Warner by the said name of Juan J. Warner, by Manuel Micheltorena, governor as aforesaid, by grant of date November 28, 1844, which lies to the north and east of," etc., the portion not included being the Moss league. In accordance with the terms of this decree, the land described as and adjudged to be the separate property of Mrs. Rains consisted of "Warner's Ranch," and more definitely described as (1) being the same land set apart to Warner and wife as a homestead; (2) being the same land included in the deed from the sheriff under the foreclosure sale to Rains; (3) being the Rancho de Valle de San Jose and Agua Caliente grant to Pico by Gov. Alvarado, January 8, 1840, and to Warner by Gov. Manuel Micheltorena by grant of November 28, 1844, (excepting therefrom the Moss league.) This decree of the San Bernardino court was entered March 12, 1863.

There can be no question as to the extent of the land included in the Warner homestead, for it is a stipulated fact in the case that the Warner homestead embraced all the land included in both the Warner and Portilla patents, except the Moss league. Consequently, to the extent of the homestead description found in the decree, we know exactly what land was there vested in the widow. The description of the land included in the deed from the sheriff to Rains consists of "that certain tract of land known as the 'Valle de San Jose and Agua Caliente,' and being the land granted to Jose Antonio Pico by Juan J. Alvarado, governor of the department of the Californias, by deed of grant of date January 8, 1840, and to John J. Warner by Manuel Micheltorena, governor aforesaid, by deed of grant of date November 28, 1844." It will be observed that the description of the land in the sheriff's deed is the same as the third description set out in the decree, except that in addition it includes the land covered by the Moss league. The Agua Caliente described the land granted to Pico January 8, 1840, and appears to have comprised the northern portion of the Valle de San Jose. The *expediente* forwarded to Governor General Micheltorena by Warner contained his application for the place known by name as "Valle de San Jose," "surrounded by the mountain, and which is vacant." Upon November 28, 1844, said Micheltorena by his order recited: "Whereas, Juan Jose Warner, Mexican by naturalization, has petitioned for his own personal benefit, and that of his family, the land known by the name 'Valle de San Jose,' bounded on the east by the entrance into San Felipe and the mountain, on the west by the mountain and canon Aguanga, and on the north bounded by the mountain, and the boundaries on the south being the Carrizo and the mountain, * * * I have resolved to grant him the said land, declaring it by these presents his property." It will thus be seen that the grant to Warner referred to in the decree, known as the place "Valle de San Jose," covered the entire valley, for it is bounded at all points of the compass by the mountain, and it also necessarily covers the Agua Caliente or Pico grant. The remaining description of the land covered by the decree is the place known as "Warner's Ranch," and the decree itself in terms declares what land is included in the description "Warner's Ranch." It also appears, as early as 1856 by the report of the commissioners appointed to set apart the Warner homestead, that the "Valle de San Jose" was known as "Warner Ranch." The oral evidence tends strongly to the same point. The admissions of Mrs. Carillo Rains in her pleadings in subsequent litigation clearly indicates that she so considered it, and in truth, at the date of the decree in 1863, there was no tract of land other than the Valle de San Jose, or the Warner homestead, (which was the same tract less the Moss league,) to which the description "Warner's Ranch" could apply. We conclude that the evidence is entirely convincing that "Warner's Ranch" and the "Valle de San Jose" refer to the same tract of land, which tract comprises the Moss league and the Warner homestead, and which, therefore, include all the land embraced wihtin the Warner and Portilla patents, and that the San Benardino decree included all the land covered by the Warner homestead. We leave this branch of the case by quoting with approval from the opinion of Mr. Justice THORNTON upon the previous appeal, (79 Cal. 153, 21 Pac. Rep. 531:) "The complaint [referring to the San Bernardino Case] intended to challenge John Rains' right and title to this land, and to bring them to judicature, and this, we think, was done by the pleader. So that the parties claiming under Rains might deny by their answer her right to the land, and offer in evidence any title, whether derived from Portilia or any one else, to the land, which would show the land to be a part of his estate. The title to the land was in controversy in this suit as between the personal representative and the children of John Rains on the one hand, and his widow on the other, and it was determined in favor of the widow, (plaintiff.) John Rains acquired his interest in the Portilla grant after his foreclosure at the sheriff's sale under the decree of foreclosure in the action to foreclose his mortgage taken from Warner and wife; and if, after Mrs. Rains obtained the deed of the administrator under the decree in the San Bernardino Case, she had brought an action against John Rains to recover the land embraced in the decree, and he had set up against her his Portilla title, she might have defeated it, if not by the decree just above mentioned, by showing that the Portilla interest was acquired by him with money belonging to her as her separate estate. In our judgment, the decree under consideration conclusively determined that the land embraced in it belonged to Mrs. Rains, and that the estate of Rains had no title to it acquired from any source,—whether Portilla or Pico, or any one else." It is a stipulated fact that defendants have title to the undivided one half of the land included in the Portilla patent, and therefore defendants would have title to an undivided one half of the Moss league. The remaining one half of the Moss league, being in Rains at the time of his death, descended to his heirs, as follows: One half thereof, or twenty-five one-hundredths of the entire league, to Mrs. Rains. There were five children. Isaac died a minor, intestate and without issue, pending administration, and his interest passed to the brothers and sisters in equal shares. Estate of Donahue, 36 Cal. 329. This would vest twenty-five one-hundredths in the four children, which interest is now represented by the plaintiffs here.

Section 1573 of the Code of Civil Procedure provides: "No action for the recovery of any estate sold by an executor or administrator under the provisions of this chapter can be maintained by any heir or other person, claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator." During the progress of the administration of the Rains estate, the administrator, under order of the court, sold to one Carlisle the interest of the estate in and to the Portilla grant. The defendants insist that, by virtue of the foregoing section, the Rains heirs having failed to bring any action against Carlisle or his grantees for the recovery of this land, and the time for bringing such action having long since expired, the title thereto vested absolutely in Carlisle, and therefore there is an outstanding title which is sufficient to defeat plaintiffs in ejectment. The fact that this probate sale was not merely irregular, but entirely void, appears to be immaterial. Harlan v. Peck, 33 Cal. 521; Ganahl v. Soher, 68 Cal. 97, 8 Pac. Rep. 650. It appears that Carlisle never entered into possession of this land under his purchase, and to hold that under the circumstances, as here depicted, the interest of the heirs was transferred to Carlisle would be novel in the extreme, but we do not deem it necessary to discuss that question. Here it is conceded that no title vested in Carlisle under the probate sale, and that the facts exist which under this section of the Code deprive plaintiffs of the right to bring an action for the recovery of the land. These are the only salient existing facts, and they do not establish title in any one. The provision of the Code does not purport to affect the question of title to the realty, but simply refers to a right of action. It is purely a statute of repose. It would seem that defendants, in order to defeat plaintiffs' right of recovery, could no more rely upon this defense than they could upon the defense of title in John Doe by an adverse possession for the statutory time. The right to bring this action is entirely distinct from any question of Carlisle's title. This section of the Code creates a statute of limitations, a personal privilege, and, if the Rains heirs should bring an action to recover the land, *non constat* that Carlisle would take advantage of the plea afforded by the statute. It appears that Carlisle never took possession of the land under his deed. Perchance he recognized the fact that he obtained no title thereunder, and makes no claim to title. If such be the fact, an action by the heirs was not demanded, and the title is still in them and their grantees. We conclude, therefore, that the facts relied upon in this regard do not constitute any defense to plaintiffs' cause of action.

The Portilla patent is dated January 10, 1880. The defendant, the Merchants' Exchange Bank, was made a party to the action by an amended complaint filed October 20, 1885, more than five years subsequent to the issuance of the patent, and the trial court found that as to the defendant bank the plaintiff Foley was barred from any right of recovery, by reason of an adverse possession of five years. The defendants sued in the original complaint were John G. Downey and John Doe, Richard Roe, etc., fictitious defendants. Almost two years after the filing of the complaint, a summons was served on the Merchants' Exchange Bank. Subsequently the service of this summons, upon motion of the bank, was quashed, and the complaint was then amended by substituting said bank as defendant in lieu of John Doe, Richard Roe, etc. Some five years later plaintiffs moved to set aside the original order quashing the summons. It is unnecessary to pass upon these proceedings in detail. It is sufficient to say we believe the original action of the court in quashing the service of summons justified, and are satisfied that the said bank was not a party to the action until October 20, 1885. Conceding these facts, the evidence is insufficient to support the finding of adverse possession. At the time the defendant bank obtained an interest in this land from the grantees of Downey, the plaintiff Foley was a cotenant of Downey, and subsequently she became a cotenant of the bank. The bank was never in the actual possession of the land, and for its adverse possession relies upon the possession of its cotenant, Downey; but this claim would be equally open to plaintiff Foley. There is no evidence that Downey was acting for the bank in his claim of adverse possession, and especially no evidence that plaintiff Foley knew that Downey was claiming an adverse possession for the bank as against her. It is not clear that one cotenant in possession can create a title by adverse possession for himself and a second cotenant out of possession, as against a third cotenant. In Miller v. Myles, 46 Cal. 539, the court said: "The tenant out of possession has a right to assume that the possession of his cotenant is his possession until informed to the contrary, either by express notice, or by acts and declarations, which may possibly be equivalent to notice under certain circumstances. But until he has notice, either actual or constructive, in some form that the possession of his cotenant has become hostile, it will be deemed in law to have been amicable, notwithstanding the tenant in possession may in fact have been holding adversely." See Packard v. Johnson, 57 Cal. 182; Aguirre v. Alexander, 58 Cal. 28. The notice to plaintiff in this case to support the ouster is purely constructive, and to support such character of notice the evidence must be entirely convincing. In Winterburn v. Chambers, 91 Cal. 180, 27 Pac. Rep. 658, the court, in discussing this question, said: "It is the 'intent' which determines the character of the possession; but it is essential that this intent be in some mode, either by actual or presumptive notice, directly or indirectly communicated to the other cotenant. This intent is not the secret purpose of the occupant, but is the purpose which the acts themselves manifest, and the acts done must be manifested to the person against whom the ouster is directed." While the evidence here may have been sufficient to support a finding of adverse possession in favor of defendant Downey, there is nothing to be found in the record to indicate that Downey's "intent" extended beyond his own interest in the land, or that plaintiff Foley had any notice of the existence of such an intent in the mind of Downey, even if he were possessed of it. We think the findings of the court upon the question of the statute of limitations arising under the probate sale to Carlisle, and under the claim of adverse possession by the defendant Merchants' Exchange Bank, are not supported by the evidence. The judgment and order are affirmed as to the land embraced in the said one fourth of the Portilla patent, except as to the twenty-five one-hundredths of the Moss league, and as to said interest the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

3 Cal. Unrep. 488

PEOPLE v. NAGLE. (No. 20,892.)

(*Supreme Court of California.* April 1, 1892.)

CRIMINAL LAW—APPEAL—SUFFICIENCY OF EVIDENCE.

On trial for larceny, where there was some evidence tending to show defendant's guilt, a verdict of guilty will not be disturbed on the ground of the insufficiency thereof.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. HEBBARD, Judge.

Maggie Nagle was convicted of petit larceny, and appeals. Affirmed.

Alex Campbell, Jr., for appellant. *Atty. Gen. Hart*, for the People.

PER CURIAM. Appellant was convicted of petit larceny under an information charging grand larceny, and now insists the evidence is insufficient to justify the verdict. There was some evidence before the jury tending to show the guilt of the defendant, and, under those circumstances, we will not disturb the verdict.

Let the judgment and order be affirmed.

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94 Cal. 284

MONTGOMERY v. PACIFIC COAST LAND BUREAU. (No. 14,454.)

(*Supreme Court of California.* April 2, 1892.)

TERMS OF AUCTION SALE—ANNOUNCEMENT IN CATALOGUE—PRINCIPAL AND AGENT—RATIFICATION OF AGENCY—AUTHORITY OF AGENT—EVIDENCE—PUBLIC LANDS—SALE OF SOLDIER'S HOMESTEAD BEFORE PATENT—LIABILITIES OF VENDEE—ADVICE OF ATTORNEY.

1. The terms of a public auction sale of land were announced in advance in a printed catalogue, in which a number of different tracts belonging to different owners was described, and at the end of each description were stated the terms of sale. At the end of the catalogue, after all the descriptions, was the following: "Title perfect. Instrument of sale at purchaser's expense. Ten days allowed for search of title. A deposit of ten per centum will be required on the fall of the hammer," etc. *Held*, that the portion of the catalogue quoted applied generally to each separate tract described therein.

2. Where defendant, assuming to act as plaintiff's agent to sell land, receives from an intending purchaser a portion of the purchase price, and plaintiff tenders a conveyance to such purchaser, and notifies defendant in writing not to return the money so received, it is a ratification of defendant's agency.

3. The fact that defendant assumed to be plaintiff's agent is, as against defendant, *prima facie* evidence that he had written authority so to act.

4. Where a tract of land was patented by the United States as an additional soldier's homestead, and the entry was made in the name of the soldier by his attorney in fact, acting under an irrevocable power dated two years before the entry, to which was added a relinquishment of dower by the soldier's wife, and after the entry and its approval, but before patent, the land was conveyed in the soldier's name to plaintiff's grantor, plaintiff's title is good at law.

5. Such conveyance was not such an assignment of the soldier's homestead right before entry in violation of the homestead act as to render the title liable to be annulled at the suit of the United States.

6. Where an intending purchaser of land pays part of the price, which is to be returned to him if the title is found to be imperfect, while, if it is perfect, he is to complete the purchase, the fact that he is advised by an attorney that the title is imperfect, and acts thereon in good faith, does not exempt him from damages for the breach of his contract if the title is in fact perfect.

7. Where such portion of the purchase price is paid to an agent of the owner of the land, and the agent, on the representations of the intending purchaser that the owner's title is not perfect, returns it, and the title is afterwards shown to be perfect, the agent is liable to his principal for the money so paid to him.

In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action by Z. Montgomery against the Pacific Coast Land Bureau to recover money alleged to have been paid, received by defendant to plaintiff's use. Judgment for defendant. Plaintiff appeals. Reversed.

Hunsaker, Britt & Goodrich and *Z. Montgomery*, for appellant.

Wellborn, Parker & Stevens, for respondent.

In support of his position that, where a person agrees to complete a purchase of land if the title thereto be perfect, the fact that he was advised by an attorney that the title was imperfect would justify his refusal to perform the contract, respondent cited the following: Turner v. McDonald, 76 Cal. 180, 18 Pac. Rep. 262; Phillips v. Day, 82 Cal. 24, 22 Pac. Rep. 976; Phelps v. Prusch, 83 Cal. 627, 23 Pac. Rep. 1111; Hellreigel v. Manning, 97 N. Y. 59.

BEATTY, C. J. In April, 1886, the defendant, a California corporation, was engaged at the city of San Diego in the business of selling lands upon commission. On the 24th of that month it sold at public auction to A. and S. Hart a tract of land belonging to the plaintiff for $9,000. The terms of sale were announced and advertised in advance by means of a printed catalogue, in which a number of different tracts belonging to different owners was described. At the end of each description were stated the terms upon which it would be sold, *i. e.* the portion of the price to be paid in cash, time of payment of balance, and rate of interest on deferred payments. The terms of sale of plaintiff's land, so announced, were as follows: "Terms, one-half cash; balance in one to three years, and interest at ten per cent." After the description of other tracts, to be sold on different terms as to credits, and at the end of the catalogue, was the following: "Title perfect. Instruments of sale at purchaser's expense. Ten days allowed for search of title. A deposit of ten per centum will be required on the fall of the hammer; balance of cash payment on delivery of deed; and, if not so paid, (unless for defect of title,) then said ten per centum to be forfeited, and the sale to be void. For maps, catalogues, and further particulars, apply to Pacific Coast Land Bureau, branch office, 6th street San Diego. R. J. PENNELL, Auctioneer." We remark, in passing, with respect to a question that seems to be raised in the argument, that there is, in our opinion, no doubt that this last quoted portion of the catalogue applies generally to each separate tract described therein, and not merely to that one which immediately precedes it. We hold, in other words, that it states in part the terms of sale of plaintiff's tract of land as well as of others described in the catalogue. Such, indeed, seems to have been the construction acted upon by all the parties to the transaction, for immediately ensuing the sale the Harts paid to defendant the sum of $900,—10 per cent. of the purchase price,—and they at the same time placed in the hands of their legal advisers an abstract of plaintiff's title to the land, for the purpose of obtaining their opinion as to its validity. Being advised that the title was defective, they, or their attorneys, stated their objections to representatives of the plaintiff, who insisted, notwithstanding such objections, that his title was perfect, and demanded the completion of the sale. In this connection he tendered a deed of conveyance to the purchasers, to the sufficiency of which they made no objection, but which they declined to accept solely upon the ground that the title of plaintiff was not perfect. Upon the same ground they demanded of the defendant the return of the $900, deposited at the time their bid was accepted. In compliance with this demand, the defendant, after being notified by plaintiff not to do so, returned said $900 to the Harts, and the plaintiff thereupon commenced this action to recover the same as money had and received to his use. The cause was tried without a jury. The findings and judgment of the superior court were in favor of defendant, and plaintiff's motion for a new trial was denied. The appeal is from the judgment and from the order denying a new trial.

The complaint alleges in general terms the receipt by defendant of $900 to the use of plaintiff, and the answer and finding of the court negative this allegation. The findings, therefore, support the judgment. But the appellant contends that the refusal of a new trial was erroneous, because the superior court erred in admitting evidence over his objections, and because the evidence properly admissible does not sustain the findings. There is included in the bill of exceptions an opinion of the superior judge, delivered prior to the filing of his findings of fact and conclusions of law, which shows very clearly that the principal ground of his decision was that plaintiff's title, although it may be good, was not so free from doubt as to enable him to enforce its acceptance by the purchasers of the land. He also holds, apparently, that, according to the evidence, the $900 in controversy was not received by defendant for plaintiff's use, but solely for the use and benefit of the defendant itself. In addition to these grounds, upon which the decision of the superior court is rested in the opinion referred to, the respondent contends that the order denying a new trial must be affirmed, for the reason, if for no other, that there was no evidence that plaintiff ever gave the defendant written authority to sell his lands, and, consequently, that it does not appear that defendant was the plaintiff's agent in the sale of said land, or that the 10 per cent. of the purchase price was received for his use or benefit. It is true that the record contains no direct evidence of an antecedent written authorization to defendant to make the sale, and we concede that without such antecedent written authority, or a subsequent ratification by plaintiff of the sale made in his name before the return of the money to the purchasers, he could not have claimed it of the defendant. But here there is evidence of such ratification. Before the money had been returned, (June 21, 1886,) the plaintiff had tendered a conveyance (May 28, 1886) to the purchasers, and had notified the defendant in writing not to return the money. Aside from this, we think that, as against one who assumes to be the agent of another, that fact is sufficient, *prima facie*, to justify the inference that he was duly authorized to do what he claimed the authority to do, and that, where the question of agency in fact becomes material, the burden is upon him to rebut the presumption arising from his claim of authority. In other words, we hold that where one sells land of another, claiming authority to do so, this is, as against him, at least *prima facie* evidence of written authority.

As to the grounds upon which the superior court expressly rested its decision, we think that neither is sufficient to sustain it. The evidence shows that the title of the plaintiff to the land in controversy was in fact perfect, and that this appeared from the abstract and public records of San Diego county at the time of the sale. The land—a tract of 80 acres—had been patented by the United States as an additional soldier's homestead. The entry was made in the name of the soldier,—Cook,—by his attorney in fact, acting under an irrevocable power dated two years before the entry, to which was added a relinquishment of dower by Cook's wife. After the entry and its approval, but before patent, the land was conveyed in the name of Cook to plaintiff's grantor. It was admitted that the legal title was in the plaintiff, but in the opinion of the lawyers who advised the Harts the terms of the power under which the land had been entered and conveyed, and the circumstances of the transaction, were such as clearly to evince, and to put any purchaser upon notice, that Cook had virtually and in effect made an assignment of his homestead right before the entry, contrary to the terms, or at least to the clear policy, of the law of the United States; that the patent had therefore been fraudulently obtained, and could at any time be annulled at the suit of the United States. This opinion, we think, was erroneous. In the case of Rose v. Lumber Co., 73 Cal. 385, 15 Pac. Rep. 19, this court decided that a patent of the United States, issued under similar circumstances, was not void, and placed its decision upon the ground that there had been no violation of the terms or the spirit of the law. Upon the same ground it must be held that plaintiff's title is not only good at law, but that it is secure against a suit in equity to annul the patent.

But the superior court, irrespective o the question of the actual validity of the title, which it held not to be necessaril involved, decided that the purchaser were justified in refusing the conveyanc and in demanding back their deposit, and, therefore, that defendant was bound t restore it, because of the opinion of counsel of admitted standing, ability, and reputation that the title was not safe. We think, however, that upon the authority of Winter v. Stock, 29 Cal. 413, it must be held otherwise. A purchaser of real property does well to obtain professional advice as to the validity of the title, but he must take the risk of the soundness of the advice upon which he acts. It may turn out to be erroneous, and, if so, the fact that it was given and acted upon in good faith will not exempt him from damages for the breach of his contract. None of the later cases cited by respondent are in conflict with this view. We have not been cited to any decision, and we know of none, which holds that where the facts are all admitted and appear of record, an erroneous opinion that a title is invalid will justify a purchaser in receding from his bargain. From this view of the law it follows as a necessary consequence that, when the plaintiff's title was shown to be perfect, and he tendered a sufficient conveyance, he became entitled to demand and receive from the purchasers the cash payment provided for in the terms of sale, and, as a part thereof, the $900 in the hands of defendant, less its proper charges and commissions.

It may be conceded that as to this deposit the defendant, pending the examination of the title, was a stakeholder for the parties and for its own protection. But when the title was shown to be perfect the deposit then became, according to the terms of sale, a portion of the cash payment, and the property of the plaintiff, less the charges and commissions of the defendant. Thereafter the defendant could not return it to the purchaser except at its own risk. Having done so, and having made a mistake, it cannot escape its just liability to the plaintiff.

We think the court erred in admitting in evidence the opinions of the attorneys who pronounced plaintiff's title unsafe, and in admitting evidence as to the meaning of the printed terms of the sale. We also think that on the evidence the findings and judgment should have been for the plaintiff. The judgment and order appealed from are reversed.

We concur: De Haven, J.; Sharpstein, J.; Paterson, J.; McFarland, J.; Garoutte, J.; Harrison, J.

94 Cal. 304

People v. Ng Sam Chung *et al.* (No. 20,876.)

(*Supreme Court of California.* April 6, 1892.)

Criminal Law—Former Jeopardy.

Defendants have been placed in "jeopardy" where they have been tried for petit larceny, but before verdict the court, believing they have been guilty of a greater offense, which includes the crime charged, dismisses the case; and they cannot be rearrested and tried for the same or a higher offense, involving the same facts.

In bank. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

On the trial in the police court of Ng Sam Chung and Woo Sing for the offense of petit larceny the evidence showed that the offense charged was grand larceny, and the court dismissed the case. Thereafter they were charged in the superior court, and convicted of grand larceny, and appeal. Reversed.

Robert Ferral and *F. E. Stranahan*, for appellants. *Wm. S. Barnes* and *Atty. Gen. Hart*, for the People.

Garoutte, J. The defendants were prosecuted in the police court of the city and county of San Francisco for the offense of petit larceny, in stealing one gold bracelet of the value of $27, the property of Jeong Koong. A jury trial was waived; and after the evidence was concluded, upon the suggestion of the prosecuting attorney that the property was taken from the person of said Koong, and that therefore the offense was grand larceny, the court ordered the action dismissed. The defendants were thereafter placed upon trial in the superior court upon a charge of grand larceny, upon an information alleging the same facts set out in the complaint in the police court, and the further fact that the property was taken from the person of said Jeong Koong. In addition to their plea of not guilty, they plead that they had been once in jeopardy, and the determination of that question is the only matter involved upon this appeal.

The solution of the question as to whether a defendant has been placed in jeopardy in many cases is a matter of considerable difficulty, especially in the light of the variance existing in the decisions of the courts upon the subject. Bishop, in his work on Criminal Law, (section 1027,) states the general rule to be: "When the indictment is sufficient and the proceedings are regular, before a tribunal having jurisdiction, down to the time when the jeopardy attaches, there can be no second jeopardy allowed in favor of the state on account of any lapse or error at a later stage." In 1 Benn. & H. Lead. Crim. Cas. p. 537, the correct rule for the determination of the question as to the existence of a prior jeopardy for the same offense is thus stated: "A former conviction or acquittal of a minor offense is a bar to a prosecution for the same act, charged as a higher crime, whenever the defendant, on trial of the latter, might be legally convicted of the former, had there been no other prosecution." The author illustrates by saying: "If, therefore, a person has been indicted and convicted of manslaughter, he cannot be again prosecuted for the same homicide, charged as a murder; for, though these crimes are not exactly the same, yet, as the person, when on trial for murder, might, under the rules of law, have been convicted of manslaughter, if the evidence failed to sustain the more serious offense, it would follow that if he had been already convicted of manslaughter, in a prior indictment for that crime alone, he might on the trial for murder be convicted of the same identical crime, and thus be punished twice." The correctness of the converse of the foregoing rule is even more manifest, viz., a conviction or acquittal of a higher offense is a conviction or acquittal of all lesser offenses necessarily included therein. Bish. Crim. Law, § 1057, fully indorses the principle laid down in the authority just quoted. The author says: "Where the conviction or acquittal is upon an indictment covering no more than one of the smaller crimes included within a larger, will it bar fresh proceedings for the larger? If it will not, then the prosecutor may begin with the smallest, and obtain successive convictions, ending with the largest, while, if he had begun with the largest, he must there stop,—a conclusion repugnant to good sense." The same principle is declared in Whart. Crim. Law, § 563. In the case of State v. Wiles, 26 Minn. 381, 4 N. W. Rep. 615, we find the facts and the legal principles similar to those involved in this appeal. The defendant was convicted of a misdemeanor by a justice of the peace, in stealing a hat of the value of four dollars. Subsequently, he was prosecuted for a felony in stealing the hat from a shop. The court held that the first conviction was a bar to the second prosecution; petit larceny being necessarily included in the second offense charged. In this case the defendants are charged with grand larceny, in stealing a bracelet of the value of $27 from the person of one Koong. This offense as necessarily includes petit larceny as the stealing of a hat of the value of four dollars from a shop includes petit larceny, or as the offense of an assault with a deadly weapon includes a simple assault. Aside from the question of jeopardy, there can be no doubt that, under the information filed against the defendants in this case, they could have been convicted of petit larceny, if the evidence at the trial had failed to show that the property was taken from the person of said Koong. It follows that, if defendants were placed in jeopardy by reason of the proceedings in the police court, their trial in the superior court was a second jeopardy, and they are entitled to their discharge. It appears the defendants were tried upon a charge of petit larceny by a court of competent jurisdiction, and upon the conclusion of the evidence the court, believing that another offense had been committed, refused to render a judgment, but dismissed the action of its own motion. If the evidence in the case proved a petit larceny, the court should have found the defendants guilty; if the proof was lacking to establish such offense, it should have found the defendants not guilty. Jeopardy had attached to them long before the court dismissed the action; and it could not deprive them of any benefit to be derived from that jeopardy by refusing to allow the case to go to judgment, even though it was aware that by reason of an error of law committed during the progress of the trial, or by reason of insufficiency of the evidence to support the charge, a mistrial would be the necessary result. In this case, if the police court had rendered a judgment of conviction, it would not have been void, but voidable only. Under a voidable judgment of conviction a defendant is not only in jeopardy, but in jail; and such a judgment accomplishes all the purposes contemplated by any judgment, until successfully attacked. There is no good reason to be urged that after these proceedings in the police court the defendants could have been again arrested and tried upon the charge of petit larceny upon the same facts. Such a prosecution could have been had unless the previous proceeding caused jeopardy to attach. It is thus apparent that jeopardy did attach; and, under the standard authorities which we have cited, it was a fatal bar to the prosecution in the superior court. The case of People v. Hunckeler, 48 Cal. 331, is directly in point upon many of the matters herein discussed. Let the judgment and order be reversed, and the cause remanded, with directions to discharge the defendants and dismiss the proceedings.

We concur: DE HAVEN, J.; MCFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.; PATERSON, J.

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94 Cal. 317

TREGEA v. OWENS, Collector. (No. 14,264.)

(*Supreme Court of California.* April 11, 1892.)

IRRIGATION DISTRICTS—ASSESSMENTS—SUBMISSION TO ELECTORS.

1. Under St. 1887, p. 29, § 37, authorizing the board of directors of irrigation districts to provide for the payment of certain enumerated expenses by a levy of assessments, and giving the board, for the purposes of the levy, the powers possessed by boards of supervisors; and section 41, providing for the submission to the electors of the question whether a special assessment shall be levied for the purpose of raising money to be applied to any of the purposes provided in the act; and St. 1883, p. 304, § 25, subd. 13, giving boards of supervisors power to levy taxes on the property of any district for road purposes, etc., provided that no tax should be levied on a district until the proposition to levy the same had been submitted to the electors of the district, —an assessment cannot be levied by the directors without a previous authorization, by a vote of the electors of the district.

2. The provision that the directors may call an election for the purpose of submitting such question, "when in their judgment it may be advisable," merely means that if, in their judgment, an assessment is advisable, they shall call an election.

In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Action by one Tregea against one Owens, collector of the Modesto irrigation district, to recover an assessment paid under protest. Judgment for defendant. Plaintiff appeals. Reversed.

Schell & Eastin and *Bond & Fishback*, for appellant. *C. C. Wright, C. A. Stonesifer*, and *A. L. Rhodes*, for respondent.

HARRISON, J. The directors of the Modesto irrigation district levied an assessment September 19, 1888, of 33⅓ cents upon each hundred dollars in valuation of the real property within said district, "for the purpose of defraying the expenses of the organization of said district, and payment of the salaries of officers and employes of said district for the year 1888." Under this assessment the defendant, as collector of said district, proceeded to collect the same, and for that purpose was about to sell certain property belonging to the plaintiff, when the plaintiff, for the purpose of preventing the property from being sold, paid to him under protest the sum of $63.16, and thereafter brought this action to recover the amount so paid, upon the ground that the assessment was illegal, and that the money was paid by him under duress. The act (St. 1887, p. 29) under which these proceedings were taken provides for raising money from tolls and charges, and also by assessments upon the property within the district. As the tolls and charges are to be collected from the use of the canal, it is obvious that until the canal has been constructed the only mode by which the directors can raise money for any purpose, except from the sale of bonds, is by means of assessment. This assessment, although referable to the power of taxation, is distinct from a tax, and is not subject to the contitutional provisions respecting taxation, but may be levied upon all real property within the district, without deducting from the value of such property the amount of any mortgages existing thereon. In re Bonds Madera Irrigation Dist., (Cal.) 28 Pac. Rep. 272. Section 37 of the act referred to declares "that, for the purpose of defraying the expenses of the organization of the district, and of the care, operation, management, repair, and improvement of such portions of said canal and works as are completed and in use, including salaries of officers and employes, the board * * * may provide for the payment of said expenditures by a levy of assessments therefor, * * * and the board shall have the same powers and functions, for the purposes of said levy, as are now possessed by boards of supervisors in this state." We have not been referred to any statute which confers upon the boards of supervisors the power to levy an assessment, as distinct from a tax; but section 25, subd. 13, of the county government act, (St. 1883, p. 304,) defines the powers of boards of supervisors in the matter of levying taxes, and gives them power "to levy taxes upon the taxable property of their respective counties for all county purposes, and also upon the taxable property of any district for the construction and repair of roads and highways and other purposes: provided, that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors of such district, and received a majority of all the legal votes cast upon such proposition." It is thus seen that boards of supervisors are not authorized to levy a tax upon any district for district purposes without a previous approval thereof by the voters of that district, at an election held for that purpose.

The Wright act has been framed upon the theory that the electors of an irrigation district shall themselves determine the amount which they will pay for the expenses of the local improvement, whether by the issuance of bonds, for the payment of which an annual assessment is to be levied, (sections 15–17,) or by a contribution of money to be paid by a single assessment, (section 41;) and this theory is further shown by the provisions of section 37, which limit the power of the directors in levying an assessment to such as are possessed by boards of supervisors in levying a tax upon a district within their county. Section 41 provides for submitting to the qualified electors of the district the question whether a "special assessment" shall be levied for the purpose of raising money "to be applied to any of the purposes provided in the act." If the directors desire to raise money for the purpose specified in section 37 by "levy of assessments therefor," rather than from tolls and charges, such assessments are the "special assessments" referred to in section 41, and must be previously authorized by a vote of the electors within the district. The provision that the directors may call an election for the purpose of submitting such question, "when in their judgment it may be advisable," does not mean that they may levy an assessment according to their will, and submit the question of such levy only when in their judgment it may be advisable; but it means that, when in their judgment it may be advisable to levy an assessment, they shall call an election for the purpose of submitting to the electors within the district the question whether the assessment shall be levied. The directors are the governing body of the district, and the body by which the assessment is to be levied. They are also to determine, in the first place, whether it is advisable to levy an assessment for any of the purposes provided in the act, and also the amount of such assessment; but before they can levy it they must obtain the consent of the electors of the district, as provided in section 41. If the directors have the power to levy an assessment, irrespective of the will of the electors, the provisions of section 41 for an election to determine such question, which require that "the notice must specify the amount of money proposed to be raised, and the purpose for which it is intended to be used," would be meaningless, for the directors could levy the assessment, even if the vote of the district was adverse thereto. This section is intended to supplement the provisions of section 37, which limit the powers of the directors in making the levy to such as are possessed by boards of supervisors, by providing a mode in which the will of the electors of the district, required under subdivision 13 of section 25 of the county government act, may be ascertained for the purpose of guiding the action of the directors of the irrigation district.

In the complaint herein the plaintiff alleged "that said levy of assessment was made by said board of directors without calling a special election, or submitting to the qualified electors of the district the question whether or not a special assessment should be levied for the purpose of raising said sum of money, or any other sum; that no election was held in said district authorizing said directors to make said levy of assessment." Upon the motion of the defendant the court below struck this averment from the complaint, and, upon the plaintiff's offering to prove the facts therein alleged, excluded the evidence. Inasmuch as it was essential to the validity of the assessment that an election therefor should have been held, it was proper for the plaintiff, in order to establish the illegality of the assessment, to allege and show that it was made without such election, and the action of the court in striking the averment from his complaint was error, and for this error the judgment and order denying a new trial are reversed.

We concur: DE HAVEN, J.; MCFARLAND, J.; GAROUTTE, J.; PATERSON, J.; SHARPSTEIN, J.

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93 Cal. 653

CAMPBELL v. WEST *et al.* (No. 14,501.)

(*Supreme Court of California.* April 15, 1892.)

APPEAL—OBJECTIONS NOT RAISED BELOW.

A merely technical error, which might have been corrected on application to the court below, will not work a reversal of a judgment, where no such application was made.

In bank.

On rehearing. For former report, see 29 Pac. Rep. 219.

PER CURIAM. The point urged in support of the petition for a rehearing in this case was not overlooked in deciding the appeal. If the fact that the amended complaint was served on the defendants, and not on their attorney, was in any degree prejudicial to them, they should have sought relief by motion in the superior court before appealing from the judgment. We will not reverse a judgment for a merely technical error, which could be corrected in the superior court, when no such application has been made.

Rehearing denied.

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94 Cal. 326

MARTIN v. CALIFORNIA CENT. RY. CO. (No. 14,052.)

(*Supreme Court of California.* April 15, 1892.)

INJURIES TO TRAINMAN—DEFECTIVE COUPLINGS—EVIDENCE—INSTRUCTIONS.

1. In an action for injuries causing the death of a brakeman while attempting to couple cars, it was alleged that the injuries were caused by the negligence of defendant railroad company in using a "Miller hook" coupling in connection with a "Potter drawhead coupling," either of which was safe when used in connection with one of its own kind, but dangerous when used with one of the other kind. It appeared that defendant knew of the dangerous nature of the couplings. *Held*, that the question of contributory negligence was properly submitted to the jury.

2. An instruction that though decedent was engaged in a dangerous business, requiring constant and watchful care on his part, and that he should act with rapidity and promptness, still, if he did not always bear this in mind, and act upon it, and was thereby injured, he could recover, appears to be based upon the doctrine of emergency or sudden danger, of which there was no evidence, and is erroneous; and an injury so received would be the direct result of contributory negligence on his part.

3. The fact that this character of coupling was in general use among railroad companies only tends to show ordinary care in its selection, and is not conclusive evidence that defendant was not negligent.

In bank. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by Louisa V. Martin against the California Central Railway Company to recover damages for the death of plaintiff's husband by defendant's negligence. Judgment for plaintiff. Defendant appeals. Reversed.

Elmer E. Rowell and *A. Brunson*, for appellant. *Waters & Gird*, for respondent.

GAROUTTE, J. This action arose out of injuries resulting in the death of Arthur A. Martin, husband of respondent, who at the time of his death was a brakeman in the employ of appellant. While attempting to couple a caboose car and a freight car, the cars came together, and he was instantly killed. The cause of action is based upon the theory that appellant did not use ordinary care in the selection of the couplings for the cars as operated, and that said Martin met his death by reason of such fact. The special negligence alleged against appellant consisted in the use of a "Miller hook coupling" upon the caboose car, in connection with a "Potter draw-head coupling" upon the freight car; that while each of the couplings, when used in connection with one of its own kind, was practically safe and entirely proper, yet when used in connection with one of the other character the act of coupling cars became so dangerous that it indicated a lack of ordinary care in the selection of the apparatus, and the employer should be held responsible for all injuries resulting therefrom to the employe. Appellant denies the unfitness of the machinery; alleges that deceased knew the character of it, and assumed the risk, and also that he was guilty of contributory negligence; and in this connection appellant insists that the following instructions, given by the court to the jury, were erroneous: "(1) The jury are instructed that in this case it is claimed by the defendant that deceased knew the nature, kind, and character of the couplings used on the caboose car mentioned in the complaint, and that, having such knowledge, he should have so acted as to have avoided injury by said coupling appliances; and, failing to do so, he was guilty of contributory negligence. The question of neglignce is for the jury to decide, under all the evidence in the case, even if it appears that said deceased Martin knew the character, kind, and dangerous nature of the said coupling. While it is a circumstance to be taken into consideration by you, it is not necessarily a decisive one. (2) If the service to be performed by said Martin in making said coupling was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, the law does not require that he should always bear in mind the nature, kind, and dangerous character of said coupling appliances, or be prepared at all times to avoid it. Taking all the facts into account, it is for you to determine whether said Martin was guilty of such negligence as contributed directly to his death. If you find he was not guilty of such negligence, and that the accident was caused by the neglect of the defendant, then your verdict should be for plaintiff."

Appellant, in effect, contends that knowledge upon the part of Martin of the character of the coupling, and the danger attendant upon the use of it, of itself, will defeat a recovery by plaintiff, notwithstanding appellant may have been guilty of the greatest negligence in the selection of the machinery. The principle of law embraced in such contention is entirely too broad in its scope. Shear. & R. Neg. § 215, reads: "Such rulings were unjust, because a servant has the same right that any one else has to complete his contract in reliance upon its original terms. A party to any other contract having mutual obligations is allowed to perform fully his part, notwithstanding the failure of the other party to fulfill a condition precedent, without necessarily waiving his right to insist upon performance of such condition at a later period. * * * The real question to be determined in such case is whether, under all the circumstances, the master had a right to believe, and did believe, that the servant intended to waive his objection to the unfitness of his fellow servant, or the defect in the materials provided for the work, and to accept an implied contract exempting his master from liability. This is a question of fact, not of law, and it must be left to the jury, at least if not entirely free from doubt." In Hawley v. Railway Co., 82 N. Y. 373, where the plaintiff, an engineer, was injured by reason of a defective roadbed, knowing at the time its dangerous condition, the court said: "We think, under all the circumstances, and upon all the evidence given on both sides, that it was a question for the jury to determine, whether the plaintiff acted with reasonable prudence and discretion in venturing to run his engine over the road. * * * It would be a very unjust rule which would allow a master to shield himself from responsibility for the consequences of his own negligence by alleging those acts, not inevitably or imminently dangerous, to have been negligent, which his servant performed by his express orders." These views are fully supported in McMahon v. Iron-Ore Co., 24 Hun, 48. In that case the court said: "It would seem to be unreasonable that one who has undertaken a service, which in itself has some elements of danger, whenever he shall see that the danger has been increased through some negligence of his employer, must either stop his employment or be deemed to have accepted the increased risk. We do not think that this is the rule. And it seems to us that the plaintiff had a right to go to the jury on the question whether he was, under the circumstances, justified in going on with his work." The foregoing cases, and many others tending to support this principle, are cited and approved in Magee v. Railroad Co., 78 Cal. 430, 21 Pac. Rep. 114. Conceding that the deceased knew the character and dangerous nature of the couplings used upon these cars, we think, under the evidence disclosed by the record, and in view of the authorities cited, the question of his negligence was still an open one, and should have been presented to the jury for their consideration. It follows that respondent's instruction to this effect is correct, and that appellant's instructions to the contrary are not the better law.

The second instruction given to the jury was clearly erroneous, and counsel for respondent has presented no authority to support it. It appears to be based upon the doctrine of emergency or sudden danger, but there is nothing in the facts of this case to demand the application of that rule. There was no sudden danger, no emergency. The danger that surrounded Martin at the time of his death was the danger incident to the act of coupling the cars,—a danger which was ever present when he was engaged in the performance of that duty. In effect the instruction told the jury that notwithstanding the deceased was engaged in a dangerous business, requiring constant and watchful care upon his part to save himself from injury, still, if he did not always bear these things in mind, and act upon them, and was thereby injured, he could recover. An injury received under such circumstances would be the direct result of contributory negligence upon the part of the party injured, and would defeat a recovery.

The instruction asked by appellant, that if this character of coupling was in general use among railroad companies, then it was not negligence upon the part of appellant to use it, was properly refused. Such general use was evidence tending to show ordinary care in the selection of the coupling, but not conclusive evidence. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: Harrison, J.; Sharpstein, J.; Paterson, J.; McFarland, J.; De Haven, J.

PEOPLE v. FORRESTIER *et al.* (No. 20,860.)

(*Supreme Court of California.* April 1, 1892.)

Department 1. Appeal from superior court, city and county of San Francisco; F. M. Angellotti, Judge.

Louis Forrestier and Person Francisco were convicted of larceny, and appeal. Affirmed.

Carroll Cook and *J. A. Spinetti*, for appellants. *Atty. Gen. Hart*, for respondent.

Per Curiam. Appellants were convicted of the crime of grand larceny, and appeal from the judgment and order denying a motion for a new trial. For a reversal of the judgment, various rulings of the court in the admission and rejection of evidence are relied upon. We have carefully examined the specifications of error presented, and find nothing to justify a new trial. Let the judgment and order be affirmed.

94 Cal. 322

DEAR v. WEINEKE. (No. 14,426.)

(*Supreme Court of California.* April 11, 1892.)

Assessment Book—Sufficiency of Entry.

Under Pol. Code, § 3650, prescribing the manner in which property must be listed for assessment in the assessor's book, but providing that a failure to enumerate personal property in detail should not invalidate the assessment, an entry by the assessor in his book, as follows, "Value of personal property, exclusive of money and solvent credits, $15,725," is a sufficient form of assessment. San Francisco v. Pennie, 29 Pac. Rep. 66, followed.

In bank. Appeal from superior court, San Diego county.

Action by P. Dear against H. W. Weineke. Judgment for defendant. Plaintiff appeals. Affirmed.

Deakin & Story, for appellant. *Johnstone Jones*, Dist. Atty., and *J. L. Copeland*, for respondent.

PER CURIAM. This action was brought to recover certain taxes claimed to have been paid under duress, and which it is declared by the appellant were not collectible by reason of the assessment being invalid. The individual whose personal property was assessed gave a list of it in detail, as he states in his complaint, to the assessor, but that official did not list the property in detail, but made this entry in the assessment book: "Value of personal property, exclusive of money and solvent credits, $15,725." The complaint is demurred to as not stating facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff not desiring to amend his complaint, judgment passed for the defendant, from which the present appeal is prosecuted. The only question involved is whether the form of the assessment set out in the assessor's book was sufficient, under section[1] 3650 of the Political Code, and that it was sufficient is in effect decided in San Francisco v. Pennie, (No. 12,923,) 29 Pac. Rep. 66, and upon the authority of that case the judgment must be affirmed.

94 Cal. 308

PEOPLE v. FLEMING. (No. 20,886.)

(*Supreme Court of California.* April 7, 1892.)

ASSAULT WITH INTENT TO COMMIT RAPE—INTENT—INSUFFICIENCY OF EVIDENCE.

Where, on a prosecution for assault with intent to commit rape, it appears that defendant, in his endeavors to have sexual intercourse, committed an assault or battery, but the female testifies that when she was exhausted, and her opposition and refusals had ceased, he voluntarily left her bed, and abandoned his project, the evidence is insufficient to show an intent to have carnal knowledge by means of force sufficient to overcome the female's resistance, and a judgment of conviction will be reversed; Pen. Code, § 261, defining "rape" as "an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, * * * where she resists, but her resistance is overcome by force or violence."

In bank. Appeal from superior court, Los Angeles county; B. N. SMITH, Judge.

Samuel J. Fleming was convicted of assault with intent to commit rape, and appeals. Reversed.

T. J. Carran and *C. W. Pendleton*, for appellant. *James McLachlan* and *Atty. Gen. Hart*, for the People.

GAROUTTE, J. The defendant was convicted of an assault with intent to commit rape, and now appeals from the judgment and order denying his motion for a new trial. The prosecuting witness was a servant girl of the age of 24 years, doing the housework for defendant and his family. The errors of law relied upon by counsel for a reversal of the judgment are not well taken, and the only question remaining is whether or not the evidence is sufficient to support the verdict of the jury. The events which occurred at the time the alleged assault was committed, as depicted by the prosecuting witness and the defendant, are directly contradictory in all essentials; and under those circumstances the finding of the jury, to the extent that it involved the veracity of these two parties, will not be disturbed. The testimony, as disclosed by the record, upon all salient matters pertaining to the commission of the offense, consists of the evidence of the prosecuting witness alone; still, if her evidence was sufficient to prove the crime, and the jury gave credence to it, the verdict should be upheld. People v. Mayes, 66 Cal. 597, 6 Pac. Rep. 691. After a careful examination of the evidence of the prosecuting witness, conceding it to be true in all particulars, we conclude that it does not establish a *prima facie* case of the crime of assault with intent to commit rape. Section 261 of the Penal Code reads: "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: * * * (3) Where she resists, but her resistance is overcome by force or violence." In Russell on Crimes, (volume 1, p. 692,) the author quotes with approval the principle laid down in Rex v. Lloyd, 7 Car. & P. 318, wherein it was held: "In order to find the prisoner guilty of an assault to commit a rape, you [the jury] must be satisfied that the prisoner, when he had hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part." In the case of State v. Hagerman, 47 Iowa, 152, the court said: "The assault must have been made with intent to commit a rape, notwithstanding all possible resistance that could be made. The intent must have been to perpetrate the crime at all events, regardless of what the prosecutrix might or could do to prevent it." This principle of law is supported by the great weight of authority, and cannot be questioned. It would subserve no good purpose here to recite the evidence of the prosecutrix as to the *res gestæ* of the accusation. By her testimony it is apparent that the defendant desired to have sexual intercourse with her, and that he committed either an assault or a battery upon her, of a technical character at least, while engaged in his solicitations and blandishments; but these things may all be true, and be entirely foreign to any intention on his part to commit the crime of rape by the use of force to the extent of overcoming all resistance she might offer. In the case of Com. v. Merrill, 14 Gray, 415, the facts were very similar to the facts adduced by this record, and the court reversed the judgment upon the weakness of the evidence, and ordered a new trial. In that case the court said: "We think it entirely clear that the evidence at the trial of this case fell far short of proving any intent by the prisoner to have carnal knowledge of the prosecutrix by force and against her will. There was ample proof of gross indecency and lewdness, and of an attempt, by long-continued and urgent solicitations and inducements, to lead the prosecutrix to consent to the wish of the prisoner to have sexual intercourse with her. These facts would have been sufficient to warrant a jury in finding the prisoner guilty of an assault. * * * It is therefore necessary that the acts and conduct of the prisoner should be shown to be such that there can be no reasonable doubt as to the criminal intent. If the acts and conduct are equivocal or equally consistent with the absence of the felonious intent charged in the indictment, then it is clear that they are insufficient to warrant a verdict of guilty." As was said in Pefferling v. State, 40 Tex. 493: "There is a manifest distinction between an assault to commit a rape and an assault with intent to have an improper connection. Any such violent or indecent familiarity with the person of a female against her will, where the latter is the extent of the purpose and intent of the aggressor, is an aggravated assault, and should be punished as such." This principle was also approved in the late case of People v. Manchego, 80 Cal. 306, 22 Pac. Rep. 223. Upon an examination of the record in the case of People v. Brown, 47 Cal. 447, we find more evidence to support the verdict than in the present case, yet the court said: "The evidence falls wholly short of establishing the crime charged upon the defendant."

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[1] Which prescribes the manner in which property must be listed for assessment in the assessor's book, but providing that failure to enumerate in detail the personal property would not invalidate the assessment.

In the light of the evidence before us, we think the conduct of the defendant did not indicate that settled purpose to use whatever force was necessary upon the prosecutrix to accomplish the consummation of his desires; and that is the test the law demands in order that his guilt should be adjudged. It can hardly be said that the defendant used force to any degree, and, from all the circumstances of the affair, it would appear that physical force was not an element in his mind in attempting to carry out his intentions. There was no duress upon the part of the prosecutrix, no fear of personal violence, for there were no threats of violence. The defendant sought only to accomplish his purpose by promises, persuasions, and arguments. The intent to commit the rape is the vital element in the case. A rape was not accomplished; hence the intent of the defendant must be determined from his acts and conduct. If he had intended to use force in carrying out his purpose, why was it not done? Why was not the crime of rape committed? It is conceded the woman was not possessed of a sufficient power of resistance, if he had used physical force. The law says there is no intent to commit rape unless a defendant is resolved to use all force necessary to carry out his designs. He could have carried out his designs by using force, but at the very moment when his success was assured, when, according to her statement, she was exhausted, and her refusals and opposition to his desires had entirely ceased, at that moment he voluntarily left her bed, and retired to an adjoining room, where he passed the remainder of the night. His departure was no flight, for there was no alarm; there was no danger of discovery; and the conduct of the defendant at this time was entirely inconsistent with that of the would-be ravisher. The acts and conduct of the defendant were not only equivocal and consistent with the absence of a felonious intent to commit a rape, but the evidence preponderates to the effect that the accused depended for success in the accomplishment of his design upon the solicitations and blandishments of the seducer, rather than upon the physical force necessary to constitute the crime here charged. See State v. Canada, 68 Iowa, 397, 27 N. W. Rep. 288; People v. Royal, 53 Cal. 62. Let the judgment and order be reversed, and the cause remanded.

We concur: BEATTY, C. J.; DE HAVEN J.; MCFARLAND, J.; PATERSON, J.; HARRISON, J.; SHARPSTEIN, J.

94 Cal. 420

Moulton v. Harris. (No. 14,457.)

(*Supreme Court of California.* April 30, 1892.)

Part Performance of Oral Contract for Sale of Land—Materiality of Evidence.

1. Where defendant orally agreed to sell plaintiff land, and plaintiff, by her agents, took possession of the land with defendant's consent, and made valuable improvements thereon, it is sufficient part performance to take the contract out of the operation of the statute of frauds. Calanchini v. Branstetter, 84 Cal. 253, 24 Pac. Rep. 149, followed.

2. Where defendant contended that he did not agree to sell the land, but that his agreement was to sell a band of horses running on the land, to take land of plaintiff at a certain figure, part of which was to be paid in horses, to assume part of a mortgage debt incumbering plaintiff's land, and to give his note for the balance, and the pleadings admitted plaintiff's ownership of the land, the trial court properly excluded evidence that the land which defendant got from plaintiff was not plaintiff's.

3. There was no error prejudicial to defendant in excluding evidence that he had paid part of his note for the balance, where the note was a joint one in favor of plaintiff and another, and it was assigned by plaintiff's copayeee, without her authority, and the evidence showed that plaintiff never knew of such payment.

4. The issue being whether defendant agreed to sell his land, it was error to exclude an instrument signed by plaintiff, in which she agreed that, if the mortgage that defendant had executed in satisfaction of the mortgage on plaintiff's land should exceed a certain sum, she would pay the interest on such excess.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; Philip W. Keyser, Judge.

Action by Lina Moulton against E. A. Harris. Judgment for plaintiff. Defendant appeals. Reversed.

H. M. Albery and *T. J. Hart*, for appellant. *John T. Harringan*, for respondent.

Foote, C. This action was brought to enforce the specific performance of a contract for the conveyance of land. Under the findings, which are, as we think, supported by the evidence, it appears that the plaintiff, the vendee, took possession of the land by her agents, with the consent of the vendor, and made valuable improvement thereon, on the faith of the contract. This is sufficient part performance of the contract (it being oral) to take it out of the operation of the statute of frauds under the rule announced in Calanchini v. Branstetter, 84 Cal. 253, 24 Pac. Rep. 149.

The most strenuous contention of the defendant for the reversal of the order refusing a new trial seems to be as to the rulings of the court upon the admission or rejection of proffered evidence. The contention of the plaintiff is that she traded her tract of land—about 800 acres, in Colusa county—for a band of horses and the land of the defendant in Lassen county; that, putting her land at $16,000, and the defendant's horses at $8,000, the defendant agreed to assume a mortgage on her lands for over $5,000, and make her a title to his land in Lassen, which was valued at $2,675; that, as he could not, on account of certain litigation, give her at that time a perfect title to the land, he agreed to give her a note for the sum last above mentioned, which was not to be paid except in the event the defendant should find it impossible to make title to the Lassen county land to the plaintiff; and she now waives a good title, and asks simply for a conveyance of that land. The contention of the defendant is that he never did agree to sell the land in Lassen, but that the note represented a part of the purchase price which he was to pay for the land of plaintiff. As a part of his evidence he stated that he was to assume the payment of but $3,000 of the mortgage debt on the plaintiff's land, and that he was only to pay interest on that much of it, and that the plaintiff agreed to be responsible for the rest of the sum due on the mortgage, and to pay the interest on it. The evidence of the defendant was intended to show that he did not agree to sell the land, but that his agreement was to sell his band of horses, then running on that land, and to take the plaintiff's land at $16,000, to pay $8,000 in horses, $3,000 of the mortgage debt and interest then incumbering the land of plaintiff, and to give this note for $2,675 for the balance of the purchase price of plaintiff's land. The pleadings admit the ownership of her land by the plaintiff, and there is nothing set up in the answer as to any failure on the part of the plaintiff to perform her contract. The only matter at issue is, did or did not the defendant, at the time the contract was entered into for the purchase or trade for the plaintiff's land, agree to give in part consideration and payment therefor his land in Lassen county? It follows, therefore, that all the evidence offered on the part of the defendant, going to show that the land in Colusa county which he bought from the plaintiff was not hers in fact or equity, as against her father's creditors, was entirely irrelevant and immaterial, and was properly ruled out by the trial court.

It is insisted that the proof offered to show a payment of the note for $2,675 ought to have been admitted to show that the contract was as defendant asserts. But the proof showed that the note was a joint one in favor of the plaintiff and one Meyers, and that she never authorized its assignment by Meyers to any one, and never received a cent upon it, and that Meyers transferred it without any authority from her, or knowledge that he had done so. Besides, the defendant was permitted to say that he paid to the assignee of Meyers $500; and it is plain from the statement as made by defendant that this sum was all he ever claimed to have paid on the note, and that the plaintiff never knew of it, or authorized it. We see no error prejudicial to defendant in this.

The only reversible error which we perceive in the record is the ruling of the court which excluded from its consideration a written agreement, which reads thus: "This agreement made this 26th day of November, 1880, between J. Meyers and Lina Moulton, of the county of Colusa, state of California, the parties of the first part, and E. A. Harris, of said county and state, the party of the second part, witnesseth, that whereas, a certain indenture of mortgage between E. A. Harris of the first part, and the Colusa County Bank of the second part, dated the 26th day of November, A. D. 1880, for the sum of $5,325; now, therefore, it is understood and agreed between the aforesaid parties that the said parties of the first part will pay or cause to be paid to the said party of the second part all the interest on said sum that may accrue on all amounts over and above $3,000. JACOB MEYERS. LINA MOULTON." The defendant, to show that he did not sell his land in Lassen, had testified previously that he was to give his horses at $8,000, to assume $3,000 of the mortgage on plaintiff's land, and give his note for the balance of $16,000. And also, to corroborate this statement, he had shown, in some prior negotiations between himself and one Meyers, acting for the plaintiff, the execution of a written memorandum of agreement setting out these matters. Now, if it could be made to appear that the plaintiff had signed an agreement at the time the transaction between herself and the defendant took place, in which she agreed to pay interest on all over $3,000 of the mortgage that the defendant had just executed in satisfaction of the mortgage which existed on her land, to the Colusa County Bank, it would tend to show, as we think, that he was telling the truth when he said that the horses at $8,000, the assumption of $3,000 of the mortgage debt, and the $2,675 note were in consideration of the sale of plaintiff's land, worth $16,000, and that his land in Lassen was not part of the consideration. He ought, as it seems to us, to have had considered by the court all facts and circumstances which went to throw light on the true nature of the contract he had made, as upon that depended the determination of the issue as to whether he had agreed to make title to his land in Lassen county as part consideration for the land of plaintiff. But upon no other ground could this evidence have been admissible under the pleadings as they stand, and which the court, as we think, properly refused to allow to be amended. For the reasons stated, the order should be reversed, and we so advise.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed.

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94 Cal. 370

KRAUSE v. SPIEGEL. (No. 14,626.)

(*Supreme Court of California.* April 28, 1892.)

MALICIOUS PROSECUTION—ARREST FOR SLANDER—FALSE IMPRISONMENT.

1. Defendant charged plaintiff before a magistrate with having committed slander of and concerning defendant, and procured a warrant to issue, whereupon plaintiff was arrested and imprisoned, and on hearing discharged. *Held*, in an action for malicious prosecution, that plaintiff had no cause of action; defendant's charge before the magistrate not furnishing any ground for the issuance of the warrant of arrest, there having been no imputation of any criminal act therein.

2. But by the issuance of such warrant, and the arrest and imprisonment thereunder of plaintiff, a cause of action for false imprisonment arose in his favor.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; ANSEL SMITH, Judge.

Action by E. E. Krause against Tony Spiegel. Judgment for defendant. Plaintiff appeals. Affirmed.

F. J. Kierce, (*Wheaton, Kalloch & Kierce*, of counsel,) for appellant. *James H. Budd*, for respondent.

BELCHER, C. It is alleged in the complaint in this case that in December, 1887, the defendant appeared before a justice of the peace, and falsely and maliciously, and without reasonable or probable cause, made a verified complaint, charging plaintiff "with having committed slander of and concerning defendant," and procured the justice to issue a warrant for the arrest of plaintiff upon said charge; that the justice issued the warrant accordingly, and plaintiff was arrested and imprisoned thereunder for six hours, when he was released by the justice upon his own recognizance; that thereafter plaintiff was examined before the justice upon the said charge of slander, and, no one appearing to prosecute, he was acquitted and discharged; that the said charge, and the arrest of plaintiff thereunder, was extensively published by the procurement of defendant, and by reason thereof plaintiff was greatly injured in his business, credit, and reputation; that defendant well knew he had no cause for the arrest of plaintiff, and that he swore to the warrant for the purpose and with the intent of harassing and annoying plaintiff, and that the same did harass and annoy him; and that, by reason of the premises, plaintiff suffered damage in the sum of $10,000, for which he asked judgment. The action was commenced more than a year after the alleged discharge of the plaintiff, and the defendant demurred to the complaint upon the grounds that it did not state facts sufficient to constitute a cause of action; that several causes of action were improperly united; and that each of the causes of action sued upon was barred by the provisions of section 340, subd. 3, of the Code of Civil Procedure. The court below ruled that the complaint did not state facts sufficient to constitute a cause of action for malicious prosecution, and that the causes of action stated, so far as they were for false imprisonment and libel, were barred by the provisions of the statute pleaded. The demurrer was accordingly sustained; and, the plaintiff declining to amend, judgment was entered that he take nothing by his action, and that defendant recover his costs. From that judgment the plaintiff appeals.

The only question is, did the complaint state a cause of action for malicious prosecution? The rule is general, and supported by all the decisions and text-books upon the subject, that when one maliciously, and without reasonable or probable cause, institutes or prosecutes, in a court having jurisdiction of the matter, a criminal proceeding against another, the proceeding, when terminated in favor of the accused, furnishes the basis for an action for malicious prosecution. In some of the states it has been held that, if the court had no jurisdiction of the criminal proceeding, still an action for malicious prosecution might be maintained; but in other states a contrary rule has been declared. See 3 Lawson, Rights, Rem. & Pr. § 1088; 4 Wait, Act. & Def. p. 338; and cases cited. In some cases it has been held that where one maliciously, and without probable cause, charged another with a crime, for which he was arrested and held to answer or put upon trial, an action for malicious prosecution would lie, though the facts charged did not constitute a crime. A leading case of this class is Dennis v. Ryan, 65 N. Y. 385. There the plaintiff had been indicted, upon the testimony of the defendant, for the crime of forgery, and acquitted upon the ground that the acts complained of did not constitute the crime alleged or any crime. The action was for malicious prosecution in falsely and maliciously charging and causing the plaintiff to be indicted, arrested, and tried for the crime of forgery. The plaintiff recovered judgment, and on appeal the judgment was affirmed by a divided court. So, in several cases, it has been held that an action for malicious prosecution might be maintained, though the information or indictment were defective, and no conviction could be had thereunder; "for in either case, whether the indictment be good or bad, the plaintiff is equally subjected to the disgrace of it, and put to the same expense in defending himself against it." 3 Lawson, Rights, Rem. & Pr. § 1090. This case is not like any of those before referred to. Here no criminal prosecution was commenced or prosecuted against the plaintiff. The only charge made before the magistrate was that the plaintiff had slandered the defendant. This was not a charge of a criminal act, and it furnished no ground whatever for the issuance of a warrant of arrest. But when the warrant was issued, and the plaintiff was arrested and imprisoned under it, a cause of action for false imprisonment at once arose in his favor; and, if suit had been brought in time, it could without doubt have been maintained. There is, however, a distinction between an action for false imprisonment and an action for malicious prosecution. Under the old practice the former was called an "action of trespass," and the latter an "action on the case;" and under our statute the former is barred in one year, (section 340, subd. 3, Code Civil Proc.,) and the latter in two years, (McCusker v. Walker, 77 Cal. 212, 19 Pac. Rep. 383.) No case has been called to our attention in which it was held that an action for malicious prosecution could be maintained upon facts similar to those presented here, and there are several cases holding to the contrary. In Hahn v. Schmidt, 64 Cal. 286, it is said: "In Leigh v. Webb, 3 Esp. 164, Lord Eldon moved that if a party makes a complaint before a justice, which the justice conceives to amount to a felony, and issues his warrant against the party complained against, and the facts do not amount to felony, no action for malicious prosecution will lie against the party who made the complaint." And it is further said: "We are unable to find any English case in which Leigh v. Webb, supra, has been overruled, or the soundness of the views expressed by Lord Eldon even questioned." In McNeely v. Driskill, 2 Blackf. 259, it appeared that Driskill had been arrested on a warrant issued by a justice of the peace on an affidavit of McNeely, which did not authorize the justice to issue it, and had been discharged. Thereupon, Driskill brought an action against McNeely for wrongfully and maliciously prosecuting him on a charge of larceny, and obtained judgment. On appeal the court said: "The affidavit shows a state of facts on which an action of trover might have been maintained, but it contains no charge of larceny against any person. The appellant had lost his property, and wished to recover it. He states that fact to a justice of the peace. The justice forms his judgment upon the facts stated. He issues his mandate to an officer to search for the property, and to bring the person in whose possession it may be found before himself or some other justice of the peace, etc. This was an error, but it is the error of the justice, and not of the appellant; and if a justice of the peace, by mistake of judgment, conceives an act to be felony which is not felony, and in consequence of that mistake causes an innocent person to be arrested and imprisoned, the law will not hold the person who made the complaint responsible, in this form of action, for the consequences of such errors." In Turpin v. Remy, 3 Blackf. 216, the court said: "An action for a malicious prosecution can only be supported for the malicious prosecution of some legal proceeding before some judicial officer or tribunal. If the proceedings complained of are extrajudicial the remedy is trespass, and not an action on the case for a malicious prosecution." In Bennett v. Black, 1 Stew. (Ala.) 494, it was said: "The court are of opinion that if a justice of the peace, or any other judicial officer to whom application may be made for a warrant for the apprehension of offenders against the criminal law of the land, was by mistake of judgment to conceive that to be felony which from the facts sworn to did not amount to that offense, and should the party complained against be committed to jail, it would not subject the party complaining to an action of this sort, [malicious prosecution.] If it could, it would subject every prosecutor to an action for the mistakes of the criminal judge, which is too unreasonable to be admitted." In Newman v. Davis, 58 Iowa, 447, 10 N. W. Rep. 852, the action was for malicious prosecution, and in the complaint it was alleged that the defendant, before a magistrate, "falsely, maliciously, and with intent to injure, harass, and oppress said plaintiff, made information on oath, accusing said plaintiff of using abusive language, such as, 'You are a liar and thief,' and then and there maliciously, and with intent to injure, harass, and oppress said plaintiff, procured a warrant to be issued by said magistrate, and placed in the hands" of a constable, and that plaintiff was arrested under the warrant and afterwards discharged. It was held on appeal that "where the complaint did not charge the commission of any specific offense, and the facts stated did not impute any crime, but the justice of the peace, by mistake of judgment, and thinking a crime was charged, caused the arrest of the party, the law will not hold the person who made the complaint responsible, in an action for malicious prosecution, for the consequences of such error." But it is said in Hahn v. Schmidt, supra, that "in order to constitute a defense to an action for malicious prosecution the facts stated in the complaint, if they do not constitute a crime, must nevertheless be true." In support of this proposition, several cases are cited, but they are all cases in which a crime had been distinctly charged, and the facts stated were insufficient to constitute a crime. The rule declared has no application to this case.

In our opinion the complaint here did not state a cause of action for malicious prosecution, and the demurrer was properly sustained. We advise that the judgment be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(94 Cal. 45)

PEOPLE v. LEMPERLE. (No. 20,855.)

(*Supreme Court of California.* March 26, 1892.)

HOMICIDE—EXPERT TESTIMONY—INSTRUCTIONS.

1. Where the only proof as to the competency of a witness as an expert was his statement that he was a physician, and had some experience during the last two years in gunshot wounds, it was error, on a trial for murder, to allow him to testify, from examination of deceased, that he thought "the pistol [at the time of the discharge that caused deceased's death] was about four feet * * * from the wounded man; * * *" a physician not being, as such, an expert in such matters.

2. Where there was no witness to the homicide except defendant, who testified that deceased was coming at him with a brick raised to strike him, when he raised his pistol to frighten deceased, and it went off, and the only contrary statement of the killing was an alleged confession of defendant to the effect that deceased grabbed him, whereupon he fired at deceased once and then threw the pistol away, the admission of the medical testimony on the distance of the pistol was harmless error.

3. Where proper instructions are asked for, it is not necessary that they should be given in the exact language in which they are requested, it being sufficient if they are given substantially.

4. Where the court substantially embodied in its charge to the jury part of Pen. Code, § 1105, that "if you find that defendant fired the fatal shot, then the burden of proving circumstances of mitigation, or that justify or excuse the killing, devolves upon the defendant," it was error to omit from the charge the following qualifying portion of such section: "Unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. C. B. HEBBARD, Judge.

Charles W. Lemperle was convicted of manslaughter, and appeals. Reversed.

Davis Louderback, for appellant. *Wm. S. Barnesand* and *W. H. H. Hart*, Atty. Gen., for the State.

TEMPLE, C. The defendant was arraigned and tried for the crime of murder, and, having been found guilty of manslaughter, appeals from the judgment and from the order refusing a new trial. The only error alleged in regard to the admission of evidence consists in permitting a medical witness to testify, from his examination of the deceased, the distance of the deceased from the muzzle of the pistol at the time of its discharge. The witness said: "I should think the pistol was about four feet—that is, the muzzle of the pistol, not including the length of the arm—about four feet from the wounded man, as near as I can tell." The only proof of the competency of the witness, as an expert, was that he was a physician, and his statement, "I have had some experience as to gunshot wounds in the last two years." That the ruling was erroneous there can be no doubt. A physician is not, as such, an expert upon such matters. If he found that the flesh was burned or contained unburned powder, he would know that the pistol must have been near, but this is matter of common observation, and not a matter of special knowledge. The facts being stated, it was for the jury to judge. People v. Westlake, 62 Cal. 303; People v. Smith, (Cal.) 29 Pac. Rep. 64; 1 Greenl. Ev. § 440, and cases cited. But while it was plainly error, it is simply impossible to see how it could have prejudiced the defendant. There were no witnesses to the homicide, except the defendant. His testimony in his own behalf was that the deceased was coming at him with a brick raised to strike him, and he raised the pistol to frighten the deceased away, and it went off. The only contrary statement was an alleged confession to a policeman, to the effect that deceased grabbed him by the throat, and he fired at him once and threw his pistol over the fence. There is certainly, therefore, nothing in the medical opinion, improperly admitted, inconsistent with defendant's evidence or theory of defense, and nothing which could strengthen the claim of the prosecution. The court gave an instruction substantially embodying section 1105, Pen. Code, but omitting the qualification contained in the statute: "Unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." These words were inserted in the statute as a qualification of the rule laid down, and it would be going a long way for the court to say that it is of no effect or value. Certainly the purpose of this qualification, if it serves any, is not accomplished by the general charge as to reasonable doubt, which may arise upon a consideration of the whole case. Without this qualification the jury might be led to believe that they must look to evidence introduced by the defendant only, for mitigating circumstances or for evidence to justify or excuse the act. The legislature must have entertained that opinion, or they would not have added the qualification. The instruction that, "to justify a person for killing another upon the ground of self-defense, the killing must be done under a well-founded belief that it was absolutely necessary for such person to kill the deceased to save himself from great bodily harm," is, when taken in connection with other parts of the charge, not a ground for reversal. Although not highly commendable, it has several times been held by this court not to be erroneous. People v. Bruggy, (Cal.) 29 Pac. Rep. 26, and cases there cited; People v. Westlake, 62 Cal. 303. As to the exceptions that certain instructions asked were not given in the very language in which they were proposed, the record shows that they were given substantially. It is impossible to see how the defendant could have been injured by the changes made. Under the circumstances, it is not necessary to comment at length upon the line of argument which the court permitted the district attorney to pursue in his closing speech. It was certainly very unfair to draw any conclusions adverse to the defendant from the fact that he had not stated certain important matters, contained in his testimony on the trial, at the coroner's inquest. He was not sworn at the inquest, and, although taken there by the officers, he was dumb, unless speech was given him by the jury, who were conducting an *ex parte* examination, and called whom they pleased as witnesses. Even the remarks of the court seemed to imply that it was proper to claim that defendant had failed to make the same statements before the coroner. It was an unfair inference. Some of the remarks of this court in the case of People v. Lee Chuck, 78 Cal. 317, 20 Pac. Rep. 719, would be appropriate here. The judgment and order should be reversed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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94 Cal. 314

SELIGMAN v. ARMANDO. (No. 14,513.)

(*Supreme Court of California*. April 9, 1892.)

REPLEVIN—VALUE OF GOODS—JUDGMENT FOR VALUE ONLY—PLEADING—EVIDENCE—REVIEW ON APPEAL.

1. In replevin to recover a portion of a stock of goods transferred to defendant in fraud of creditors, a finding that such portion was of the value of $500 will not be disturbed on appeal, where it appears that the original value of the debtor's stock was $2,500; that she had sold, in the ordinary course of business, goods of the value of only $600, and that the value of her remaining stock was but $800, and the original value of the stock conveyed was $1,100.

2. The testimony of a witness that he found in defendant's store a large number of the goods, but that they were, with the exception of a few articles, so intermingled with the goods of defendant that they were not distinguishable, warranted a finding that the goods were so confused and mixed that they could not be returned, and made it unnecessary that the judgment should be in the alternative.

3. Defendant was not prejudiced by a refusal to permit her to be asked whether she knew when she took the goods that insolvency was contemplated, when she had already testified that she did not know that the debtor was insolvent, and that she made no inquiry into her financial condition, but supposed that the business was "going good."

4. An objection that a complaint in replevin does not sufficiently describe the property cannot be made for the first time on appeal, but should have been the ground for a demurrer.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Replevin by Carl Seligman, receiver in insolvency of Pauline Calori, against Mary Armando, to recover certain goods alleged to have been fraudulently transferred to defendant by said insolvent. The complaint alleged that said Pauline Calori was "in possession of a large stock of groceries belonging to her; "that, prior to filing her petition in insolvency, she "removed and secreted a large portion of said stock of groceries, of the value of about $500, so held by her, for the purpose of defrauding her creditors;" and that said defendant, "for the purpose of assisting her in defrauding her creditors, received said stock of groceries into his store building." There was no other description of the property. From a judgment for plaintiff, defendant appeals. Affirmed.

Smith, Winder & Smith, for appellant.
Graff & Latham, for respondent.

PATERSON, J. The appellant relies for a reversal of the judgment upon her specifications of the insufficiency of the evidence to support the findings. We have read the testimony, and think there is abundant evidence to support all the findings of the court. While it is true the only direct testimony as to the value of the goods taken is that of the defendant, there is sufficient evidence in the statement to support the finding of the court that the property was worth $500. Defendant testified that she paid Mrs. Calori $325 for the property, and that the price agreed upon was "a little less than she had paid." Mrs. Calori, one of the witnesses, testified that the goods in the store one week before the attachment was levied were worth about $2,500, and that at the time of the attachment the stock was worth no more than $800. According to the testimony of the defendant the goods sold in the ordinary course of business during the week previous to the attachment did not exceed in value the sum of $600. There is enough in the defendant's own testimony to support the finding that she was aware of the fact that Mrs. Calori was insolvent at the time the goods were removed from the store. Washburn v. Huntington, 78 Cal. 577, 21 Pac. Rep. 305.

It is claimed that there is nothing to show that the defendant "confused and mixed said goods with a stock of groceries owned by her in said building, so that the same were undistinguishable." C. H. Plummer, a salesman for Newmark & Co., testified that he examined the goods in the store of the defendant, and found a large number of articles which had been sold to Mrs. Calori, but that the goods taken from the Calori store were, with the exception of a few articles, so intermingled with the goods of the defendant that they were not distinguishable. It was not necessary, therefore, that the judgment should be in the alternative form. Caruthers v. Hensley, 90 Cal. 559, 27 Pac. Rep. 411.

The defendant was not prejudiced by the ruling of the court, sustaining the objection to the question, "Did you know at that time that Mrs. Calori contemplated going into insolvency?" The defendant had testified previously that she did not know that her sister, Mrs. Calori, was insolvent, and, in reply to subsequent questions, stated that she made no inquiry with regard to the financial condition of Mrs. Calori, and supposed that the business was "going good with them."

While the complaint cannot be regarded as a model of pleading, we think it is sufficient to support the judgment. The objections now urged against it should have been made by demurrer on the ground of uncertainty. No demurrer to the complaint was filed. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; HARRISON, J.; MCFARLAND, J.; GAROUTTE, J.; DE HAVEN, J.

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94 Cal. 323

PENNIE v. VISHER *et al.* (No. 14,327.)

(*Supreme Court of California.* April 11, 1892.)

CHANGE OF VENUE—QUIETING TITLE—SITUS OF LAND—RESIDENCE OF DEFENDANTS—OPENING DEFAULT—GROUNDS—WAIVER.

1. It is no ground for a change of venue in a suit to quiet title to land that neither the land is situated nor the defendants reside in the county wherein it was instituted.

2. A written notice of a motion for a change of venue does not comply with the requirement of Code Civil Proc. § 396, that such motion shall be demanded in writing.

3. Where a demurrer and motion for a change of venue were both properly overruled, it was not error to first overrule the demurrer.

4. It is not ground for opening a default that it was entered while a motion for a change of venue was pending, and before the expiration of 10 days from the time a demurrer was overruled; that no notice was given defendant of the time when the demurrer would be argued and submitted, or that it had been submitted and overruled; and that defendant and his counsel were mistaken in believing that they were entitled to such time and notice.

5. A default is not waived by a subsequent stipulation on the part of plaintiff's attorney with defendant's attorney, in open court, to argue and submit defendant's motion for a change of venue, and by the argument and submission thereof.

In bank. Appeal from superior court, Sacramento county; J. W. ARMSTRONG, Judge.

Bill in equity by James C. Pennie, administrator *c. t. a.* of Charles McLaughlin, deceased, against Sebastian Visher and others, to cancel certain contracts, to quiet the title of plaintiff to certain land, and to restrain defendants from asserting title thereto or disturbing the possession thereof. D. M. Vance, one of the defendants, gave written notice that he would move for a change of venue, and ask that the place of trial be changed from the superior court of Sacramento county to the superior court of San Joaquin county, on the ground that the action was "brought for the recovery of real property, and to quiet title thereof, and that none of said real property" was situated "in said county of Sacramento," but was "situated in said county of San Joaquin;" and that neither he nor any of the defendants resided in said county of Sacramento, but that he and other codefendants resided in the county of San Joaquin. The motion was based upon the "affidavit of D. M. Vance, and upon the disclaimer by the defendants in said action of their right and title in and to all the lands situated in said Sacramento county." The motion was denied, the demurrer of said defendant to the complaint was overruled, and there was a judgment by default. Defendant moved to open the default on the following grounds: That no notice was given him of the time when the demurrer would be argued and submitted, or that it had been submitted and overruled; that the default was entered before the usual time allowed defendant within which to file an answer after an adverse decision upon a preliminary motion or demurrer; that the default was entered while the motion for a change of venue was pending; that it was error to enter judgment by default before disposing of a motion for a change of venue; that the default was prematurely entered while the motion for a change of venue was pending, and before the expiration of 10 days from the time the demurrer was overruled and the motion for a change of venue was denied, and before the question of the jurisdiction of the court was decided; mistake of defendant and his counsel in relying upon and believing that plaintiff's attorney would stipulate, as advised by the clerk, that said motion and demurrer would be argued and submitted on the same day, and at such a time as would be convenient for both parties and their attorneys; surprise and mistake in believing that the rules of court required notice to be given the adverse party upon the overruling of his demurrer, and that after the issue was decided the defendant would be allowed at least 10 days in which to file his answer; and that the default was waived by the stipulation in open court, on the part of plaintiff's attorney with defendant's attorney, to argue and submit the motion for a change of venue after said default was entered, and the subsequent argument and submission of said motion and judgment thereon. The motion to open the default was denied, and said defendant appeals. Affirmed.

Amos H. Carpenter, for appellant. *Wilson & Wilson*, for respondent.

SHARPSTEIN, J. D. M. Vance, one of the defendants in the above-entitled action, appeals from an order denying his motion to set aside the default entered against him, and from the judgment entered in said action. Appellant demurred to the plaintiff's complaint, and moved for a change of the place of trial, upon an affidavit stating the grounds upon which his motion was based. The motion was overruled, and that ruling is complained of as being erroneous. We think the grounds specified for a change of the place of trial insufficient; and, were they not, there does not appear to have been a demand for the change in writing, such as is required by section 396 of the Code of Civil Procedure. Estrada v. Orena, 54 Cal. 407; Byrne v. Byrne, 57 Cal. 348. The demurrer was overruled before the motion for a change of the place of trial was. Both were properly overruled, and the order in which they were overruled could not in any way affect the substantial rights of the parties, as it might have done if the motion to change the place of trial had been granted after the demurrer was overruled. As it is, it appears to be nothing more serious than a harmless irregularity, which we are bound to disregard.

After appellant's demurrer was overruled, his default was entered, for failure to answer, and he moved to set it aside. The grounds upon which that motion was based were insufficient to entitle the moving party to have the default set aside, and there was no abuse of the discretion of the court in denying it.

Judgment and order affirmed.

We concur: McFarland, J.; Paterson, J.; Garoutte, J.; De Haven, J.

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94 Cal. 341

Malone v. Roy. (No. 13,946.)

(*Supreme Court of California.* April 26, 1892.)

Deed Absolute in Form—When a Mortgage.

In an action to quiet title the issue was whether a deed from defendant to plaintiff, which was absolute on its face, was security for a loan. Defendant was in possession of the property under a contract of purchase from G., to whom he was indebted for the price. Defendant applied to plaintiff for a loan to pay off this indebtedness. Plaintiff paid G. the purchase money, and the latter conveyed the property to defendant. On the following day defendant executed the deed in question, and at the same time plaintiff gave him an agreement to reconvey the land to defendant if the amount specified was paid within one year. Plaintiff testified that he took a deed to the property, so that, if defendant could not pay the money in a year, plaintiff might be saved the expense of foreclosing; that he told defendant he did not wish the property, but that all he wanted was a repayment of his money. Plaintiff further testified: "My agreement with defendant was that he should have the benefit of the ranch for the year, but the money was to go to pay the interest on the principal sum he owed me." "I didn't expect at the time that I should have to take the place; I thought he would redeem it." There was no evidence that plaintiff had possession of the land during the year, other than that, at the request of defendant, he executed a lease of the land and some 60 of defendant's milch cows to M. *Held*, that the deed was intended by both parties as a mere security for the debt.

Commissioners' decision. Department 2. Appeal from superior court, Del Norte county; J. E. Murphy, Judge.

Action by John Malone against George G. Roy to quiet title to a tract of land. Judgment for plaintiff. Defendant appeals. Reversed.

L. F. Coburn, for appellant. *Lucas & Miller*, (*Sawyer & Burnett*, of counsel,) for respondent.

Vanclief, C. This is an action to quiet plaintiff's alleged title to a tract of land containing 360 acres, situate in the county of Del Norte, and known as the "Gordon Ranch," in which the judgment of the trial court was in favor of the plaintiff. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The plaintiff claims title to the land by a grant, bargain, and sale deed to him from the defendant, dated January 4, 1888, reciting a paid consideration of $7,532.50, which, upon its face, appears to be absolute. But the defendant contends that the deed was intended merely as security for a debt which defendant owed to plaintiff for money loaned by the latter to the former, and therefore that it is only a mortgage. The court found that the deed was not intended as security, but that it was intended to be what it purports to be,—an absolute conveyance of the legal title. Does the evidence justify this finding? is the only question presented for decision.

Prior to the 3d day of January, 1888, the defendant did not have the legal title to the land, but had been in possession thereof several years, under a contract to purchase from one Gordon, to whom, on January 3, 1888, he was still indebted for a balance of the purchase money, which then amounted to about $6,550. A few days prior to this date he applied to plaintiff for a loan of money sufficient to pay Gordon, and thereby to procure a deed for the land, offering a mortgage on the land as security. Plaintiff at first consented to loan the money for two years, with interest at the rate of 1¼ per cent. per month, compounded annually; but the negotiations finally resulted in the following transactions: On January 3, 1888, plaintiff paid defendant's debt to Gordon for balance of purchase money, and Gordon then conveyed the land to defendant. On the following day (January 4th) defendant executed to plaintiff the deed in question, and at the same time plaintiff executed to defendant, on a separate paper, the following instrument: "Crescent City, Cal., Jan. 4, 1888. Whereas, George G. Roy has this day made and executed a deed to John Malone, of the Gordon Ranch, in Del Norte county, Cal., consisting of the following described pieces or parcels of land, to wit, [here follows description;] containing 360 acres of land, with the tenements, etc., for the sum of seven thousand five hundred and thirty-two dollars and fifty cents: Now, therefore, this witnesseth that if the said George G. Roy shall, on or before the 4th day of January, 1889, pay to the said John Malone the full sum of seven thousand five hundred and thirty-two dollars and fifty cents, ($7,532.50,) then the said John Malone will reconvey the above-described premises to the said George G. Roy. And if the payment, as above specified, shall not be paid on the 4th day of January, 1889, then this obligation shall be void, and the said Roy agrees to surrender the same to the said John Malone. JOHN MALONE." The price ($7,532 50) for which, according to this instrument, plaintiff agreed to reconvey, is composed of the principal sum paid Gordon, and the interest thereon for one year, at 1¼ per cent. per month, together with the estimated taxes on the land for the same year.

Defendant testified that the deed was given as mere security for the payment of his debt to plaintiff, and one year's interest thereon, at the rate of 1¼ per cent. per month, and his testimony is corroborated and strengthened by numerous circumstances, but most effectively by the testimony of the plaintiff. On his own behalf plaintiff testified: "I recognize the deed just filed in evidence, and know the land therein described, and am still the owner thereof. Have not disposed of it since, and am still in possession of it, and was at the time of the commencement of this action." On cross-examination he testified as follows: "The consideration for the deed was $7,532.50. Question. As matter of fact, Mr. Malone, the money you paid was $6,670? Answer. I bought the indebtedness that defendant owed Gordon, and the interest for a year at one and a quarter (1¼) per month was added; the taxes were also added, and this made $7,532.50. My business now is farming. At the time the deed was passed it was loaning money, buying and selling land. I made quite a business of loaning money, and my usual rate is, and has been for several years past, one and one quarter per cent. per month. Several days prior to the execution of this deed (Plaintiff's Exhibit A) either the defendant, or Mr. Miller for him, asked me for a loan of $6,600. There was a good deal of talk about it. Mr. Miller was then my attorney, but he came to me in regard to defendant. He was acting as attorney for defendant, to see if I would pay off the Gordon indebtedness, which I through Mr. Miller agreed to pay off. At first I was to be secured by a mortgage on the premises for two years. Mr. Miller, as defendant's attorney, and defendant came to me separately several times, and at last I agreed to give him two years by his giving me a deed, and paying one and a quarter (1¼) per cent. on it. After that defendant refused to take two years. All he wanted was one year to pay me back. I told Mr. Roy (defendant) I would pay the indebtedness off if he would give me a deed to the property, and pay the interest and principal in one year. Then I agreed I should give defendant a written agreement, providing that if he paid me I should deed back the place to him, and, if not, the agreement should last no longer. They wanted me to accept a mortgage, but I would not, on account of the time it would take to foreclose it if they didn't pay it at the end of the year. I first agreed with either Mr. Miller or defendant to take a mortgage for two years, and, at defendant's suggestion, the time was reduced to one year. Q. Your object, then, as I understand it, Mr. Malone, in taking the deed and the bond in place of the mortgage, was to prevent the trouble of foreclosing, and the expense attached thereto? A. Yes, sir; that there was to be no more expense or trouble about it. Q. To secure the payment of this money? A. No, sir; a deed of this property, and that if he paid me my money back in one year I should deed back the place to him, and, if not, there was to be no more trouble. The deed was given as *bona fide*. I had a doubt that if I took a mortgage he might put me to more trouble, and I would not accept it, and, to save expense and trouble, I took a deed in case he could not raise the money in one year, and during this year defendant had the rents and profits of the ranch. Q. Wasn't that a part of the consideration of the deed? A. No, sir; the deed had nothing to do with it. He had the rents and profits through Giacomini. I rented the place to Giacomini, and he paid me $600 down, which amount I gave defendant credit for on another debt he owed me outside of this land indebtedness at that time. The rent was $20 per cow. I don't remember how many cows there were. I think the rent came to $1,140 for the year. All the expense I recollect of defendant paying was $5 towards fixing the fence. Mr. Giacomini fixed some fence for which I paid him, and at my request defendant repaid me. Defendant also bought some nails and milk-pans to be used on the ranch. I paid for no repairs or improvements myself during that year, because defendant had the privilege of paying me the $7,000, and that I should deed the ranch back to him within the year. I knew when I received this deed January 4, 1888, there was a lawsuit pending in this court relative to this property. * * * Q. You remember that during that time these negotiations were going on to obtain this money from you, that you told defendant that you didn't want the place at all; all you wanted was your money and interest? A. Yes, sir; I may have told him that. Q. That was a fact; you only wanted your money back and interest? A. I think I said so, sir. From the time the deed was made I have considered myself in possession of the ranch. Defendant was to have the use of the ranch for one year from the date of the deed placed to his credit, and he has had it. Through Mr. Giacomini he has received credit for the ranch and cattle both up to the time I went to receive the ranch from Giacomini. I can't say whether it was November 1st or January 1st, but think is was January 1st. My agreement with defendant was that he should have the benefits of the ranch for the year, but that the money was to go to pay the interest on the principal sum he owed me. I did not consider the place good security for $8,000. I gave all I could for the place. I didn't expect at the time that I should have to take the place. I thought he would redeem it." Upon redirect examination he said: "After the deed was made I did not consider defendant indebted to me in any sum in connection with this deed. I did not take any new or other evidence of indebtedness from him, but defendant promised and agreed to pay me,—to repay me. It was understood between defendant and myself that he would pay within the year, and that if he did so

I would redeed that property to him. Q. The question I want to get at is, was there any existing promises between you and the defendant that he would pay you any money? A. The only agreement there was between us— I gave him the agreement,—I gave defendant an agreement to the effect that if he paid me back my money and interest I should redeed the place back to him; there was no existing debt at that time."

There is no evidence that plaintiff had possession of the land during the year, other than at the request of defendant he executed a lease of the land and some 60 of defendant's milch cows to one Giacomini, as dictated by defendant, the whole rent reserved being for defendant's use, and defendant made or paid for all repairs during the term of the lease. It seems clearly apparent from plaintiff's testimony alone that the deed was intended by both parties as mere security for a debt, and none the less so because, in plaintiff's opinion, it is not a mortgage. That it is a mortgage is a conclusion of law from the fact that at the time it was executed it was intended merely as security for the payment of defendant's debt to the plaintiff. To this effect the law is too firmly established to require citation of authorities. And, as there is no substantial conflict of evidence as to the intention of the parties in this respect, the finding of the trial court that the deed was not intended as security for any debt is not justified by the evidence. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur. Belcher, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

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94 Cal. 334

In re Schmidt's Estate. (No. 14,849.)

(*Supreme Court of California.* April 26, 1892.)

Allotment of Homestead—Duration of Right—Title in Heirs.

1. Deceased left an estate consisting of a small amount of personal property and six adjacent lots, which, with their improvements, were valued as follows: Lot 1, $700; lot 2, $1,000; lot 3, $800; lot 4, $800; lot 5, $400; lot 6, $800. There was a dwelling house on each lot, except on No. 1. The house on lot No. 6 had been used by deceased as a place of residence. Deceased made no provision for his wife by will, and no homestead was selected by either of them during his lifetime. The widow filed a petition praying that lots 1, 2, and 5, which were adjacent, be set apart to her as a homestead. It appeared at the hearing that the whole property was incumbered by a mortgage for $1,500, and that, including the mortgage, claims against the estate had already been presented, exceeding $3,000. The court denied the prayer of the petition as to the lots asked for, but set apart lot No. 6 for a homestead. *Held*, that the court properly exercised its discretion, under Code Civil Proc. § 1465, which provides that if no homestead has been selected, designated, and recorded, "the court must select, designate, and set apart, and cause to be recorded, a homestead," etc.

2. Code Civil Proc. § 1468, relating to "provision for the support of the family," provided that "when property is set apart for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband," etc. In 1881 this section was amended by adding to it the following: "If the property set apart be a homestead selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order; and the title vests in the heirs of the deceased, subject to such order." *Held*, that the amendment related to homesteads selected and set apart by the court, and not to those selected and recorded while the husband and wife were both living.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Petition by Lina Schmidt, widow of John P. Schmidt, deceased, praying that three lots be assigned to her as a homestead. Petition denied as to the lots prayed for, but an order was made assigning one lot. Petitioner appeals. Affirmed.

F. J. Castelhun, for appellant. *A. Morganthal*, for respondents.

Belcher, C. The deceased, Schmidt, died testate in January, 1891, leaving, surviving him, his widow, Lina Schmidt, the appellant, and three adult children, issue of a former marriage. His estate consisted of a parcel of land, described as six adjacent lots, situate on Pacific avenue and Walnut street, in the city of Alameda, and a small amount of personal property. The lots were his separate property, and in the inventory and appraisement returned and filed the values placed upon them, and the improvements thereon, were as follows: Lot 1, $700; lot 2, $1,000; lot 3, $800; lot 4, $800; lot 5, $400; lot 6, $800. The lot at the corner of the streets, described as "Lot 1," was vacant, and on each of the other lots was a one-story frame dwelling house. Prior to his death, four of these houses were rented by deceased to tenants, and the other one, situate on lot 6, was occupied by himself as his place of residence. Deceased and his surviving wife were married about five years before his death, and they lived together as husband and wife in his said house on lot 6 until May 8, 1890, when she left him, and thereafter lived separate and apart from him. Deceased made no provision for his wife in his will, and she had no property of her own. No homestead was selected, designated, or recorded by deceased or his wife during his life. After the will had been admitted to probate, and the inventory and appraisement of the estate returned and filed, Mrs. Schmidt presented to the court her petition, asking, among other things, that the vacant lot and the two lots adjacent thereto, numbered 1, 2, and 5, be set apart to her as a homestead. At the hearing of the petition, it was shown that the whole property was incumbered by a mortgage for $1,500, and that, including the mortgage, claims against the estate had already been presented, exceeding the sum of $3,000. It was also shown that the property was appraised at its full value, and that there was no material difference between the lots, as regards their use for a homestead, and that the sale of the remaining lots would not be affected, whichever one should be selected and set apart as a homestead. The court denied the prayer of the petition as to the lots asked for, but made an order setting apart to the petitioner, as a homestead for and during her natural life, lot 6. The appeal is from this order.

1. It is claimed by appellant that where separate premises are equally adapted to use as a homestead the court has no discretion, but is bound to set apart the premises selected by the applicant, and that in this case, if the condition of the estate did not warrant the granting of appellant's petition in full, then the court should have set apart to her lot 2 instead of lot 6. In support of this point the only authority cited is Estate of Walkerly, 81 Cal. 579, 22 Pac. Rep. 888. In that case the court set apart to the widow and child, for a limited time, the residence of the deceased, which was his separate property, and was of the value of $18,000. The estate was of the value of $50,000, over and above all the indebtedness. This court held that there was no limitation as to value in setting apart a probate homestead for a limited time, and it was said: "This was a matter within the discretion of the court below, and, unless it appears that such discretion has been abused, we think this court should not interfere. The estate here is a large one, and we cannot say, from the evidence before us, that the court below abused its discretion in the matter." The Code provides that if no homestead has been selected, designated, and recorded, "the court must select, designate, and set apart, and cause to be recorded, a homestead," etc. Section 1465, Code Civil Proc. The obvious purpose of this statute is to provide the family of the deceased with a home, where they may live and be protected as against creditors and heirs; and it is made the duty of the court to select and set apart for that home such part of the estate, consisting of a dwelling house and the land on which the same is situated, as in view of the value of the estate, and all the circumstances surrounding it, shall seem just and proper. The court is not bound by the wishes of the applicant, but should exercise its own discretion and good judgment; and, unless that discretion is abused, its action will not be disturbed on appeal. Here the whole estate was of small value, and the court set apart to the petitioner the house and lot where she and her husband resided till she left him, and where he continued to reside till he died. This seems to have been the proper thing to do, and at any rate we can see in it no abuse of discretion.

2. It is also claimed that the court erred in setting apart the homestead for and during the lifetime of appellant only, and not absolutely. In support of this point the case of Mawson v. Mawson, 50 Cal. 539, and sections 1465 and 1468 of the Code of Civil Procedure, are cited and relied upon. Mawson v. Mawson was decided in 1875, and, in construing the sections referred to as they then stood, it was held that there was a distinction between a homestead selected from the separate property of the deceased, and recorded during his or her lifetime, and a homestead selected and set apart from the separate property of the deceased by the probate court; that in the former case the homestead selected could only be set apart for a limited period, and that in the latter case the homestead selected vested absolutely in the survivor, if there were no minor children. The court, however, said: "It is somewhat difficult to understand upon what ground the legislature discriminates between homesteads selected and recorded in the lifetime of the parties, and those to be set apart by the probate court out of the separate estate of the deceased. But these provisions are in no respect inconsistent with each other. The language is incapable of any other interpretation than that, if a homestead be set apart by the probate court out of the separate estate of the deceased husband, it shall belong to the widow and minor children, if there be any, while on the other hand it is equally clear that if the homestead be selected and recorded while the husband and wife are both living, out of the separate estate of either, 'it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the probate court to assign it for a limited period to the family of the decedent.' It is our duty to administer the statute law as we find it, and not to account for its incongruities." At the time this decision was rendered, section 1468 read as follows: "When property is set apart for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband," etc. In 1881 the section was amended by adding to it the following: "If the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order; and the title vests in the heirs of the deceased, subject to such order." Appellant contends that this amendment relates to homesteads selected and recorded while the husband and wife were both living, and not to so-called probate homesteads, selected and set apart by the court, and that it was not intended to, and did not in fact, change the rule declared in Mawson v. Mawson. We cannot agree to this construction, for the reason that if it be correct the amendment was altogether useless and uncalled for; a similar provision being then found in section 1474 of the same Code. In our opinion, it was intended by the amendment to change the rule declared in Mawson v. Mawson, and to take from the court the power to set apart homesteads selected from the separate property of the deceased, except for a limited period. And this view seems to be in harmony with the subsequent decisions of this court. In Lord v. Lord, 65 Cal. 84, 3 Pac. Rep. 96, the court below had set apart, as a homestead, property that was partly community and partly separate property. The order was reversed,

and on page 87, 65 Cal., and page 98, 3 Pac. Rep., it is said: "The proceedings in this case were taken under section 1465 of the Code of Civil Procedure, as amended in 1880. This section received a legislative construction in harmony with the views we have above expressed, by the amendment of section 1468, approved February 19, 1881, wherein it is provided that, where separate property is set apart, it is set apart for a limited period only; the title vesting in the heirs, subject to the order setting apart." In the case of In re Noah, 73 Cal. 590, 15 Pac. Rep. 290, the deceased had made no provision in his will for his widow. The estate was all separate property of the deceased. The only real estate was a four-story brick building used for business purposes. The widow asked for an order of sale of the property and for an allowance of $5,000, in lieu of a homestead. The petition was denied, and in sustaining the order this court, on page 594, 73 Cal., and page 292, 15 Pac. Rep., said: "Here no homestead was selected during the lifetime of the decedent. Moreover, the appellant sought to have set apart to her a homestead out of the separate property of deceased. In such cases the court can only set apart a homestead 'for a limited period, to be designated in the order; and the title vests in the heirs of the deceased, subject to such order.' Code Civil Proc. § 1468." In the case of In re Lahiff's Estate, 86 Cal. 151, 24 Pac. Rep. 850, a homestead was set apart to the surviving husband out of the separate property of his deceased wife. The case was appealed to this court; and on page 153, 86 Cal., and page 851, 24 Pac. Rep., it is said: "No homestead having been selected and recorded during the lifetime of the decedent, it was the duty of the court to designate and set apart a homestead out of the community property, if there was any such; if not, then out of the separate property of the decedent. Code Civil Proc. § 1465. * * * If there was no minor child, then it was for the surviving husband alone. Code Civil Proc. § 1468. But if taken, as this was, from the separate property of the decedent, it could be for only a limited period, as was done in this case."

It is objected for appellant that the question presented here was not involved in either of the cases above cited, and that the language quoted was therefore *obiter dictum*. Conceding this to be so, still we think the provisions of the Code referred to were correctly construed. If follows, in our opinion, that the order appealed from should be affirmed.

We concur: Vanclief, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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94 Cal. 354

SHERER v. SUPERIOR COURT OF LASSEN COUNTY. (No. 14,825.)

(*Supreme Court of California.* April 26, 1892.)

APPEAL FROM JUSTICE'S COURT—EXTENT OF REVIEW—JUDGMENT.

1. The constitutional provision that the superior courts "shall have appellate jurisdiction in such cases arising in justices' and other inferior courts, in their respective counties, as may be prescribed by law," limits the exercise of their jurisdiction to the extent and mode which the legislature may prescribe.

2. Under Code Civil Proc. § 980, providing that, on appeal from a justice's court heard upon a statement of the case, the superior court "may review all orders affecting the judgment appealed from, and may set aside or confirm or modify any or all proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial," the superior court, on appeal by plaintiff from a judgment of a justice for defendant setting aside a judgment previously rendered for plaintiff, and dismissing the action, cannot reverse the judgment appealed from, and affirm the judgment set aside, but can only reverse said judgment and order a new trial, since the last judgment is the only one appealed from, and the former judgment does not affect it, and for the further reason that, when the judgment was set aside, it ceased to exist, and there is no such judgment to affirm.

In bank.

Certiorari by Josiah Sherer to review the action of the superior court of Lassen county in entering a judgment against petitioner on appeal from a justice's court. Judgment annulled.

Spencer & Raker and *Henry N. Clement*, for petitioner. *A. L. Shinn*, for respondent.

Harrison, J. *Certiorari* to review the action of the superior court of Lassen county in entering judgment against the petitioner in a cause appealed from the justice's court of township No. 1, in that county. Whatever irregularities or errors were committed in the justice's court cannot be examined upon this proceeding. The writ is directed to a review of the action of the superior court, and its functions are limited to such acts of that court as were in excess of its jurisdiction. The provision of the constitution that the superior court "shall have appellate jurisdiction in such cases arising in justice's and other inferior courts in their respective counties as may be prescribed by law" limits the exercise of its jurisdiction to the extent and mode which the legislature may prescribe. The superior court cannot acquire jurisdiction of a cause pending in a justice's court, except in conformity with the steps prescribed by the statute for taking an appeal from that court, nor can it, after such appeal has been taken, exercise any other jurisdiction in the cause than has been authorized by statute. Within the limits thus prescribed, however, its errors in the exercise of its jurisdiction, however gross or glaring they may be, must be submitted to as a part of the sacrifice which every individual is compelled to yield to the infirmities of human government. After its appellate jurisdiction has once been acquired, its action within the limits of that jurisdiction, unless in direct contravention of some positive statute, is entitled to all the presumptions of regularity that attach to the exercise of its original jurisdiction. It appears from the statement of the case upon which the appeal was heard by the superior court that on July 25, 1891, judgment had been rendered in the justice's court in favor of the plaintiff, and that on

August 1, 1891, upon motion of the defendant, the justice set aside the said judgment, and afterwards, on the same day, when the case came on for trial, gave and entered judgment dismissing the action and allowing the defendant his costs. Thereupon the plaintiff appealed to the superior court, and stated in his notice of appeal that he appealed "from the judgment entered herein on the 1st day of August, 1891, in favor of the defendant, and against this plaintiff," and that "said appeal is taken on questions of law alone, and from the whole of said judgment." In due time thereafter a statement of the case was prepared and settled by the justice, and when the matter was heard thereon in the superior court that court rendered and filed its decision that the judgment of July 25th be affirmed, and the judgment of August 1st be reversed, and thereupon caused to be entered in its records the following judgment: "This cause came on regularly to be heard on the 7th day of October, 1891, on appeal from justice's court of township No. 1, of the county of Lassen, state of California, on questions of law alone; and the cause having been submitted to the court for its decision, and the court on the 26th day of October, 1891, having made and filed its decision affirming the judgment given and made in said justice's court, on July 25, 1891, in favor of plaintiff, it is ordered, adjudged, and decreed that the plaintiff, H. L. Hoagland, do have and recover of the defendant, Josiah Sherer, the sum of ninety-five and five one-hundredths dollars, and his costs herein taxed at $12.35."

Section 980, Code Civil Proc., provides: "Upon an appeal heard upon a statement of the case the superior court may review all orders affecting the judgment appealed from, and may set aside or confirm or modify any or all proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew on appeal the trial must be conducted in all respects as other trials in the superior court." In the present case the judgment appealed from is the one which was entered August 1, 1891; and, as there were no proceedings subsequent to or dependent upon such judgment, the action of the court was limited to a review of the orders "affecting" that judgment, or to the granting of a new trial. It had no jurisdiction to cause the judgment appealed from to be entered in its own records, nor could it enter its own judgment upon the merits of the case, except upon a new trial. While, upon *certiorari* to the justice's court, it would have had authority to annul the order of August 1st, vacating the previous judgment, and also the judgment of that date, yet, upon an appeal from the judgment of August 1st, it was limited to a review of that judgment, and if in its judgment the justice had erred in vacating the judgment of July 25th, and rendering the judgment appealed from, it should have reversed the judgment, and ordered a new trial. It could not, however, upon an appeal from the judgment of August 1st, affirm the judgment rendered by the justice on July 25th, for the reason that there had been no appeal from that judgment, and also because, having been vacated in the justice's court, there was no judgment of that date to be affirmed. If in the judgment of the superior court the justice erred in vacating the judgment and rendering the judgment appealed from, it should have ordered a new trial, and the parties could then have obtained its own judgment upon the merits of the controversy. It is therefore ordered that the judgment aforesaid, entered in the superior court, be, and the same is hereby, annulled, and that court is directed to proceed upon the appeal before it as is indicated in this opinion, and to render its judgment accordingly.

We concur: DE HAVEN, J.; GAROUTTE, J.; MCFARLAND, J.; PATERSON, J., SHARPSTEIN, J.

(94 Cal. 362)

STEINHART *et al.* v. NATIONAL BANK OF D. O. MILLS & Co. (No. 14,502.)

(*Supreme Court of California.* April 27, 1892.)

BANKS—NOTE FOR COLLECTION—CHARGING MAKER'S ACCOUNT—PAYMENT—EVIDENCE.

1. In an action against defendant bank to recover the amount of a note, it appeared defendant received the note from the payee for collection; that the maker was a customer of defendant, and that the next morning defendant's clerk presented the note for payment; that the maker wrote across its face, "Please charge the same to my account;" and that the clerk thereupon wrote on the back of the note, "Charged account;" and then stamped thereon the date and name of defendant. The stamp mark meant "Canceled." The clerk charged the amount of the note in the maker's pass book, and also in his account in defendant's journal. The same day defendant drew its check in favor of the bank through which plaintiffs sent the note, and after business hours mailed the check and a letter of advice to such bank. At the time the note was presented for payment the maker was insolvent, but defendant had no knowledge of that fact. The afternoon of the same day the maker made an assignment, and immediately after ascertaining the fact defendant procured the letter from the post office, and canceled the check, and returned the note by mail to plaintiffs' bank. There were no indorsers on the note, and neither plaintiffs nor their bank had any knowledge of the transactions between defendant and the maker until the check had been canceled. When the note was presented to the maker he had no money to his credit with defendant, but was indebted to it in a considerable sum. *Held*, that such transaction did not constitute payment of the note.

2. The maker of the note, after testifying that he made the assignment on February 18th, was allowed to testify that it took his lawyer about half an hour to write the assignment; that he went to his lawyer about 4 o'clock; and that he had a consultation about his affairs with the lawyer in the morning. *Held*, that this was not error.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Action by William Steinhart and others against the National Bank of D. O. Mills & Co. to recover the amount of a certain note. From a judgment for defendant, plaintiffs appeal. Affirmed.

Rothchild & Ach, for appellants. *Denson & Oatman*, for respondent.

Belcher, C. This is an action to recover the sum of $860, money alleged to have been received by the defendant to and for the use of the plaintiffs. The court below gave judgment for the defendant, from which, and from an order refusing a new trial, the plaintiffs appeal. The facts of the case, as found by the court, are as follows: On the 17th day of December, 1888, one G. Politz made his promissory note to the plaintiffs for $860, payable two months after date at the bank of defendant. They delivered it to the London, Paris & American Bank of San Francisco for collection, which bank forwarded it to the defendant at Sacramento, to be presented for payment, and it was received Sunday, the 17th day of February, 1889. The maker was a customer of the defendant, and on the morning of the 18th he deposited with the defendant $400 on general account. While he was at the bank, at the time he made the deposit, a clerk of the defendant presented the note for payment. The maker wrote across the face of the note: "Please charge the same to my account. G. Politz." The clerk then wrote on the back of the note: "Charged account. Littlefield." The clerk, Littlefield, then stamped these words on the back of the note, within a square: "National Bank of D. O. Mills & Co., February 18, 1889, Sacramento, Cal." The square and words were in red ink, and understood to mean "Canceled." The clerk then charged the amount of the note in the pass book of the maker, and in the journal of the defendant, in his account. Before the close of the business hours of the day the defendant drew its check in favor of the London, Paris & American Bank, upon the Bank of California, and after the close of business hours inclosed its check in an envelope, with a letter of advice, addressed to the London, Paris & American Bank. At the time of this transaction Politz had no money or other funds on deposit with the defendant. Some time previous he had made his note, payable one day after date to the defendant, to cover overdrafts, for the sum of $3,500, which was accredited to his account. Allowing this note as a credit in account with Politz, and charging him with the amount of said check, the journal of the defendant at the close of the business hour on that day showed a nominal credit in his favor of $367; but in fact he had overdrawn his account in excess of his note, then overdue, and moneys deposited, more than $2,000. At the time the defendant received from Politz the note for $3,500 to cover overdrafts he was in good credit, but in fact insolvent, and was insolvent on the 18th day of February, 1889, at the time of the transaction out of which this action arose; and about 5 o'clock of the afternoon of that day he made a general assignment, under the provisions of the Civil Code, for the benefit of his creditors. The defendant knew nothing of the insolvency of Politz until after the assignment was made. On the same day, and immediately after ascertaining that he had made an assignment, the defendant procured the envelope from the post office containing the check, and canceled it, and immediately indorsed on the back of the note these words: "Charged in error. F. Miller, Cashier." "Canceled in error. F. Miller, Cashier,—" and immediately, on the same evening, returned the note by mail, with letter of advice as to what had been done, to the London, Paris & American Bank of San Francisco. There were no indorsers on the note due plaintiffs. Neither the plaintiffs nor the London, Paris & American Bank knew or had any notice of the transaction between the defendant and Politz, or of the drawing of the draft by the defendant, until after the check had been canceled, and the defendant had declined to advance the money to pay the note. The defendant did not receive any money or other valuable thing from Politz to or for the use of the plaintiffs, and they have lost no rights by the acts of the defendant.

Upon these facts, the principal question presented for decision is, did the transaction between Politz and the defendant constitute a payment of the note? The appellants contend that it did, and that the finding that "the defendant did not receive any money or other valuable thing from Politz to or for the use of the plaintiffs, and they have lost no rights by the acts of the defendant," was not justified by the evidence. The above is the only finding objected to, and we do not think the contention in regard to it can be sustained. It is not disputed that when the note was presented to Politz for payment, and he wrote on it, "Please charge the same to my account," he had no money in the bank to his credit, but was indebted to it in a considerable sum. The request was therefore, in effect, that the defendant advance or loan to him the money to make the payment, and trust him till he could pay it back. This the defendant, supposing him at the time to be of good credit, seems to have been willing to do, but when, near the close of the business day, it learned that he had made an assignment for the benefit of his creditors, and was insolvent, it changed its mind, and concluded not to advance the money. It thereupon got back its check, and canceled it. At this stage the transaction was unknown to the plaintiffs, and was incomplete, and as against Politz the defendant had a clear right, we think, to do as it did. And if it be assumed, as claimed by appellants, that the transaction amounted to a contract on the part of defendant to advance the money to pay the note, still it had a right to rescind the contract if its consent thereto was given by mistake, (section 1689, Civil Code;) and that it was so given is shown by the evidence and findings. As against the plaintiffs, the test as to whether the note was paid or not is, could they afterwards have maintained an action upon it against Politz, the maker? It is settled law in this state that, when a creditor takes a note or check for an antecedent debt, it does not operate to extinguish the debt, unless it is received by express agreement as payment. Griffith v. Grogan, 12 Cal. 317; Welch v. Allington, 23 Cal. 322; Brown v. Olmsted, 50 Cal. 162; Bank v. McDonald, 51 Cal. 64; Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 Pac. Rep. 28. If, then, the check of the defendant had been forwarded to and actually received by the plaintiffs, it would not, until collected, have paid their note, and released the maker from liability thereon. And the fact that the note was mutilated, and marked "Canceled," did not affect the plaintiff's right to sue upon it, since this matter could all be explained and accounted for. Section 1982, Code Civil Proc. In our opinion, therefore, the note was not paid, and the finding objected to was justified and proper.

The appellants also make the point that the court erred in the admission of evidence. Politz was called as a witness for defendant, and testified that he made an assignment on the 18th day of February, 1889. He was then asked by counsel for defendant: "How long were you preparing or having that assignment prepared?" The question was objected to as irrelevant and immaterial, the objection was overruled, and an exception taken. The witness answered: "It took my lawyer about half an hour to write it. I went to him about four o'clock. I had a consultation with my legal adviser about my affairs before that. I think it was the same morning." The witness then went on to say that his consultation in the morning was not about making an assignment, and that he then thought he was able to pay all his debts in the ordinary course of business. We are unable to see that there was any error in the ruling complained of, and, if there was, that the appellants were in any way prejudiced thereby. We think the judgment and order should be affirmed, and so advise.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(94 Cal. 352)

In re WALKERLY'S ESTATE. (No. 14,834.)

(*Supreme Court of California.* April 26, 1892.)

PROBATE PROCEEDINGS—APPEALABLE ORDERS.

1. An order of the superior court sitting as a court of probate, denying an executor's motion to vacate an order denying his petition for an allowance for extraordinary services rendered by him, and to restore the cause to the calendar, is not appealable; the general rule being that appeals can only be taken from such judgments or orders in probate proceedings as are mentioned in Code Civil Proc. § 963, subd. 3, specifying the judgments and orders from which an appeal may be taken.

2. Such order is not a "special order, made after final judgment," within the meaning of Code Civil Proc. § 963, subd. 2, allowing an appeal to the supreme court from such an order of the superior court.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Columbus Bartlett filed a petition for an allowance against an estate for extraordinary services rendered by him as executor, and from an order denying his motion to vacate an order denying the petition and to restore the cause to the calendar he appeals. Appeal dismissed.

Noble Hamilton, Joseph A. Joyce, and *R. M. F. Soto*, for appellant. *H. C. Firebaugh* and *Frederick E. Whitney*, for respondents.

MCFARLAND, J. In this estate, one of the executors, Columbus Bartlett, filed a petition praying to be allowed a certain sum of money for alleged extraordinary services rendered by him as such executor. Objections were made to the allowance prayed for by the other executors, and by various parties interested in the estate; and, the matter having been heard, the court, on March 11, 1891, made an order denying said petition. Afterwards, on March 30, 1891, the said Bartlett made and served notice of motion to vacate said order of March 11th, and to restore the cause to the calendar, upon the ground that no findings had been filed or waived; and that the court make findings, and that judgment be entered thereon as required by law. This motion was afterwards heard, and on May 29, 1891, the court made an order denying it; and from this last order, denying the motion to vacate, etc., said Bartlett has undertaken to appeal to this court. Respondents move to dismiss the appeal upon the ground, among others, that the said order denying the said motion to vacate is not an appealable order. The order appealed from is clearly not appealable. The general rule is well established that appeals can only be taken from such judgments or orders in probate proceedings as are mentioned in subdivision 3 of section 963 of the Code of Civil Procedure;[1] and the order appealed from in the case at bar is not one of those there mentioned. Const. Cal. art. 6, § 4; Estate of Calahan, 60 Cal. 232; Estate of Dean, Id. 613; In re Moore, 86 Cal. 58, 24 Pac. Rep. 816; In re Wiard, 83 Cal. 619, 24 Pac. Rep. 45. The only modification of the rule established by the cases just cited is to be found in Appeal of Bauquier, 88 Cal. 303, 26 Pac. Rep. 178, 532. In that case there was a regular contest and trial over the question of issuing letters testamentary to an executrix, and an appeal to this court from an order denying a new trial; and this court merely held that "in all cases in which the superior court, when sitting as a court of probate, is authorized to entertain a motion for a new trial, an appeal will lie from its order therein."

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[1] Code Civil Proc. § 963, subd. 3, allows an appeal from the superior to the supreme court "from a judgment or order granting, refusing, or revoking letters testamentary or of administration, or of guardianship; admitting or refusing to admit a will to probate; or against or in favor of the validity of a will, or revoking the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition sale or conveyance of real property; or settling an account of an executor or administrator or guardian; or refusing, allowing, or directing the distribution of an estate, or any part thereof; or the payment of a debt, claim, legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart the homestead.

But as in the case at bar the attempted appeal is not from an order made on a motion for a new trial, the Bauquier Case does not apply. And that the order here appealed from is not a "special order, made after final judgment," within the meaning of the second subdivision of said section 963, is also settled by the authorities first above cited. If it were otherwise, the third subdivision of said section could be entirely disregarded by simply assuming that a probate order not therein mentioned was a final judgment, and that an order refusing to vacate it was a "special order made after final judgment." The appeal is dismissed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

94 Cal. 368

WELSH v. PLUMAS COUNTY. (No. 14,434.)

(*Supreme Court of California.* April 27, 1892.)

TOLL ROADS—ACCEPTANCE OF FRANCHISE.

Under act March 17, 1866, which authorized certain persons to "construct" a toll wagon road between certain points, the taking possession of a public road, already built, between the same points, was not an acceptance of the franchise.

Commissioners' decision. Department 2. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

Action by P. R. Welsh against Plumas county to quiet title to a certain road. From a judgment for defendant, plaintiff appeals. Affirmed.

Goodwin & Goodwin and *John Gale*, for appellant. *U. S. Webb* and *Atty. Gen. Hart*, for respondent.

FOOTE, C. The plaintiff brought this suit under section 738, Code Civil Proc., having in view the quieting of his alleged title to a wagon road in Plumas county, as against the adverse claim of that county. The court below sustained a demurrer to the complaint, filed, and gave judgment thereon for the defendant. Upon an appeal being taken by the plaintiff to this court, the judgment was reversed. 80 Cal. 338, 22 Pac. Rep. 254. In that case the acceptance of the franchise, as tendered by the act of the legislature, under which the plaintiff claimed the title to the wagon road, was conceded by the demurrer. But, in the present instance, the case was tried upon its merits, and the findings of facts, which we think are amply sustained by the evidence, show that there never was any acceptance of the franchise, as tendered by the legislative enactment, under which alone the road could be acquired by the plaintiff through his grantor. The title of the act in question is: "An act to authorize the construction of a wagon road from the Cold Spring House, in Butte county, to Greenville, in Plumas county." The object had in view in the act must have been the construction of a wagon road between those two points. It was said in the former opinion in this case, where under the pleadings it was conceded that the plaintiff had constructed the road, that the manifestation of acceptance of the franchise was the building of the road within the time mentioned in the act. 80 Cal. 338, 22 Pac. Rep. 254. But, when the evidence was introduced on the present trial, it appeared that neither the plaintiff here, who succeeded to the rights of the original grantees, nor his grantor, ever built or constructed any road; that his grantor took possession and used a public road already constructed by the money of the taxpayers, paid out by the county authorities; but that he did nothing towards building the road, which should have been done to manifest acceptance of the grant. It will not be presumed that the legislature intended to turn over to the grantees in the act, private individuals, for their personal benefit, a public road already constructed by the county by means of public money; but rather that it intended what the title of the act under which the grant is made reasonably imports, that is, that the parties were to construct and maintain a road between two given points. This is in accordance with the rule that a private act, where there is doubt in respect to its interpretation, is to be construed most beneficially to the public interests. Bartram v. Turnpike Co., 25 Cal. 283; Spring Valley W. W. v. San Francisco, 52 Cal. 122. To constitute acceptance, it was necessary that the private parties should indicate such acceptance by building the road under the grant of the legislative act. It is not to be presumed that the legislature, as the appellant seems to think, was intent upon making a valuable franchise for private individuals, but that the intention was to facilitate public travel and convenience by the construction of an additional road between the points to and from which the road already constructed by the county ran. Private gain, and not the public good, would have been subserved by allowing private individuals wholly to appropriate a public road already constructed by the county, and to charge tolls for travel thereon from the taxpayers who had contributed to construct it. We are of opinion that the view taken by the trial court of the act in question was right, and should be upheld. As the finding of nonacceptance is conclusive in support of the judgment, and as it was warranted by the evidence, it becomes unnecessary to discuss any other point made by the appellant. We are of opinion that the judgment and order should be affirmed, and so advise.

We concur: FITZGERALD, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

94 Cal. 438

Forsyth v. Dunagan *et al.* (No. 14,121.)

(*Supreme Court of California.* May 5, 1892.)

Highways—Dedication and Acceptance—Recorded Plats.

1. The owners of land subdivided it into lots with roads extending through them, recorded the plat, and marked the location of the roads by causing ditches to be dug on each side of them. They united in a deed to the county, conveying said roads to it on condition that it should "accept, declare, duly establish, and use the same as public highways." The county did not accept the conveyance until after nine years, and plaintiff had meanwhile been conveyed one of the lots, subject "to the right of way of the public over such portions of the land as may fall within any road laid out on such land." It did not appear that at the date of the conveyance the roads had been opened or actually used by the public, or that any conveyances had been made with reference to the recorded plat. *Held* that, the offer to dedicate such roads not having been accepted within a reasonable time, the board of supervisors would be enjoined from opening the same.

2. Evidence of the value of the land over which it was sought to open a road, and of improvements put thereon by plaintiff, was irrelevant and inadmissible.

3. Evidence of the manner in which the system of roads laid out in the subdivision connected with other roads was properly excluded, in the absence of evidence that conveyances had been made with reference to the recorded plat.

In bank. Appeal from superior court, Fresno county; J. B. Campbell, Judge

Action by William Forsyth against D. C. Dunagan and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. D. Tupper, *H. H. Welsh*, and *F. H. Short*, (*Frank H. Short*, of counsel,) for appellants. *Church & Cory* and *E. F. Preston*, for respondent.

Beatty, C. J. This is an action to enjoin the defendants, the members of the board of supervisors and a district road master of Fresno county, from opening a road through the land of the plaintiff. By the judgment of the superior court a temporary injunction was made perpetual, and defendants appeal from the judgment, and from the order denying their motion for a new trial.

There is but little controversy as to the facts of the case. It appears that in the year 1878 F. Roeding was the owner of section 32 of a certain township in Fresno county. In conjunction with the owners of the adjoining sections, 31 and 32, he caused to be made and recorded a map of the entire tract, by which it was subdivided into 20-acre lots, with streets and roads extending through it north and south and east and west. On this plat or map so recorded the tract was designated as the "Nevada Colony," and the design was to sell the lots to settlers. Besides making and recording the map, the owners caused ditches to be dug on each side of the streets as surveyed, thus making their location on the ground, and in January, 1879, they united in a deed to the county of Fresno, by which they conveyed the roads so laid out to said county. But said conveyance was upon the express consideration that the county should "accept, declare, duly establish, and use the same as public highways." Among the roads so laid out and conveyed was a strip of 50 feet in width, extending north and south between the southwest and southeast quarters of said section 32. The county never in any way accepted said conveyance, or did anything in compliance with its conditions, until April, 1888, at which time the board of supervisors adopted a resolution declaring said streets and avenues public highways. At a subsequent date, they ordered the county surveyor to lay out a road 25 feet on each side of the half-section line, extending north and south through said section 32, and thereafter directed the road master of the district to open the road to the public, which he was proceeding to do, in obedience to such direction, when enjoined in this action. The plaintiff herein is owner of the southwest quarter of section 32, by grant from F. Roeding, dated December 6, 1881. In this grant the land conveyed is described as being a portion of the Nevada Colony, and it is made "subject nevertheless to the right of way of the public over such portions of the land herein granted as may fall within any road laid out on such land," etc. The southeast quarter of said section was conveyed to one Pugh, subject to the same reservation or exception. It does not appear that at the date of these conveyances the street or road in question had ever been opened or actually used by the public as a highway, or that Roeding or the proprietors of sections 31 and 32 had ever made any conveyances of lots or land in the Nevada Colony according to the recorded plat. An offer was made at the trial to prove the conveyance of a lot in section 33 according to said plat, but at what date—whether before or after the conveyances to plaintiff and Pugh—does not appear. Such being the case, plaintiff and Pugh inclosed the entire half section, obliterated the ditches defining the road or street between them; and the plaintiff, four years before the supervisors adopted their resolution declaring the road and avenues of the Nevada Colony public highways, planted the southwest quarter of section 32 in vines up to the half-section line,—or, in other words, he had planted in vines the 25-foot strip on the east side of his quarter section, which is embraced in the street or road as orginally laid out though the section.

It will be seen from this statement of the case that the principal question involved is whether the strip of land in controversy has been dedicated to the public as a highway. We do not think the facts show a dedication. The deed to the county was a mere offer of dedication, upon terms and conditions never accepted or complied with until long after the lapse of a reasonable time, and after the offer had been effectually revoked. So, also, the survey, marking, platting, and recording of the lands designated as the Nevada Colony was a mere offer to dedicate, revocable at the will of the proprietors or their successors until acceptance or user by the public, or conveyance by them of lots or blocks by reference to the streets. No such acceptance or user or conveyance occurred prior to the conveyance to plaintiff and Pugh, and the reservation or exception therein contained amounted to nothing, for the reason that the public had at that date no right of way over the land. After the conveyance to him of said southwest quarter, plaintiff might have kept the pending offer of dedication open, or might have renewed it if he had chosen to do so, but he did not. On the contrary, he and Pugh very clearly manifested their intention to revoke it by inclosing and planting the space laid out as a road. On the facts disclosed by the pleadings and evidence, we think the findings and conclusions of the superior court are clearly correct, because there was no acceptance or user of this road while the offer to dedicate was open, or within a reasonable time after it was made.

There are some errors assigned upon rulings of the superior court, excluding offered evidence, but they are without merit. The court did not err in excluding evidence of the value of the vines and of the strip of land sought to be taken. Such value was wholly immaterial. If the roadway had been dedicated the defendants had a right to open it, no matter how valuable the lands and vines. If it had not been dedicated the plaintiff had a right to resist the appropriation, no matter how worthless the lands and vines.

In the absence of any proof or offer to prove conveyance of lots by reference to the recorded plat of the Nevada Colony prior to the conveyance to plaintiff, the offer to prove the manner in which the system of roads therein laid out connected with other roads was irrelevant, and was properly refused.

A ruling of the court, excluding evidence of a user of the road in question, is specified as error. Counsel for appellants do not refer to the folio or page where such ruling is to be found, and I have failed to find it. There is evidence of the laying out and marking of the road in question and of other roads, both on the ground and on the recorded map, but no evidence or offer of evidence of any user by the public of this road. We find no error in the record, and the judgment and order are therefore affirmed.

We concur: McFarland, J.; De Haven, J.; Sharpstein, J.; Garoutte, J.; Paterson, J.; Harrison, J.

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94 Cal. 465

Landregan v. Peppin. (No. 14,407.)

(*Supreme Court of California.* May 5, 1892.)

Quieting Title—Writ of Possession—Subsequently Acquired Title in Defendant—Pleading.

Upon recovery of judgment in an action to quiet title "by a person out of possession," he is entitled to "a writ for the possession of the premises," under Code Civil Proc. § 380, regardless of any adverse title to the land since acquired by defendant, notwithstanding that his complaint did not allege that he was out of possession, defendant's answer alleging possession in himself, and although, after the recovery of such judgment, plaintiff dismissed an action of ejectment contemporaneously brought. Beatty, C. J., and Harrison, J., dissenting.

In bank. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action to quiet title by James T. Landregan against Joseph Peppin. There was a judgment for plaintiff, and an order for the issuance of a writ of possession, from which order defendant appeals. Affirmed.

Goodwin & Goodwin, for appellant. *E. C. Robinson* and *W. W. Kellogg*, for respondent.

Garoutte, J. This is an action brought under the provisions of section 738, Code Civil Proc., for the purpose of quieting title to certain quartz mines, situated in Plumas county. The complaint is in the usual form, and the answer denies the allegations thereof except as to the adverse claim, and further alleges that at and for a long time prior to the commencement of the action defendant was the owner of, in the possession and entitled to the possession of, all of said real estate. The court found all the allegations of the complaint to be true, and a decree was entered quieting plaintiff's title. After the entry of said decree plaintiff moved the court for an order to the sheriff that he be placed in possession of the property, and in support of said motion filed an affidavit setting forth the proceedings resulting in the decree, and also setting out the fact that at the commencement of said action plaintiff was out of possession, and the defendant was the party in possession, of the property. Defendant opposed the motion, and filed an affidavit setting forth the fact that, subsequent to the rendition of the decree, he obtained judgment on the merits against plaintiff, in an action of ejectment, to recover possession of the same land involved in this action. He also set out the acquisition by himself of an outstanding title created since the action was tried and determined. The court ordered the writ of possession to issue, and from this order defendant appeals. Section 738, Code Civil Proc., provides: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim." Section 380 of the same Code reads: "In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and person in possession may be joined as defendants, and, if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed." It will be noticed that section 738, supra, which provides for the determination of adverse claims to realty, is very broad in its terms, and includes all adverse interests, from a claim of title in fee to the smallest leasehold, and unquestionably it is the duty of the defendant to set out his interest, whatever it may be, when called upon under this section of the Code. If he has an adverse claim which will support an issue at law upon which he desires a jury trial, it is his duty to set out that claim, make out that issue, and demand his jury trial. In this action it is not necessary to determine whether or not the pleadings were sufficient to entitle either party to a jury as to any of the issues created. If not sufficient, the defendant should have made them so, if his adverse claims of interest justified such a course, and, not having done so, he cannot now be heard to complain that he was deprived of his right to a jury trial. In Donahue v. Meister, 88 Cal. 121, 25 Pac. Rep. 1096, this court, in referring to section 738, supra, said: "The main effect of said section is to give parties the right to compel others by suit to litigate and determine controversies, in cases where such right did not before exist, but, if in such a suit issues arise which are clearly legal and cognizable in a court of law, the Code does not take away the right to have such issues tried by a jury." Appellant insists that plaintiff's complaint should have alleged that he was out of possession. The section does not appear to contemplate that the pleading should so state. What benefit could the defendant derive from such an allegation? How could he be misled by the absence of it? If alleged it would have created no issue, for it would not have been denied. In fact, defendant sets out possession in himself by his answer. Prior to the adoption of the Codes, a person out of possession could not bring an action to quiet his title, but now a party is not compelled to recover possession by an action at law, and then quiet his title in equity; but under the section of the Code previously quoted he has the right to secure all the relief in one action, and this was the sole object of the provision. We do not deem it essential that the judgment itself should direct the issuance of the writ of possession. The law is fully satisfied by a supplemental order to that effect. The section of the Code provides that if the judgment upon the main question, to wit, the adverse claim, be for the plaintiff, then he may have a writ for the possession of the premises. As already suggested, it is well settled that in an action of this character the defendant must set up whatever right of possession he may claim. When, therefore, as in this case, it has been adjudicated that defendant has no adverse claims or interests of any kind or nature whatever in this realty, the subject of litigation is exhausted, and if the plaintiff is out of possession the necessary effect of the judgment is that it entitles him to that possession. In speaking of a writ of assistance under a decree in foreclosure in Montgomery v. Middlemiss, 21 Cal. 107, this court said: "The legal effect of the decree is the same without the direction."

We do not think the fact that the defendant since the date of the judgment has purchased an outstanding title is a sufficient defense to the application for the writ of possession. Plaintiff's application for the writ is based upon the adjudicated right that the defendant, as against him, has no interest of any character. Defendant now claims a right to the possession, acquired subsequent to this adjudication, and which he insists is superior to the right there decreed. It is sufficient to say the court cannot determine the merits of defendant's claim upon this application. This is a proceeding upon affidavits, and no question of title can be litigated in this way. This is a hearing upon a motion, and a motion cannot be converted into a trial. There is but little authority upon this question, but the case of Kercheval v. Ambler, 4 Dana, 170, appears to be directly in point. At the same term of court, Forman and Ambler, in separate actions of ejectment, obtained judgments against one Kercheval. Forman was placed in possession under his decree, and thereupon leased the property to Kercheval. Kercheval relied upon his possession under the lease to defeat the writ of possession issued to Ambler, and the court said: "But he [Kercheval] alone is the party here, and, though he may have been a tenant, his possession was in fact his own and beneficial to himself, and he cannot, we think, defeat or evade Ambler's judgment against himself by interposing the unlitigated claims of a stranger to that judgment, however he may represent him. * * * After Ambler obtained his judgment, the appellant, as long as that judgment remained unreversed and unsatisfied, could not defeat or evade it by any act without the consent or fault of Ambler, and, of course, could not hold the possession against Ambler's execution, and in defiance of its authoritative mandate." And again: "If he have a better right than Ambler to the possession, his only remedy allowed by law is that of some legal process, when their respective claims to possession hitherto unlitigated may be tried and determined according to law." See, also, Ritchie v. Johnson, 50 Ark. 551, 8 S. W. Rep. 942. It appears that plaintiff began an action in ejectment against defendant for the recovery of this land upon the same day that the present action was commenced; that the action to quiet title came to judgment first, and thereupon, by stipulation of the parties, the ejectment was dismissed, each party paying his own costs. Appellant insists that under section 582, Code Civil Proc., this was a judgment on the merits, and therefore an adjudication that at that time appellant was entitled to possession of the land, and consequently was a perfect defense to the motion for the writ of possession. It is unnecessary to discuss the effect of this judgment of dismissal, under the peculiar facts of this case, although, as we have already decided that the effect of the judgment in this action was to declare plaintiff entitled to the possession of the land, it is difficult to discern any substantial benefit that could have been derived to plaintiff by prosecuting the ejectment suit to final judgment. In this case it is sufficient to say we do not think the judgment of dismissal, whatever its effect, could be set up to defeat the motion for a writ of possession. Merritt v. Campbell, 47 Cal. 547, and other cases upon this question, which have been called to our attention, decide that such judgment, if properly pleaded, will constitute a defense to another claim afterwards brought upon the same cause of action. That is not the case made by this record, and we are not disposed to extend the doctrine beyond the limits fixed by the authorities. Let the order be affirmed.

We concur: DE HAVEN, J.; MCFARLAND J.; PATERSON, J.; SHARPSTEIN, J.

We dissent: BEATTY, C. J.; HARRISON, J.

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94 Cal. 156

WILLAMETTE STEAM MILLS LUMBERING & MANUF'G CO. v. UNION LUMBER & SUPPLY CO. (No. 14,504.)

(*Supreme Court of California.* March 30, 1892.)

SALE AND DELIVERY—DELIVERY OF PART ONLY —VALUE OF DEFICIT.

1. One who agrees to sell and deliver a certain amount of lumber for a certain sum, can, though failing to deliver the full amount, recover for the amount delivered, it being received and retained.

2. Defendant's testimony that it cost him a certain amount to supply the lumber which plaintiff failed to deliver under the contract, will not, in the absence of any evidence on his part as to the value of the lumber, or that the amount of the cost of supplying it was necessary and reasonable, warrant a disturbance of the finding as to the amount that should be allowed therefor.

In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by the Willamette Steam Mills Lumbering & Manufacturing Company against the Union Lumber & Supply Company for the value of lumber sold and delivered. Judgment for plaintiff. Defendant appeals. Affirmed.

Hughes & Gordon, for appellant. *Johnson & Borden* and *Sheldon Borden*, for respondent.

MCFARLAND, J. The complaint contains two counts,—one for the value of certain posts and lumber alleged to have been sold by plaintiff to defendant, and delivered at Burwell, in Los Angeles county; and the other for certain other lumber sold and delivered by plaintiff to defendant, to be used in the normal school building. The court found that defendant was indebted to plaintiff on the first count in the sum of $722.59, and on the second count in the sum of $715.23, and rendered judgment for the plaintiff for the sum of said two amounts, viz., $1,437.82. Defendant appeals from the judgment and from an order denying a new trial.

1. As to the first count, it appears that there had been a special contract between the parties, by which plaintiff was to deliver to defendant at Burwell 39,340 feet of fencing lumber and 1,064 split posts for $782.48; terms, "spot cash upon delivery of the total amount of lumber and posts." The plaintiff delivered nearly all of the lumber mentioned in the contract, and it was accepted and retained by defendant; but there was a dispute between the parties as to whether the total amount had been delivered, and defendant refused to pay anything, upon the theory that nothing was due until the total amount had been delivered. Whereupon plaintiff commenced this action for the value of lumber sold and delivered. The court found that plaintiff had delivered all the lumber, except 3,422 feet of the 39,430 feet of fencing which the contract called for. The contention of appellant is that, as a portion of the lumber mentioned in the contract was not delivered, therefore nothing was due, and the action cannot be maintained. This contention involves the proposition that appellant could keep and use all the lumber received and retained by it without paying for it. There has been, no doubt, some conflict of authorities as to the rights of parties in the situation of the parties to this action; but the true rule is stated in the opinion of the court in Polhemus v. Heiman, 45 Cal. 577. In that case the contract was for the delivery of "about fifty-three thousand pounds" of wool, and only 47,315 pounds had been delivered, but the defendants had retained the amount delivered. The court, in discussing defendant's right to recover damages for the part not delivered, alludes to the want of exactness growing out of the use of the word "about," and then proceeds as follows: "If, however, the quantity delivered was less than the quantity contracted for, the vendees were at liberty to refuse to accept it; and, having accepted a part, they might have returned that, and refused to accept less than the whole; but, having received and retained a part, they cannot refuse to pay for the part accept-

ed." The only other point made by appellant as to the first count is that the court erred in not allowing defendant enough for the 3,422 feet of lumber not delivered. The court allowed $62.89, and it is contended that it should have been $82.62, because one of the defendant's witnesses testified that it cost defendant the latter sum to supply the lacking lumber. But, as defendant offered no evidence showing the value of the lumber, or that the amount of the cost of supplying it was necessary and reasonable, we are not warranted in disturbing the finding of the court on that point.

2. There is no contention about the amount, the price, or the delivery of the lumber sued for in the second count. The only point made by appellant is that the amount to be paid for the lumber was not due, because, as contended, there was a custom or usage by which payment need not be made until 60 days after delivery of the lumber. It is not necessary to consider here what the law is as to special customs, because the evidence about the existence of the custom contended for, and its application to the contract involved in this litigation, is not so free from conflict and uncertainty as to warrant us in disturbing the finding of the court that no credit was given. It is doubtful if the alleged custom, if it existed at all, was in vogue at the time of the contract, whether it was a mere courtesy, or something which amounted to a definite credit of 60 days, or whether it was not confined to a particular association of which plaintiff was not a member. Moreover, the alleged custom applied only to wholesale lumber dealers, and to contracts for entire cargoes; and we cannot say that the court erred in not finding from the evidence that the plaintiff was a wholesale dealer, and that the contract was for a cargo. We see no ground for a reversal. Judgment and order affirmed.

We concur: DE HAVEN, J.; PATERSON, J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.

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94 Cal. 254

Ex parte HART. (No. 20,915.)

(*Supreme Court of California.* April 1, 1892.)

CONTEMPT—FAILURE TO PAY ALIMONY—VALIDITY OF DECREE.

A decree for divorce pursuant to Civil Code, § 139, for the offense of the husband, awarding alimony, is not void, although the period within which it was to be paid was not specified, it being payable until plaintiff's death or the modification of the decree, and a failure to pay the alimony is punishable as for contempt.

Petition of William N. Hart for a writ of *habeas corpus.* Petitioner remanded to custody.

James G. Maguire, for petitioner. *Maguire & Gallagher,* for respondent.

BEATTY, C. J. The petitioner is imprisoned upon a charge of contempt of court, consisting in his refusal to pay alimony awarded to his divorced wife by the decree of divorce. He contends that the imprisonment is unlawful, because, as he claims, the decree as to the order for alimony is void, by reason of the fact that it does not specify the period during which the alimony is to be paid. As I construe the decree, it intends the payment of alimony to continue during the life of the plaintiff in the divorce suit, or until modified by the court. Such a decree the court had power to make in granting a divorce for the offense of the husband. Civil Code, § 139. The decree is, in my opinion, sufficiently certain in its terms. It is within the jurisdiction of the court, and can be enforced by process of contempt. The prisoner is remanded to custody.

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94 Cal. 357

MCMILLAN v. HAYWARD *et al.* (No. 13,073.)

(*Supreme Court of California.* April 27, 1892.)

LIMITATIONS — ACTIONS AGAINST ADMINISTRATORS —ALLOWANCE OF CLAIMS.

1. The remarriage of an executrix, more than a year after taking out letters testamentary, but before the bar of the statute had attached to a debt in respect to which it had commenced to run in the lifetime of her testator, does not *ipso facto* cause her authority to cease; and an action—no claim having been made before—brought within one year after appointment of administrator with will annexed, but after the statutory bar had attached, is not saved by Code Civil Proc. § 353, which provides that, "if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuance of letters testamentary or of administration."

2. Notice by an executrix to creditors is simply of probate procedure, and the giving or not giving of it does not affect the statute of limitations, nor does her failure to publish it affect a creditor who did not present his claim for allowance.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by D. McMillan against L. A. Hayward, administrator, and others, to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Reversed.

R. Percy Wright and *Jas. F. Tevlin,* for appellants. *W. B. Tyler* and *D. H. Whittemore,* for respondent.

TEMPLE, C. Defendants appeal from the judgment against them within 60 days; and the point made here is that the finding to the effect that the cause of action was not barred by the statute of limitations is not sustained by the evidence, and is contrary to the other findings of fact. It appears that May 8, 1873, Frank Scherf executed a note secured by mortgage, which became due one year from the date thereof. That the mortgagor died, testate, November 15, 1875, and January 11, 1876, his widow was appointed executrix, and duly qualified. March 5, 1878, she married again, and her letters testamentary were revoked July 15, 1887. No notice to creditors was published by her. Hayward was appointed administrator with the will annexed September 6, 1887, and this suit was commenced September 14, 1887, against the administrator and the minor children of Scherf, his devisees, to foreclose the mortgage. No claim was ever presented against the estate for the amount due on the note and mortgage, and in the complaint all recourse against other property of the estate is expressly waived. The defense is the bar of the statute of limitations, (section 337, Code Civil Proc.,) which we think is fully sustained by the facts as above recited. Respondent, however, claims that his rights are saved by section 353 of the Code of Civil Procedure, which provides: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuance of letters testamentary or of administration." Scherf died after the maturity of the note. The statute had therefore commenced to run, and would continue to run, unless it is brought within some express exceptions of the statute; and death is not made such, further than that the suitor may in such case commence his action within one year after letters are issued. This action was commenced neither within four years after the maturity of the note, nor within one year after letters were issued. Respondent contends that, inasmuch as the executrix married about 18 months after her appointment, but before the bar of the statute would have attached had Scherf lived, her authority ceased *ipso facto*, and suit could not have been brought to foreclose the mortgage until her successor was appointed. Therefore, since this statute was intended to extend, and not to shorten, the time, he had one year after the appointment of Hayward within which to begin his action. The evident purpose of section 353 is to secure to a party who has a cause of action against a decedent one year after the appointment of a legal representative within which to bring his action. This may or may not have the effect of extending the time. If it be necessary, in order that such person shall have one year after the appointment of a legal representative, then suit may be brought after the expiration of the general limitation; otherwise this section does not have, nor was it intended it should have, any effect whatever upon his rights. Such construction does not shorten his time, as limited by the general statute. It simply leaves him to that statute, because it was not necessary to extend the time in order to give him his year. The executrix had been acting as such more than one year before she remarried, long enough to have completed the administration and obtained her discharge. Had she done so, could respondent have asked to have the administration reopened, that he might have his time extended? In this respect he does not differ from any claimant against an estate. The fact that notice to creditors was not published cannot affect him, since he did not present his claim for allowance, and the giving or the not giving of that notice does not affect the general statute of limitations. That is simply of probate procedure. Indeed, respondent's case differs in no respect, so far as this aspect of it is concerned, from that of any other creditor of an estate. Any one is liable to lose a part of the period allowed by the statute of limitations for the commencement of his action if the other party dies. In case of judgments, the statute, in effect, says that he may sue at any time within five years. But, if his debtor die, he may be forced to present his claim within four months, and bring his suit within three months, thereafter. He might as reasonably as the plaintiff claim the right to revive the administration, and bring his action after such peridos. But we think the respondent mistaken in supposing that the authority of the executrix ceased upon her marriage. In Schroeder v. Superior Court, 70 Cal. 343, 11 Pac. Rep. 651, this court held that the authority of the executrix does not cease *ipso facto* upon her marriage, but that she merely became incompetent, and may be proceeded against for removal, giving her an opportunity to admit or deny the marriage. The court say: "Are all the acts of an executrix who has secretly married, or married without the fact having reached the knowledge of the judge, absolutely void? If so, they are void, and may be attacked or disregarded after a final accounting and discharge. It would be difficult to distinguish between one never competent to serve as executrix and one whose capacity to serve as such has become extinguished. But if one originally appointed executrix was in fact under age, or a convict, she is clothed with all the powers of the office until she is suspended, or by proper proceedings removed. Does a different rule obtain where, by reason of an act done *in pais*, one originally competent has made herself incompetent?" This case was recognized, and its authority conceded, in Estate of Allen, 78 Cal. 581, 21 Pac. Rep. 426. The powers of the executrix, therefore, continued until her removal,—more than 11 years after her appointment,—and respondent had his full time within which to commence his action. Since the plaintiff did not present his claim to the executrix, and in his complaint waives all recourse except as against the mortgaged premises, it may be doubted whether his cause of action would come within the section discussed, if that had made any difference. But it is not necessary to decide such question, and it is only mentioned to prevent possible misapprehension. We think the judgment should be reversed, and a new trial had.

We concur: Belcher, C.; Vancliff, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and a new trial ordered.

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94 Cal. 376

In re Hewitt's Estate. (No. 14,590.)

(*Supreme Court of California.* April 28, 1892.)

Charitable Bequests—Validity.

Even if religious societies are not charitable or benevolent societies, within the meaning of Civil Code, § 1313, prohibiting bequests or devises to any "charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses," of more than one third of the estate, where testator leaves legal heirs, a bequest to the boards of trustees of several churches of more than one third of the estate, to be used by the trustees for missionary purposes, is a bequest in trust for charitable uses, within the prohibition of said section.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; JOSEPH H. BUDD, Judge.

Petition by the executor of Nancy Hewitt, deceased, for final distribution of his testator's estate. From the decree of distribution the First Presbyterian Church of Stockton, Cal., one of the legatees, appeals. Affirmed.

Louttit, Woods & Levinsky, for appellant. *Nutter & De Vries, Ed. I. Jones, P. W. Bennett*, and *F. T. Baldwin*, for respondents.

FOOTE, C. The executor of Nancy Hewitt, deceased, filed his petition for final distribution of his testator's estate, in which he claimed that under her will the residue of her estate, after the payment of certain specific legacies, debts, funeral and other expenses, should be divided equally among three Presbyterian churches. In the language of the will: "To the board of trustees of the Reformed Presbyterian Church of Alleghany, Pennsylvania; to the board of trustees of the United Presbyterian Church of Pittsburg, Pennsylvania; and to the board of trustees of the First Presbyterian Church of Stockton, California,—share and share alike. It is my desire that the amounts bequeathed to the board of trustees of the several churches above named shall be used for missionary purposes, the same to be equally divided between foreign and domestic missions."

It is admitted that the residue of the estate is more than one third of the distributable assets of the testator's estate, and the distribution prayed for is resisted by certain heirs at law of the decedent on the ground that the clause of the will above quoted is null and void, except to the extent of the disposition of one third of the distributable assets above mentioned. In accordance with the claim of the heirs at law of the decedent, the court below made a decree of distribution to each of the churches heretofore mentioned, one ninth of the distributable assets of the estate; that is, to the three together, one third of such distributable assets. From this decree one of the churches only—the First Presbyterian Church of Stockton—appeals as to so much thereof as refuses to distribute to it a full one third of the residue of the estate of the decedent. The appellant, for a reversal of so much of the decree as is appealed from, claims that religious societies are not such charitable corporations as are mentioned in section 1313 of the Civil Code, which reads as follows: "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy, or each of them, shall be valid: provided, that no such devises or bequests shall collectively exceed one third of the estate of the testator leaving legal heirs, and in such case a *pro rata* deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law." In Estate of Hinckley, 58 Cal. 511, it was said by this court: "It is admitted that 'learning' is a charitable use. We shall endeavor to show that 'religion,' in the broad sense in which the word is employed, is charitable. Thus the intent of the testator is made more specific, and those things are benevolent or beneficent which advance religion and learning and aid the poor." In Kerr v. Dougherty, 79 N. Y. 338, the court, in giving construction to a section of the statutes of that state, similar to section 1313 of our Civil Code, where a seminary for the instruction of theological students was the proposed devisee, said, among other things: "It is also 'benevolent,' for it was incorporated to impart religious instruction, without any purpose of gain. For the same reason it comes within the definition of 'charitable,' as charitable uses embrace gifts for general public uses, and may include both the rich and the poor." See, also, Perry, Trusts, § 701. But if religious societies, like the appellant, did not, as such, come within the definition of "charitable or benevolent," as meant by the statute, yet the will of the testator and the decree of the court both show, and there is nothing in the record to the contrary, that the bequests to these churches were in trust "for charitable uses," under section 1313 of the Civil Code, for "missionary purposes, the same to be equally divided between foreign and domestic missions." We conclude that the judgment appealed from should be affirmed, and so advise.

We concur: VANCLIEF, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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94 Cal. 379

PEOPLE v. LEE YUNE CHONG. (No. 20,879.)

(*Supreme Court of California.* April 29, 1892.)

HOMICIDE—VERDICT—RECALLING JURY—APPEAL.

1. Where the jury, in a criminal case, after rendering a defective verdict, which is accepted by the court, are discharged, their functions as jurors cease, and they cannot be recalled, and directed to find a new verdict as they intended; and, if such proceedings are taken, they and the new verdict are a nullity.

2. In such case the verdict, as found in the first place and accepted by the court, stands unaffected by the subsequent proceedings; and this, notwithstanding that the order of the court that the jury be recalled also directed that the order directing the verdict to be recorded be set aside and vacated since the order, even if it could be construed as vacating the verdict, would be unauthorized and void, as the court has no control over a verdict after the jury have been discharged.

3. Since Pen. Code, § 1157, provides that, "whenever a crime is distinguished into degrees,

the jury, if they convict defendant, must find the degree of the crime," a verdict of guilty in a prosecution for murder, merely fixing the penalty at imprisonment for life, without stating the degree of murder of which defendant is guilty, is bad, and a judgment thereon will be reversed.

4. In such case defendant is not entitled to be discharged, but the supreme court, on reversing the judgment, will order a new trial, and this though defendant did not move for a new trial, but merely for his discharge; since under Pen. Code, § 1260, the appellate court may reverse, affirm, or modify a judgment appealed from, "and may, if proper, order a new trial."

5. On appeal in such case, defendant cannot raise the question of once in jeopardy, in opposition to the granting of a new trial, since that question can only arise on the new trial after an issue has been made by a plea of once in jeopardy.

In bank. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

Lee Yune Chong was convicted of murder, and appeals from the judgment, and from certain orders refusing to enter judgment of acquittal, and to direct him to be discharged. Judgment reversed and orders affirmed.

A. B. Ware and *J. T. Campbell*, for appellant. *Atty. Gen. Hart*, for the People.

McFARLAND, J. The appellant was accused of the crime of murder, and the jury returned the following verdict: "We, the jury, find the defendant guilty, and fix the penalty at imprisonment for life." This verdict was declared, and duly recorded, and the jurors were discharged for the term, and left the court room. Most of them went downstairs to the clerk's office to get warrants for their pay as jurors. Three or four of them went, by mistake, to the sheriff's office, on a still lower floor, where there was a conversation with a third party, who spoke approvingly of the verdict. In the clerk's office there was a controversy with the clerk about one day's pay, which occupied considerable time. A number of spectators mingled with the jurors as they went away from the court room, and the jurors considered themselves finally discharged, and free to talk about the case. Several of them did have conversations with different persons, who approved the verdict, and, among others, with one of the attorneys for the prosecution. After the jury had thus been discharged, the presiding judge, after having disposed of some other business, left the bench, and went towards or into his chambers. He then returned, and ordered the jury called back into the jury box, and told the clerk to make the following order: "That the order discharging the jury in the case of People vs. Lee Yune Chong be set aside and vacated, and also the order directing the verdict to be recorded be also set aside and vacated, and call the jury." The appellant was in court, and also his counsel, who had been notified to appear; and the latter objected and excepted to the order, saying that they were there only to protest against the action of the court in calling the jury back. The persons who had been jurors in the case were again brought together in the court room, and the court instructed them that their verdict was informal, and that they must amend it by finding the degree of the crime, etc. They then retired, and returned the following paper: "We, the jury, find the defendant guilty of murder in the first degree, and fix the penalty at imprisonment for life." Appellant's counsel objected to all these proceedings, and excepted to the overruling of their objections, and moved for the discharge of the appellant, and excepted to the denial of said motion. The exact time which elapsed from the discharge of the jury until their return does not appear, one of the witnesses putting it from five to ten minutes; but it is clear that during that time they were beyond the control of the court, had thrown off their characters as jurors, and had mingled with their fellow citizens free from any official obligation. On the day appointed for rendering judgment appellant's counsel "moved the court to order judgment of acquittal, and that he be discharged from custody, and that the information herein be not further prosecuted, for the following reasons;" being substantially that the jury had been discharged without his consent, and without rendering a legal verdict against him, etc. The motion was denied, and appellant excepted. Judgment was then entered sentencing appellant to imprisonment for life. The judgment recited both the verdicts. The appellant appeals from the judgment, and also from the orders of the court refusing to enter judgment of acquittal, and to direct that appellant be discharged.

It is quite clear that all the proceedings by which the court reassembled the persons who had constituted the jury, and instructed them to find another verdict, and the so-called "second verdict" itself, were nullities. "With the assent of the jury to the verdict as recorded, their functions with respect to the case cease and the trial is closed;" and, "after the verdict is received and the jury discharged, * * * the control of the jury, and of the court, over such verdict is at an end. The court cannot alter it, nor can the jury be called to alter or amend it. As well might any other twelve men be called to alter it as the men who were jurors. The office of a juror is discharged upon the acceptance of his verdict by the court." Blum v. Pate, 20 Cal. 72; Sargent v. State, 11 Ohio, 472; Rigg v. Cook, 46 Amer. Dec. 473. The case of People v. Jenkins, 56 Cal. 7, cited by respondent, is not in point. In that case the court, noticing that the form of the verdict was irregular, before the verdict was finally accepted or the jury discharged, directed the jury to retire and reconsider their verdict. That course was entirely proper; and this court, on the appeal, after alluding to the duty of the trial court to see to the form of the verdict, say: "For that purpose the court can at any time while the jury are before it, and under its control, see that it is amended in form so as to meet the requirements of the law." The language hereinbefore quoted, to the effect that the functions of a jury cease with their assent to the recorded verdict, must be construed, of course, as applying to a final assent, followed by a discharge. A court would, no doubt, have the power to direct a jury to correct an informal verdict, although the mistake had not been discovered until after the verdict had been entered upon the minutes, "while the jury are before it and under its control." There might be peculiar circumstances under which questions difficult of solution would arise, but the facts in the case at bar are so broad and well defined as to bring it clearly within the general rule above stated. The case stands, therefore, as though there had been no attempt to revive the defunct jury, or to change the real verdict. The order that "the order directing the verdict to be recorded be also set aside and vacated," does not, in terms, vacate the verdict itself, but if it could be construed as in terms vacating the verdict it would be unauthorized and void.

The judgment must be reversed, however, because the verdict failed to find the degree of the crime. It has always been the statutory law that in a murder case the verdict of guilty must designate the degree of the crime of which the defendant is found guilty; and for many years the Penal Code has provided generally that, "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime." Section 1157. And it has been held here in a number of cases that when the degree is not found by the verdict (when the crime has degrees) the judgment will be reversed, and a new trial granted. People v. Marquis, 15 Cal. 38; People v. Campbell, 40 Cal. 129; People v. Jefferson, 52 Cal. 452; People v. Travers, 73 Cal. 580, 15 Pac. Rep. 293; People v. O'Neil, 78 Cal. 388, 20 Pac. Rep. 705.

Appellant's motion to be discharged was properly denied. While the failure of the jury to find the degree of the crime is an error for which the judgment must be reversed, it no more entitles appellant to a discharge than would any other reversible error committed during the progress of the trial. Appellant asks that the judgment be reversed, and that he be discharged; and contends that, as he did not move for a new trial, no new trial can be ordered. It will be observed that in the cases last above cited—where there was a failure to find the degree of the crime—new trials were ordered, though in most of them a new trial had not been asked by the appellant. Under section 1260, Pen. Code, the appellate court may reverse, affirm, or modify a judgment appealed from, "and may, if proper, order a new trial." It was expressly held in People v. Olwell, 28 Cal. 456, approved in People v. Barric, 49 Cal. 342, and People v. Travers, 77 Cal. 176, 19 Pac. Rep. 268, that—we quote from People v. Travers—"if a defendant in a criminal case is convicted and appeals, and the judgment is reversed, the appellate court may order a new trial, even though the defendant does not move for such new trial, and denies the power of the court to grant it." And the case at bar is clearly one in which it is proper that a new trial should be ordered.

Counsel for appellant argue the question of "once in jeopardy," but that question can arise only after an issue has been made by a plea of "once in jeopardy." It is not necessary, therefore, to discuss that question here, although it may not be out of place to say that the cases last above cited of People v. Olwell, People v. Barric, and People v. Travers are strong authorities against the position taken by appellant on that question. As to other points made, we see no error in giving or refusing instructions to the jury. There are a number of skeleton allusions in the brief to alleged errors in rulings upon the admissibility of evidence, but, as they are not argued or stated, we have not followed up the references to the transcript to see what they are. The judgment is reversed, and a new trial is ordered. The orders appealed from are affirmed.

We concur: **Beatty**, C. J.; **De Haven**, J.; **Sharpstein**, J.; **Paterson**, J.; **Harrison**, J.; **Garoutte**, J.

(3 Cal. Unrep. 489)

CAIN v. CODY. (No. 14,412.)[1]

(*Supreme Court of California.* April 29, 1892.)

REPLEVIN—JUDGMENT—DAMAGES—AMENDMENT OF PLEADING.

1. In an action to recover possession of certain charcoal, and damages for its detention, the verdict was as follows: "We, the jury, * * * find judgment for plaintiff in the following amount, to wit: Value of coal, $546.00; damages in pursuit of recovery of property, $384.00; total, $930.00." *Held*, that the verdict was a general finding that plaintiff was entitled to a return of the property, and a special finding as to value and damages.

2. It was proper to allow damages as compensation for the time and money expended in pursuit of the property. Arzaga v. Villalba, 24 Pac. Rep. 656, 85 Cal. 191, followed.

3. In replevin, upon the introduction of plaintiff's evidence as to the quantity and value of the coal alleged to be withheld, there was no abuse of discretion in permitting an amendment of the complaint so as to allege the detention of a larger quantity of coal, of greater value, and correspondingly increased damages.

Commissioners' decision. Department 2. Appeal from superior court, Mono county; O. F. **Hakes**, Judge.

Action by James S. Cain against M. J. Cody to recover possession of certain personal property and damages for its detention. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

W. H. Virden, (*Reddy, Campbell & Metson*, of counsel,) for appellant. *W. O. Parker*, for respondent.

Vanclief, C. Action to recover possession of personal property, (2,850 bushels of charcoal,) or the value thereof, in case a delivery cannot be had, and $384 damages for the wrongful detention thereof. The defendant denied that plaintiff was owner or entitled to possession of the property, denied that the value thereof exceeded $100, and denied all damages. But he avowed the taking and detention, and justified the same as sheriff, under a writ of attachment at suit of W. T. Elliot against one Hock Chung, alleging that the charcoal was the property of Hock Chung, and subject to the attachment. The cause was tried by a jury, whose verdict was as follows: "We, the jury impaneled to try the case in which J. S. Cain is plaintiff and M. J. Cody is defendant, find judgment for plaintiff in the following amount, to wit: Value of coal, $546; damages in pursuit of recovery of property, $384; total, $930." Upon this verdict the court rendered judgment that plaintiff recover possession of the charcoal described in the complaint, "to wit, 2,850 bushels, more or less," or the sum of $546, the value thereof, in case delivery cannot be had, and the sum of $384 damages for the detention of said personal property, together with plaintiff's costs. No objection to the form or substance of the verdict appears to have been made in the court below until 22 days after the verdict was recorded and the jury discharged.

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[1] Rehearing granted.

1. It is urged by counsel for appellant that the verdict is insufficient, because it fails to find "the right of the plaintiff to the possession of the property," and therefore furnishes no basis upon which the judgment for a return of the property, or for the value thereof in case a return could not be had, can stand. Though informal, I think the verdict may be fairly construed to be a general verdict for the plaintiff, besides separately and specially finding the value of the property and assessing the damages. This general verdict for plaintiff responds to all issues as to which the law does not require a special verdict, and implies a finding that plaintiff was owner and entitled to the possession of the property, since no special verdict to this effect is required in an action of this kind. Etchepare v. Aguirre, 91 Cal. 288, 27 Pac. Rep. 668; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657. The word "judgment" was evidently used by the jury in the sense of the word "verdict."

2. It is contended that the verdict is erroneous, for the reason that the jury allowed as damages compensation for the time and money expended in pursuit of the property. This question was well considered, and decided adversely to the views of appellant in the late case of Arzaga v. Villalba, 85 Cal. 191, 24 Pac. Rep. 656. Whether or not these damages should have been specially pleaded is not involved in this case, since no objection to the evidence thereof was made on this ground in the court below, and no point upon this question is made by counsel here.

3. During the trial, while the evidence for plaintiff as to the quantity and value of the coal was being given, plaintiff moved the court for leave to amend his complaint by inserting 2,850 bushels of charcoal, instead of about 1,500 bushels, and by inserting the sum of $712.50 as the value thereof, instead of $400, and by striking out the sum of $200 damages, and in lieu thereof inserting $384. The court took the motion under advisement until the evidence was closed, but before the case was submitted to the jury the court granted the motion. Before retiring, a juror, from his place in the box, asked the court if plaintiff's motion to amend his complaint was granted, and the court answered that it was. These amendments were not actually engrossed in the complaint until after the verdict of the jury had been rendered and recorded, when plaintiff's counsel asked the court to instruct the clerk to insert them in the complaint. The court so instructed, and the clerk then inserted them according to the order of the court; but the amendment as to the number of bushels of coal does not appear in the copy of the complaint in the transcript. It is insisted that the court erred in allowing these amendments. That it was within the discretionary power of the court to allow these amendments for the purpose of conforming the complaint to the evidence on the part of plaintiff, and that the action of the court in this respect will not be regarded as reversible error unless it appears that the defendant may have been injured thereby, seems to be well settled. Hooper v. Wells, 27 Cal. 35; Bank v. Stover, 60 Cal. 387; Cheney v. O'Brien, 69 Cal. 200, 10 Pac. Rep. 479; Walsh v. McKeen, 75 Cal. 519, 17 Pac. Rep. 673. As to the number of bushels of coal, I think the amendment was unnecessary. The coal sued for was described in the complaint as being all the coal then in two certain buildings, and as being "about 1,500 bushels." The first part of the description, viz., "all the coal then in the two buildings," was sufficient to enable the officer or any person to find and identify the property sued for; and was limited by the last part of the description, "about 1,500 bushels," as it might have been had it been necessary to segregate or distinguish the coal sued for from other coal in the same buildings. Besides, there was no issue as to the quantity or identity of the coal sued for. The pleadings show that each party claims the same coal by the same description, to wit, all the coal in the two buildings. The defendant claims to have rightfully taken possession of it by virtue of writs of attachment and execution. Had the defendant prevailed in the action, he, as against the plaintiff, would have been entitled to the possession of all the coal in the two buildings at the time the action was commenced, even though the complaint had not been amended, and though the quantity had been proved to be 2,800 bushels, "more or less." As to the value of the coal, and as to the amount of damages, the pleadings were at issue before the complaint was amended; and it must be presumed, in the absence of a showing to the contrary, that the defendant was as well prepared as he could have been, with evidence, to reduce both the value and the damages to the lowest possible figure; and consequently that no additional preparation was necessary to meet or disprove the amendments of the complaint as to such value and damages; and as it does not appear that defendant stated to the court any ground or reason for his objection to the proposed amendments, or asked for any postponement of the trial to enable him to procure additional evidence, it is difficult to conceive how those amendments could have been unjustly prejudicial to his defense. On the contrary, so far as material, they appear to have

been in furtherance of justice. Surely no abuse of the discretionary power of the court is made to appear.

4. For reasons above stated, the description of the property in the judgment, being the same as that contained in the complaint, is sufficiently definite.

5. Appellant's points on the admission of evidence on the part of plaintiff are not sufficiently plausible to require special consideration.

6. The instructions given to the jury were quite as favorable to the defendant as he was entitled to ask. The instruction asked by defendant, numbered 4, so far as correct, was embodied in the instruction given numbered 1. If there had been no evidence of a sale from McBride to plaintiff of a part of the coal sued for, the court might have so instructed the jury, as that was a question of law; but if, in the opinion of the court, there was evidence tending to prove such sale, the question as to whether such evidence was sufficient to prove a sale of all the coal, or only a part of it, was the only question that could have been properly submitted to the jury; and since it clearly appears that the evidence tended to prove a sale of all the coal sued for, it follows that, so far as the requested instruction submitted to the jury the question as to whether or not there was any evidence of such sale, it was erroneous, and was properly refused. The requested instruction numbered 6 was properly refused, for the reason (if for no other) that it excluded damages as compensation for time and money expended in pursuit of the property. So far as the requested instruction numbered 8 is correct, it is substantially embraced in the instructions given numbered 3, 6, and 7. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 494)

LILLIS *et al.* v. PEOPLE'S DITCH CO. (No. 13,807.)[1]

(*Supreme Court of California.* April 30, 1892.)

RES ADJUDICATA—CONSTRUCTION OF JUDGMENT—PAROL EVIDENCE—WATER RIGHTS.

1. In an action to enjoin the diversion of "any water" from a river, and the obstruction thereof by "any" dam, defendant claimed a right, by adverse user, to divert "14,400 inches per second, under a four-inch pressure." It was adjudged that plaintiff's cause of action was barred, the court finding specially that defendant had adversely diverted "one hundred cubic feet per second, under a four-inch pressure." *Held*, in a subsequent action by plaintiff to enjoin the diversion of a greater quantity of water than "14,400 cubic inches per second," that defendant was not estopped by the first judgment to claim that it had acquired the right to divert more than that quantity, since the special finding in the first action should be construed to mean that it had a right to 100 miners' feet, equal to 14,400 miners' inches, per second, under a four-inch pressure, the amount intended to be claimed in the answer; and judgment was properly rendered that defendant was entitled to an equivalent quantity, "450 cubic feet of water per second," under the evidence, which showed, in addition to the rate at which the water would flow under such pressure through an aperture of 100 square feet, that defendant, when taking steps to appropriate the water under Civil Code, § 1415, after posting notices claiming 14,400 cubic inches per second under a four-inch pressure, constructed a ditch of sufficient capacity to carry off 777,600 cubic inches, equal to 450 cubic feet, per second, rather than 14,400 cubic inches only.

2. The judgment in the first action being ambiguous, parol evidence as to the capacity of the ditch was admissible to aid in construing it.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Action by S. C. Lillis and others against the People's Ditch Company for an injunction. From a judgment for defendant, plaintiffs appeal. Affirmed.

Brown & Daggett, (*Daggett & Adams*, of counsel,) for appellants. *N. O. Bradley*, *G. E. Lawrence*, and *W. D. Tupper*, (*Bradley & Farnsworth*, of counsel,) for respondent.

VANCLIEF, C. The object of this action is simply to enjoin the defendant (a corporation) from diverting from the channel of Kings river, into its ditch in Tulare county, a greater quantity of water than 14,400 cubic inches per second, on the ground that it had been adjudged by the superior court of that county, in a former action between the same parties, that this defendant, as against the plaintiffs, was entitled to divert only that quantity of water. In their complaint in this action the plaintiffs pleaded the former judgment as an estoppel. Judgment herein was in favor of the defendant, and plaintiffs appeal from the judgment, and from an order denying their motion for a new trial, made on a bill of exceptions, which, among other things, contains a copy of the judgment roll in the former action.

The principal question presented for decision is, what was adjudged in the former action as to the quantity of water to which defendant was entitled? The former action was of the nature of a common-law action on the case, brought by the plaintiffs herein on September 11, 1883, to recover from this defendant damages for the diversion of water from Kings river, to the injury of plaintiffs' riparian rights upon that stream; and, in addition to this, sought equitable relief by injunction against a continuance of the diversion complained of. The plaintiffs' prayer in that action was that plaintiffs recover damages in the sum of $60,000, and that defendant be perpetually enjoined "from diverting any water from the channel of Kings river by means of said ditch or dam, or either of them; and from placing or maintaining in the bed or channel of said Kings river any dam or obstruction; and from interfering in any manner with the free and natural flow of the waters of said stream in their natural channel." The allegations of the complaint in that action, if true, were sufficient to entitle the plaintiffs to all the relief they prayed for. As to the quantity of water diverted, it was alleged that defendant had diverted a large quantity,—all the water,—so that there was none left flowing in the river below the head of defendant's ditch.

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[1] Rehearing granted.

The answer in the former action denied the alleged riparian rights of the plaintiffs; denied that it had diverted any more water from the river than it was entitled to divert; alleged that in 1874 it "acquired the right, and has ever since had, and still has, the right to divert from said river, and to use for the purposes aforesaid, 14,400 inches per second, under a four-inch pressure, of the waters thereof," and that in 1875 it constructed across the river "a dam of sufficient height and strength only to turn into its ditch the quantity of water to which it was and is entitled;" and further alleged a continuous adverse user of its right so acquired during a period of more than five years before the commencement of that action; and further alleged "that the cause of action set forth in plaintiffs' complaint is barred by the provisions of sections 318, 319, Code Civil Proc." Upon the issues as to plaintiffs' alleged riparian ownership of lands on the stream below the point of defendant's diversion, the court found for the plaintiffs. But, upon the issues as to the alleged adverse appropriation and user by defendant, the court found that in January, 1874, "defendant, under the laws of this state, and in conformity therewith, publicly, openly, peaceably, notoriously, and adversely to the plaintiffs and to the whole world, constructed its ditch and dam, as hereinbefore found, and took from the waters of Kings river one hundred cubic feet per second under a four-inch pressure, * * * and diverted the same into its said ditch, * * * and has continued so to divert such water from about the 1st day of January, 1874, down to the time of the commencement of this [former] action." The finding further proceeds to state all the requisite acts and facts to constitute an adverse user from January, 1874, until September, 1883, and concludes as follows: "Wherefore, as conclusions of law, the court finds that plaintiffs' cause of action is barred by the statute of limitations, and that they are not entitled to recover anything, but that defendant is entitled to recover its costs herein, taxed at $382.89. Let judgment be so entered." Accordingly the judgment in the former action was simply "that plaintiffs take nothing by this action," and that defendant recover its proper costs. In the present action the court found as facts that, continuously from 1874 until the commencement of the former action, the defendant diverted from the river, and conducted through its ditch, adversely to the plaintiffs, 450 cubic feet of water per second, and that it never had diverted more than that quantity at any time before the commencement of this action, (June 9, 1888,) "or any greater quantity of water than that which it had always claimed that it appropriated and had acquired the right to divert prior to said year 1884;" and as conclusions of law found "that it is entitled to take and divert from said Kings river, as against plaintiffs, four hundred and fifty cubic feet of water per second; that plaintiffs' cause of action is barred by the statute of limitation; and plaintiffs are not entitled to recover anything, but the defendant is entitled to recover its costs herein incurred. Let judgment be entered accordingly;" and judgment was so entered. The evidence was abundantly sufficient to justify the finding of these facts, and these facts justified the conclusions of law. But appellants claim that the former judgment estopped the defendant from claiming or proving a right to more than 100 cubic feet of water per second, because, they say, the findings of fact in the former action limited defendant's right to 100 cubic feet per second.

Whether or not the former judgment was merely erroneous is not in question here, although, if uncertain, it may be construed for the purpose of ascertaining what was expressly, or by necessary implication, adjudged. Code Civil Proc. § 1908, subd. 2, provides that, in cases of this kind, "the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest." And section 1911 declares, "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." These sections of the Code are in harmony with the weight of authority in other states. Freem. Judgm. § 256. The former judgment was expressly based solely upon the defense that plaintiffs' cause of action was barred by the statute of limitations; and necessarily so, because all other issues were expressly decided in favor of plaintiffs. Besides, this defense is a confession and avoidance of plaintiffs' cause of action.

Section 458 of the Code of Civil Procedure permits this defense to be pleaded by mere reference to the sections pleaded, without stating the facts constituting the defense; which facts, however, are implied in that form of the plea, and, if controverted, must be proved by defendant; and, being new matter constituting a defense, they are deemed controverted. Section 462, Code Civil Proc. The principal fact constituting this defense, thus implied in the plea, and controverted by the implied replication, is the uniform and continuous adverse user by defendant during a period of five years, coextensive with the greatest quantity of water diverted at any time during that period. In other words, the issue raised by the implied replication to the plea extends over and covers all diversions of water by defendant during that period, and a general finding by the court "that plaintiffs' cause of action is barred by the statute of limitations" is sufficient, (Gaslight Co. v. Dameron, 67 Cal. 663, 8 Pac. Rep. 595,) and necessarily implies all that is implied in the plea, viz., all the facts required to constitute a complete defense, including the requisite adverse user to give title to defendant; since a plea of the statute of limitations by mere reference to the sections pleaded, according to section 458, Code Civil Proc., is a good plea of a prescriptive right to the use of water in cases of this kind. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379. That the court denominated this finding a "conclusion of law" is of no consequence; for, conceding that it is a conclusion of law, the Code authorizes it to be pleaded and found as the representative and equivalent of the facts from which it is drawn. The Code makes this an exception to the general rule requiring facts only to be pleaded, for which, perhaps, no sufficient reason is perceptible; yet without doubt the legislature had power to make the exception.

From the foregoing considerations it would seem to follow that it was necessary to the former judgment sustaining the plea of the statute of limitations that the court should have found that the adverse user was commensurate with all diversions of water by defendant during the period necessary to give defendant a prescriptive right, and thereby to complete the defense that plaintiff's cause of action was wholly barred; otherwise the defense was incomplete, and could not have been sustained as to the whole cause of action, but only as to a part of it; in which case the plaintiffs must have recovered, at least, nominal damages. Had the defendant diverted only 100 feet during the whole period of five years' adverse user, but had diverted 200 feet during only the last two years of that period, the plea of the statute could not have been sustained as a defense to the diversion of the additional 100 feet during the last two years.

But for the merely affirmative finding in the former action, that the defendant adversely diverted and used "one hundred cubic feet per second, under a four-inch pressure," it would be clear that the finding "that plaintiffs' cause of action was barred by the statute of limitations" necessarily implies that defendant's adverse user during said period of five years comprehended all diversions by defendant for which it otherwise would have been liable, whether such diversions were at the rate of 100 cubic feet of water per second, as found by the court in the former action, or at the rate of 450 cubic feet per second, as found by the court in this action. But it is contended for appellants that the finding in the former action specially limits the adverse user, and consequently the prescriptive right of the defendant, to 100 cubic feet of water per second, and that this special limitation must prevail over anything inconsistent with it in the more general findings in the same action. Conceding that, as a general rule, specific findings prevail over general findings which are inconsistent with them, I think this case furnishes no occasion for the application of the rule, for the reason, if for no other, that the special finding in the former action, properly construed, is not inconsistent with the general finding that plaintiffs' cause of action was barred by the statute of limitations, or with anything implied in this general finding. That the so-called "special finding" is ambiguous, uncertain, and therefore a proper subject of construction, appears upon its face. It cannot be so construed as to give effect to all its words and phrases of well-defined meaning. Either the phrase "under a four-inch pressure," or the words "cubic feet per second," must be denied any effect; and the question is, which of these shall be rejected?

The answer of the defendant in the former action alleged that in 1874 it acquired the right to divert and use 14,400 "cubic inches" of water per second, "under a four-inch pressure;" and the special finding is that in 1874 "defendant, under the laws of this state and in conformity therewith, * * * took from the waters of Kings river one hundred cubic feet per second, under a four-inch pressure," etc., which is equal to 172,800 cubic inches, and nearly 12 times 14,400 cubic inches, to which defendant alleged it had acquired the right. "The laws of this state," under and in conformity with which the court found that the defendant had acquired the right to one hundred cubic feet per second, must have been those contained in the Civil Code, § 1415, which is as follows: "A person desiring to appropriate water must post a notice in writing, in a conspicuous place, at the point of intended diversion, stating therein: (1) That he claims the water there flowing to the extent of [giving the number] inches, measured under a four-inch pressure; (2) the purposes for which he claims it, and the place of intended use; (3) the means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted."

The rule of measurement prescribed by this section is not by cubic inches, but by square inches, according to the well-known rule of miners' measurement, by which the "four inch pressure" is made an effective factor, which cannot be disregarded. An inch of water, by this rule of measurement, is the quantity that will be forced through an aperture of one inch square by a pressure of water four inches in depth above the aperture. Consequently one foot of water, by this measurement, would be equal to 144 square inches upon a cross section of the stream, and 100 feet would equal 14,400 square inches. Assuming that the head gate, through which the water is to be measured and admitted into the ditch, is 40 feet wide, (which accords with the evidence in this case,) the gate would have to be raised 2½ feet to admit the passage of 100 feet, or 14,400 inches, by the miners' or Civil Code rule of measurement. Then, in order to pass 450 cubic feet of water per second,—the quantity awarded to defendant in this action,—the water would have to flow through the gateway at the rate of 4½ feet per second, which would be equal to a rate of 270 feet per minute, or about 3 miles per hour. Assuming that, under a pressure of 4 inches, the water would flow at this rate, the quantity passing the gate per second would be precisely equal to 14,400 miners' inches, and also to 100 miners' feet. Therefore, if the special findings of the court on the former trial, as to the number of inches and feet of water, are construed to mean miners' inches and miners' feet, those findings will be perfectly consistent with each other and with defendant's answer in that action. Besides, they will not appear to be inconsistent with the findings in this action, since there is no evidence that 100 feet, by miners' measurement, is not equal to the 450 cubic feet per second, to which in this action the defendant was adjudged to be entitled. No attempt appears to have been made at the trial of this action to reduce the "450 cubic feet per second" to miners' feet, nor to reduce the 100 miners' feet to cubic feet per second. The finding that defendant acquired its right to the water under and in conformity with the laws of this state, (Civil Code,) and that the water was to be measured by inches or feet under a four-inch pressure, plainly indicate that the miners' rule of measurement, adopted by the Civil Code, was intended. Yet these were disregarded as meaningless, because inconsistent with the words "cubic feet per second;" and thereby the findings of fact were made inconsistent with each other, and inconsistent with the judgments in both actions. Why not, rather, reject the words "cubic feet per second," and thereby make the findings of fact consistent with each other, and consistent with both judgments? These ends are sufficient of themselves to turn the scale in favor of rejecting the words "cubic feet per second." But there is another circumstance which may be considered favorable to this construction, and which consists of the acts of the defendant, by its agents, under and immediately after the posting of its notice in accordance with section 1415 of the Civil Code, claiming "14,400 cubic inches per second under a four-inch pressure." Instead of constructing a small ditch of a capacity to carry merely 14,400 cubic inches per second, equal to about 8⅓ cubic feet per second, the defendant proceeded to construct a ditch of about 20 miles in length, and of sufficient capacity to carry 777,600 cubic inches per second, equal to 450 cubic feet per second, being of about 50 times the capacity required to carry 14,400 cubic inches per second, yet, presumably, of no greater capacity than required to carry 14,400 miners' inches. Through this ditch defendant continued to divert water to its full capacity, without interruption, for more than five years before the commencement of the former action. These acts show that, by its notice under the Code, the defendant intended miners' inches, and not cubic inches; and the findings of the court in the former action must have been so intended, and should be so construed. It cannot reasonably be presumed that in the former action the court intended to award to the defendant 11 times as much water as it claimed in its answer; yet, by the construction contended for, that court awarded 100 cubic feet per second, which is more than 11 times 14,400 cubic inches per second,—the quantity claimed by the answer. No doubt the intention of the court was to give defendant the equivalent of the number of inches claimed, (14,400,) reduced to feet, (100;) and, construing them to mean miners' inches and miners' feet, the reduction was correct, but, if cubic inches and cubic feet were intended, it was wildly erroneous. The effect of the findings and judgment in the present action is to reject the words "cubic feet per second," in the former findings, and to give effect to the words "under a four-inch pressure;" which, under all the circumstances, I think to be a correct construction of those findings. The parol evidence tending to prove the capacity of the ditch, and the quantity of water actually diverted during the adverse user, prior to the former action, was properly admitted as an aid to the construction of the former judgment, which, upon its face, is ambiguous and uncertain as to the quantity of water awarded to defendant in that action, and it could have had no other effect prejudicial to the plaintiffs. Gray v. Dougherty, 25 Cal. 266; Garwood v. Garwood, 29 Cal. 521; Water Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379. The objection to this evidence improperly assumed that the former judgment was too plain to admit of construction, and that the effect of this evidence was to contradict it. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

DE HAVEN, J. I concur in the judgment affirming the order appealed from.

(94 Cal. 387)

Ex parte GREEN. (No. 20,925.)

(*Supreme Court of California.* April 30, 1892.)

MUNICIPAL ORDINANCE—VALIDITY—IMPRISONMENT FOR NONPAYMENT OF FINE.

Act March 13, 1883, empowered the city of Pomona "to pass ordinances not in conflict with the constitution and laws of the state or of the United States," and to punish the "violation of any ordinance" by "fine or imprisonment or both," the fine not to exceed "three hundred dollars" and the imprisonment not to exceed three months. Const. art. 11, § 11, authorizes any city to make and enforce all police and other regulations not in conflict with general laws. Pen. Code, § 1215, provides that if a judgment is "for imprisonment, or a fine and imprisonment until it be paid," the defendant must be "detained until the judgment is complied with." *Held*, that an ordinance of said city might provide that a violation thereof should be punished by imprisonment "for ten days and by fine of one hundred and fifty dollars," and that, in default of payment of the fine, defendant should be imprisoned "until the fine be satisfied in the proportion of one day's imprisonment for every two dollars of such fine remaining unpaid."

MCFARLAND and PATERSON, JJ., dissenting.

Ex parte Rosenheim, 23 Pac. Rep. 372, 83 Cal. 390, distinguished.

In bank. Petition of Green for a writ of *habeas corpus*. Petitioner remanded.

Westerman & Broughton, for petitioner.

SHARPSTEIN, J. The return of the city marshal of the city of Pomona shows that he holds the petitioner in custody in the city jail of said city under and by virtue of a commitment issued out of the recorder's court of said city, which recites that petitioner was convicted in said court of the crime of misdemeanor, committed in said city, and upon such conviction said court ordered and adjudged that for said offense petitioner be imprisoned in the city jail of said city of Pomona for a period of 10 days and fined $150, and that, in default of the payment of said fine, he be imprisoned in said city jail in the proportion of one day's imprisonment for each and every $2 of said fine until the said fine be wholly satisfied, not exceeding 75 days, and that he be discharged on payment of such proportion of said fine as shall not have been satisfied by imprisonment at the rate prescribed. Then follows the command to said marshal to take and imprison petitioner in said jail 10 days, and also in the proportion of one day's imprisonment for each and every $2 of the fine not otherwise satisfied, not exceeding 75 days, and to discharge petitioner upon payment into court of such remaining portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed.

The misdemeanor of which petitioner was convicted consisted of a violation of section 1 of ordinance 89 of said city, which provides, among other things, that "every person convicted of violating this section of this ordinance shall be punished by imprisonment in the city jail of the city of Pomona for ten days, and by fine of one hundred and fifty dollars, (and the judgment of fine shall direct that, in default of payment of such fine, or any part thereof, defendant shall be imprisoned in the jail of the city of Pomona until the fine be satisfied in the proportion of one day's imprisonment for every two dollars of such fine remaining unpaid.)" If that provision of the ordinance be valid, the judgment, commitment, and imprisonment of petitioner are legal beyond any question. And the contention of petitioner's counsel is that the ordinance, so far as it imposes any imprisonment for a failure to pay a fine, is invalid. All the powers of a corporation are derived from the law and its charter, and it cannot enlarge, diminish, or vary its powers by ordinance or by law. The city of Pomona derives its powers from an act to provide for the organization, incorporation, and government of municipal corporations, approved March 13, 1883, under which that city is incorporated as a city of the fifth class. Power is conferred by that act upon the board of trustees of said city, "to pass ordinances not in conflict with the constitution and laws of the state or of the United States. To impose fines and penalties and forfeitures for any and all violations of ordinances, and for any breach or violation of any ordinance to fix the penalty by fine or imprisonment or both; but no such fine shall exceed three hundred dollars nor the term of such imprisonment exceed three months. To do and perform any and all other acts and things necessary and proper to carry out the provisions of this chapter, and to exact and impose within the limits of such city all other local, police, sanitary, and other regulations as do not conflict with general laws." The power to impose fines is clearly conferred, but no mode is provided for their collection. We think in such a case it is clearly within the power of a municipal corporation to adopt any reasonable mode for the enforcement of the payment of any fine that it is authorized to impose. We think this power is clearly implied in the power to impose a fine. The payment of fines has always been enforced by imprisonment. Section 1215 of the Penal Code provides that, "if the judgment is for imprisonment, or a fine and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with." The provision of the ordinance for the enforcement of the payment of a fine by imprisonment is not in conflict with any general law. In this country, courts have often affirmed the general incidental power of municipal corporations to make ordinances, but have always declared that ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state. 1 Dill. Mun. Corp. 253.

In addition to the powers enumerated in the incorporating act, the trustees of the city of Pomona are authorized "to do and perform any and all other acts and things necessary and proper to carry out the provisions of this chapter, [the chapter relating to municipal corporations of the fifth class,] and to exact and enforce within the limits of such city all other local, police, sanitary, and other regulations as do not conflict with general laws." We can conceive of nothing more necessary and proper for carrying out the provision empowering the board of trustees to impose fines for violations of ordinances than a mode of enforcing the payment of them. Without the power of enforcing the payment of such fines, the imposition of them would be nugatory. The constitution of this state provides that "any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general laws." Const. art. 11, § 11. It is not claimed that the ordinance which petitioner was convicted of having violated conflicts in any manner with any general law. Therefore the power to enforce it is expressly conferred by the constitution, subject, of course, to the rule that the mode of enforcing it be a reasonable one. The whole term of imprisonment fixed by the ordinance is less than three months, and the circumstance that the greater part of the term fixed by the ordinance is conditional is not unfavorable to those who are imprisoned. The option given might, under the incorporating act, have been withheld, and the petitioner have been imprisoned for a longer period than he can be under the ordinance. And yet the petitioner's main objection to the ordinance is that it does not provide for an imprisonment of 3 months, instead of 85 days, with the option of paying a fine, and avoiding 75 of the 85 days of imprisonment. We think the ordinance is clearly within the powers conferred by the incorporating act, and not in conflict with any general law.

In Ex parte Rosenheim, 83 Cal. 390, 23 Pac. Rep. 372, a case which seems to be very much relied on by counsel for petitioner, the court construed a provision of the Penal Code, and held that it did not authorize imprisonment for the nonpayment of a fine where the judgment imposed both imprisonment and fine. In that case the judgment was that the defendant be imprisoned for the full term fixed by the Code, and afterwards imprisoned until the fine should be satisfied, at a specified rate per day. We are not now called upon to construe any such provisions of law as were construed in that case. All that we are required to do in this case is to decide whether the ordinance which petitioner was convicted of violating is a valid one. If valid, the legality of the imprisonment of petitioner is unquestionable. We are not satisfied that the ordinance is invalid; therefore the petition is dismissed, and petitioner remanded.

We concur: BEATTY, C. J.; HARRISON, J.; DE HAVEN, J.

MCFARLAND, J. I dissent. The maximum term of imprisonment prescribed by the ordinance is 10 days, and I do not think that the petitioner can be legally imprisoned longer than that time. The law under which he was tried is not the charter, but the ordinance; and, as that law prescribes 10 days as the maximum term of imprisonment, he cannot, under the general statutory rule, be imprisoned longer than that time under the guise of working out a fine.

PATERSON, J. I dissent. When the legislature said that violations of the ordinances might be punished by "fine or imprisonment or both" it meant to provide for precisely the same kind of punishment it has provided for in a multitude of cases in the Penal Code, where the court is authorized to impose a fine or imprisonment or both. We have held here in several cases lately that the power to impose a fine or imprisonment or both does not include the power to impose a fixed term of imprisonment and a fine, and also imprisonment for nonpayment of the fine. The judgment may be for a fixed term of imprisonment, and a fine to be enforced by execution; but it cannot be for a fixed term, a fine, and imprisonment in satisfaction of the fine. Ex parte Rosenheim, 83 Cal. 388, 23 Pac. Rep. 372; Lowrey v. Hogue, 85 Cal. 600, 24 Pac. Rep. 995. It seems to me that there is an obvious inconsistency between those decisions and the decision in this case. It is said that the trustees are clothed with general authority to enforce all municipal regulations, and that imprisonment is a common and not an unreasonable mode of enforcing payment of a fine. The same thing could have been said in the Rosenheim and other cases; but the question there considered—as it is here—is not as to the reasonableness of the method of enforcing payment or satisfaction of the fine, but the power of the court to impose the additional penalty. I am unable to appreciate the force of the suggestion that, the whole term of imprisonment being less than three months,—the maximum term of imprisonment allowed by the charter,—the petitioner cannot complain. The legislature has provided that the penalty for battery shall be a fine not exceeding $1,000, or imprisonment in the county jail not exceeding 6 months, or both. Lowrey was convicted of battery, and was sentenced to serve a term of 30 days and pay a fine of $200, with the usual alternative of imprisonment, until the fine should be paid at the rate of one day for every dollar thereof. If he had remained in jail under the judgment, according to its terms, until the fine was satisfied, the imprisonment would not have exceeded the maximum term which the justice might have imposed; and yet we held that the alternative clause was void. Lowrey v. Hogue, supra. I think the same thing should be done here.

(94 Cal. xvii)

Ex parte SMITH. (No. 20,926.)

(*Supreme Court of California.* April 30, 1892.)

In bank. Petition of Smith for a writ of *habeas corpus*. Petitioner remanded.

Westerman & Broughton, for petitioner.

PER CURIAM. This case presents the same general questions which were involved in Ex parte Green, (No. 20,925,) 29 Pac. Rep. 783, the decision in which has just been rendered, and upon the authority of that case the petition is dismissed, and the petitioner remanded.

(94 Cal. 399)

SAN JOAQUIN LAND & WATER CO. v. BEECHER *et al.* (No. 14,239.)

(*Supreme Court of California.* April 30, 1892.)

CORPORATIONS—CONTRACT PRELIMINARY TO INCORPORATION—CONSTRUCTION—AUTHORITY OF AGENT—JUDICIAL OPINIONS—DICTA—SUBSTITUTION OF PARTIES.

1. By an instrument preliminary to incorporation the subscribers agreed to take the number of shares set opposite their names respectively, and to pay 20 per cent. of the par value of the shares so subscribed to one W. By the same instrument the subscribers appointed defendants and another as their agents and as the agents of the corporation to be formed, with authority to purchase property for the corporation, and to draw from W. the money paid to him, and to use such money in paying for the property purchased. *Held*, that defendants and their colleague were authorized, as agents of the subscribers, to negotiate for the purchase of property until the formation of the corporation, when their agency for the subscribers would cease, and thereafter they should act for the corporation.

2. Such instrument did not give defendants and their colleague the custody of the money paid to W.

3. In a prior action by W. for the recovery of the 20 per cent. agreed to be paid by the subscribers, to which action the corporation was not a party, any statement in the opinion rendered by the supreme court on appeal thereto, that the corporation had no right to the custody of the money collected by W., was *dictum* binding neither on the court nor on the corporation.

4. In an action by the corporation against W. for the money collected by him as money held by him for plaintiff's use and benefit, where defendants, who had repudiated their agency for plaintiff, were substituted as defendants for W., the substitution of their coagent also was not necessary for the determination of plaintiff's right to the money.

Department 1. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by San Joaquin Land & Water Company against F. M. West, for whom J. L. Beecher and George Gray were substituted. Judgment for plaintiff. Defendants appeal. Affirmed.

E. S. Pillsbury and *W. L. Dudley*, (*Gordon Blanding*, of counsel,) for appellants. *Baldwin & Campbell*, *S. D. Woods*, and *P. W. Bennett*, for respondent.

HARRISON, J. The controversy involved in this action arises out of the construction to be given to the terms of an instrument executed between the subscribers thereto for the incorporation of the plaintiff, and preliminary to such incorporation. The instrument itself was before this court in the case of West v. Crawford, 80 Cal. 19, 21 Pac. Rep. 1123, and is there set out at length. It was then held that West was authorized to collect in his own name 20 per cent. of the amount that the parties to that instrument had agreed to subscribe to the capital stock of the plaintiff, by reason of their express agreement therein to pay it to him. After that decision the subscribers paid this 20 per cent. to West, and at the commencement of this action he had in his hands of the amount so collected by him, $35,861.25, for the recovery of which the plaintiff brought this action, as money had and received by him to and for its use and benefit. After the commencement of the action, West, under the order of the court therefor, paid the money to the clerk of the court, to be held subject to the order of the court, and the appellants were substituted as defendants in his place, and answered the complaint. Upon the trial of the issues the court rendered judgment in favor of the plaintiff, from which the defendants who were substituted for West have appealed.

1. The agreement in question is of that character which is not unfrequently made by the subscribers to a corporation prior to its actual incorporation, and as preliminary thereto,—its object being for their mutual benefit and protection until the organization of the corporate body, and also for the ultimate benefit of the corporation. Upon the formation of the corporation such an agreement, with its advantages and rights, inures to the benefit of the corporation, irrespective of any agreement or want of agreement to that effect, and notwithstanding it may contain special provisions for carrying its own terms into execution. By the express terms of this instrument West was simply "the agent to collect the amount" which should become due to the plaintiff by virtue of the subscription to its capital stock which the parties to the instrument should make in pursuance of their agreement. By the instrument itself the subscribers agreed to "take," *i. e.*, to subscibe for, the number of shares set opposite their names respectively, and "to pay twenty per cent. of the par value of said shares so subscribed, and that they would pay 'the same' to West in five days after the articles of incorporation were filed. The only money which the subscribers agreed to pay to West was for the stock which they should subscribe for to the plaintiff, and West was simply constituted the 'agent' for the corporation, to collect the amount which should become 'due' under their subscription, and, after its collection, to hold it for the use and benefit of the corporation. By the same instrument the subscribers appointed the appellants, together with one Shippee, as their 'agents,' and 'the agents of the corporation so to be formed,' with authority to 'negotiate for the purchase' of property 'for said corporation,' and to draw from West any or all moneys paid to him, 'and use said money for paying for same.'" Giving to this language its reasonable construction, it was an authority to these three individuals, as agents of the subscribers prior to the organization of the corporation, to make negotiations for the purchase of the property, and that, upon the formation of the corporation, their agency for the subscribers should cease, and thereafter they should act for the corporation. They could not be the agents of the subscribers and of the corporation for the same purpose at the same time, inasmuch as the interests of the subscribers as individuals would be adverse to the interests of the corporation. The instrument does not provide that the appellants, with Shippee, should at any time be the custodians of the money collected by West. They were only to "draw" from him such money as they might need to use in paying for any property that they should purchase for the corporation; and, as it is not claimed that they have negotiated for the purchase of any property for the corporation, there was no occasion for them to draw any of the money from West, or for him to deliver it to them. They, as well as West, were at all times after the incorporation of the plaintiff only its "agents," and, having no interest coupled with their agency, it was competent for the plaintiff to remove them at any time, and appoint other agents in their place, or itself assume the custody and disposition of the money. The finding of the court that upon the incorporation of the plaintiff the appellants not only ceased to act as the agents of the subscribers, but that, "before any of the moneys were paid to West, they repudiated such agency, and refused to act under said appointment, and wholly abandoned the same," fully established the right of the plaintiff as against their claim to the custody of the money.

The appellants, however, contend that the court below in its judgment disregarded the construction given to the agreement by this court in its opinion in the case of West v. Crawford, supra; and that it was then held that the plaintiff herein had no right to the custody of the moneys which might be collected by West under that agreement. While there is some language in that opinion that upholds this contention, the opinion must be construed with reference to the case then before the court for its determination. That was merely whether West could maintain an action for the recovery of the 20 per cent. agreed to be paid by the subscribers, and his right to maintain such action was upheld upon the ground that the subscribers had made an express promise to pay it to him at a fixed date after the filing of the articles of incorporation. The only parties before the court were West and some of the subscribers, and the ultimate right to the custody of the money was not involved in the action. For the purpose of meeting the argument of the appellants therein that the money belonged to the corporation, and could be collected only by it in the manner provided by statute for collecting assessments, it was stated in the opinion that it did not appear from the agreement that the corporation would ever be entitled to receive the money. It was not intended thereby to preclude the corporation from asserting its right to the money, nor could any statement in the opinion have that effect. The corporation was not before the court, and, as its right to the money had not been submitted by it to this court for determination, it could not be estopped by any statement in the opinion from subsequently asserting such right, and any statement in the opinion respecting its right to the money would be only a *dictum*, and not binding either upon the court or the corporation.

2. It was not necessary that Shippee should have been made a party defendant. The action was brought originally against West to recover certain moneys which had been collected and were held by him for the use and benefit of the plaintiff. This money was paid into court, and the appellants were substituted as defendants in place of West, and in their cross complaint they ask that the money be paid to them alone. Inasmuch as West held the money for the use and benefit of the plaintiff, he could not, by paying that money into court, change or diminish the right of the plaintiff to receive it, nor was its right in any respect affected by the substitution of the appellants as defendants in the place of West. The appellants, after having repudiated their agency, cannot claim that Shippee's presence in court was essential to a determination of the plaintiff's right. Shippee and the appellants are in no respect trustees under the instrument for the purpose of carrying into effect any of its provisions. There was no trust created by the instrument other than such a trust as always exists between a principal and his agent, nor do the moneys in question constitute a trust fund to be disposed of under the directions of a court of equity. They are simply moneys belonging to the plaintiff, and which it has the right at any time to demand from its agent. The judgment and order are affirmed.

We concur: GAROUTTE, J.; DE HAVEN, J.

94 Cal. 139

RIMMER v. BLASINGAME *et al.* (No. 14,579.)

(*Supreme Court of California.* March 29, 1892.)

FORCIBLE ENTRY AND DETAINER—DAMAGES.

Plaintiff in an action of forcible detainer alleged her possession of certain land, and entry of defendants in her absence. She also alleged a demand and refusal of surrender, and that the defendants "have ever since said demand refused, and they still refuse, to surrender the same to plaintiff." The complaint claimed restitution, damages, and that damages be trebled. Defendants denied plaintiff's possession, but admitted their entry and detainer of possession till five days after demand, and denied damage; thus putting plaintiff's possession and the question of damage alone in issue. *Held*, that a verdict for plaintiff entitles her to a judgment for treble the amount of the verdict.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county.

Action by Elizabeth Rimmer against A. A. Blasingame and another for damages and treble damages for forcible detainer of land and premises. Judgment for plaintiff. Plaintiff appeals. Damages trebled.

O. L. Abbott, for appellant. *E. D. Edwards*, for respondents.

TEMPLE, C. This is an action of forcible detainer. After stating her possession of the demanded premises, plaintiff avers: "That on or about the 10th day of January, A. D. 1890, during the temporary absence of plaintiff from said land, the defendants above named, without the consent and against the will of plaintiff, entered upon the said real property, the above-described parcel or tract of land, and took possession and occupancy thereof, and have ever since retained and had, and they still retain and have, possession and occupancy of all of said tracts or parcels of land. That on the 4th day of March, A. D. 1890, of the said defendants the plaintiff made demand for the surrender forthwith to her of the said tracts or parcels of land, and of the possession and occupancy thereof; but upon the said demand so as aforesaid by plaintiff made for such surrender, the said defendants refused, and they have ever since said demand refused, and they still refuse, to surrender the same to plaintiff, the former occupant thereof." She also alleges that the defendants herded on the land large bands of sheep, and that she was damaged in the sum of $2,000. She asks judgment for restitution, for damages, and that the damages be trebled. The defendants answered, denying the alleged possession of plaintiff, but admitting their entry upon the land, and that they retained possession for about three months, up to about March 10, 1890, and no longer. They admit herding sheep upon the land, but deny the damage. The case was tried by a jury, which found a verdict as follows: "We, the jury, find for the plaintiff in the sum of $162.75." Upon this verdict, judgment was entered for plaintiff for $162.75, the amount of the verdict. From this judgment the plaintiff appeals, without a bill of exceptions, and makes the point that the judgment should have been for three times the amount of the verdict, for restitution of the premises, and for costs.

The respondents claim that the complaint is insufficient to constitute an action for forcible detainer, because it is not expressly averred that defendants refused to surrender possession within five days after demand. A demand made March 4th is alleged, and that defendants refused, and have ever since said demand refused, and still refuse, to surrender, etc. The complaint was verified September 3, 1890, and filed September 6th of that year. It is alleged, therefore, that defendants continued to refuse to surrender possession up to September 3d. This is a sufficient allegation. We do not concede that an action commenced under the provisions of the Code in reference to forcible or unlawful entry or detainer can be converted into an action for trespass; but, if so, we hold this complaint sufficient for unlawful entry and forcible detainer. The answer admits the entry, and that for a time the defendants held possession. It was something more, therefore, than a mere trespass. The only real issues were whether plaintiff had the actual possession at the time of the entry, and as to the amount of damages. The verdict is a finding of these issues in favor of the plaintiff. She was plainly entitled to a judgment for three times the amount of the verdict, for restitution of the premises, and for costs. The judgment should be so modified, and we so advise.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the cause is remanded, with directions to modify the judgment in accordance with the views expressed; the plaintiff's costs to include the costs of this appeal.

(94 Cal. 494)

Yost v. Commercial Bank of Santa Ana. (No. 14,491.)

(*Supreme Court of California.* May 10, 1892.)

Chattel Mortgages — Sufficiency of Certificate — Pleadings — Setting Out Exhibits in Several Counts.

1. Under Civil Code, § 2957, which provides that a chattel mortgage shall be void against creditors unless accompanied by an "affidavit that it is made in good faith," an affidavit to a chattel mortgage was sufficiently signed, "W. K. J., Secretary," without other words descriptive of official character, where the body of the certificate recited that it was made to "W. K. J., secretary of * * *, the mortgagee in said mortgage named."

2. Where a note and mortgage are pleaded and set out in one paragraph of the answer, they may be counted on in following paragraphs by reference, without again repeating them.

Commissioners' decision. In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by Charles Yost against the Commercial Bank of Santa Ana to recover personal property, and damages for the detention thereof. Defendant had judgment, and plaintiff appeals. Affirmed.

Chas. S. McKelvey, for appellant, cited, as to the sufficiency of the certificate, Hardware Co. v. Sullivan, (Mont.) 16 Pac. Rep. 588; Baker v. Power, Id. 589; Leopold v. Silverman, Id. 580.

Victor Montgomery, for respondent.

Foote, C. This appeal is taken from a judgment in favor of the defendant, and comes here upon the judgment roll alone. From the pleadings and findings, it appears that T. H. Owens and J. M. Edington for several years had been partners in the business of cultivating and raising barley on the San Joaquin ranch, in the county of Orange; that the land on which a certain crop of barley was raised, involved in this action, was leased by Owens alone, and that Edington was a silent partner; that Owens obtained a loan of $2,000 from the defendant, a banking corporation, and, to secure his note therefor, executed a chattel mortgage on the crop then growing on the leased premises. This money was used in raising the crop. Afterwards, on the 12th of September, 1889, both partners made an assignment in writing of all their right, title, and interest in the crop heretofore mentioned to one F. K. Ludlow, which instrument was duly certified and acknowledged so as to entitle it to be recorded in the proper office, where it was actually recorded on the next day. This assignment stated that it was subject to the chattel mortgage to the defendant. Owens never paid the money due on the note secured by the chattel mortgage; and on the 21st of September, 1889, Ludlow, the assignee, gave his assent whereby the defendant received possession of the growing crop, threshed, harvested, and sold it, and applied the proceeds as directed in the chattel mortgage. After this, Owens & Edington became voluntary insolvents under the statutes of this state, and their assignee brought this action for the recovery of the possession of the crop of barley in sacks, and for damages for its detention. The defendant corporation answered, setting up three defenses: The *first*, a general denial. The *second*, that the chattel mortgage had been executed by Owens for money loaned him; that he alone was known to the bank as the lessee of the land on which the crop was grown, and that the borrowed money was used to make the crop, and that the debt remained unpaid, and that the crop was sold under the mortgage in accordance with its provisions, and the proceeds applied by the defendant to the payment of the debt. The *third* defense set out facts as to the assignment to Ludlow, etc., which we have heretofore stated, and which, in our judgment, amounted to an assertion of a ratification by the other partner, Edington, prior to the insolvency of the firm, of the acts of the partner Owens in his dealing with the bank, known to it as the lessee of the land on which the crop mortgaged was grown. The answer was demurred to, and it is claimed by the appellant that the demurrer to the second and third defenses of that pleading should have been sustained.

Passing the question as to whether the second defense was demurrable or not, we think it plain that the third defense contains a statement of facts which show a complete bar to the action. We do not think that there is anything in the point that the certificate required by section 2957 of the Civil Code is defective. The body of the certificate shows that the "W. K. James, Secretary," who signed the certificate, was the "secretary of the Commercial Bank of Santa Ana, the mortgagee in said mortgage named." Thus it sufficiently appears that "W. K. James, Secretary," was the secretary of that bank, and it was unnecessary to repeat after "secretary," as appended to his signature, what was stated in the body of the certificate; that is, that he was secretary to the bank, mortgagee, etc. The cases cited from Montana are not in point here.

We think ratification is sufficiently pleaded in the third defense of the answer, and the probative facts found following the pleading, from which the ultimate fact of ratification by the other partner necessarily must be inferred, and this is sufficient from which to draw the conclusions of law which support the judgment. Hayne, New Trial & App. § 292. Hence the point made that certain of the findings are not within the issues made by the pleadings, and should be disregarded, is without merit. Nor do we perceive any force in the argument made by the appellant, that the facts are insufficient, as set up in the third ground of defense, because, as claimed, the note and mortgage are only referred to therein as being set out in the second defense, and are not set out in the third defense. If the note and mortgage had been made Exhibits A and B to the answer, and referred to as such in the third or any of the defenses stated, we do not see why that would not have been sufficient. No more difficulty or inconvenience in looking at them could result from the method adopted here, of referring to the note and mortgage as set out in the second defense, than in the method above adverted to. The practice condemned in Pennie v. Hildreth, 81 Cal. 127, 22 Pac. Rep. 398, is not that which is here involved. This is no averment "in subsequent counts that certain pargraphs of the first count are true." The case cited is therefore not in point.

We deem it unnecessary to notice any other point made, and we see no reversible error in the record, and advise that the judgment be affirmed.

We concur: Belcher, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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94 Cal. 120

California Southern Hotel Co. v. Callender. (No. 14,432.)

(*Supreme Court of California.* March 28, 1892.)

Findings—Presumptions.

1. In an action to recover the balance alleged to be due on a subscription to a corporation, the trial court found that defendant "recognized the validity of the corporation," and "acquiesced" in its expenditures "by paying" the first two calls on his subscription, and then concluded in law that defendant "has waived any defense he might otherwise have had to said subscription by reason of the manner of plaintiff's incorporation." *Held* that, the findings not being inconsistent with the legal definition of "waiver," it must be presumed that there was sufficient evidence to justify the conclusion of law.

2. Defendant agreed in the contract of subscription to the corporation that he would pay his subscription upon the call of the board of directors thereof. The complaint alleged and the court found his ownership of the number of shares subscribed for by him. *Held*, that it was unnecessary to defendant's ownership that a stock certificate should have been issued to him, it not being due till his subscription is fully paid, nor that the directors should have levied assessments on the stock, and there is a good cause of action on the contract for the balance of the subscription.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by California Southern Hotel Company against C. R. Callender to recover balances of subscription due upon a contract of subscription thereto. Judgment for plaintiff. Defendant appeals. Affirmed.

Venable & Goodchild, for appellant. *J. M. Wilcoxon*, for respondent.

Vanclief, C. The plaintiff is a California corporation, to whose capital stock the defendant subscribed $5,000 before its organization, that being 50 shares of the 1,000 shares into which the capital stock of $100,000 was divided. After having paid $2,000 of this subscription, the defendant refused to pay any part of the remainder, and this action was brought to recover from him the remaining $3,000. The cause was tried by the court, and judgment was given in favor of the plaintiff for the sum demanded. The defendant appeals from the judgment on the judgment roll, without bill of exceptions, and contends that upon the findings of fact the judgment should have been given for the defendant. The following is a copy of the written agreement to and upon which defendant subscribed for the stock: "We, the undersigned, do hereby agree to and with each other that we will organize and form a corporation, under the laws of the state of California, for the purpose of erecting, building, and owning an hotel building in the city of San Luis Obispo, county of San Luis Obispo, state of California, and for the purpose of purchasing and owning all such real and personal property as may be necessary to be used in connection with said hotel building; and we agree that the capital stock of said corporation shall be one hundred thousand ($100,000) dollars, divided into one thousand (1,000) shares, of the par value of one hundred dollars each; and we agree to and with each other that we do respectively subscribe for the number of shares of the stock of said corporation as are set after our respective names, and that we will pay for the same the said par value thereof at such times and in such manner as may be determined by the board of directors of the said corporation, to be hereafter chosen. And we further agree that whenever seventy thousand ($70,000) dollars of said capital stock has been subscribed for, a meeting shall be called for the purpose of electing a board of directors, and taking such steps as are required by law to form the said corporation, and that at such meeting the owners of a majority of said subscribed stock shall constitute a quorum, and are authorized to elect said board of directors, and transact any business necessary to fully complete the organization of the said corporation. That the number of directors and the term of said corporation shall be determined at such meeting." Here follows the list of subscribers, among whom is the defendant for "fifty shares,—$5,000." These subscriptions amounted to 772 shares. Among them was one of the Pacific Coast Steamship Company and Pacific Coast Railway Company for 100 shares, payable in freightage. This subscription purports to have been made through the agency of Goodall, Perkins & Co. Another of the subscriptions is by Edwin Goodall for 125 shares, partly payable in a block of land, if accepted by the company, estimated at $7,500, and the balance of $5,000 in cash. The court finds that Goodall, Perkins & Co. were not authorized to subscribe for the steamship and railway companies, but that the subscriptions of these companies, and also that of Edwin Goodall, entered into the computation, and constituted a part of the 772 shares subscribed before the organization of the corporation. The court further found that the corporation was organized on August 17, 1887, and that the articles of incorporation included as subscribers the name of the Pacific Coast Steamship Company for 100 shares, amounting to $10,000, and that of Edwin Goodall for 125 shares amounting to $12,500, without conditions; and further found "that at the preliminary meeting of stockholders, held for the purpose of considering whether or not the incorporation aforesaid should be organized and formed, defendant was not present, and did not vote for the shares subscribed for by him as aforesaid, and did not acquiesce in or agree that the incorporation should be formed on the subscription aforesaid. * * * That Edwin Goodall, for himself and for the Pacific Coast Steamship Company, united in the call for the meeting of the stockholders last aforesaid, and each were represented at said meeting to the full amount of the stock subscribed for by them as aforesaid by Edwin Goodall, and he voted and acted at said meeting for the full amount of the stock subscribed for by them, viz., 225 shares of the value of $22,500; and each has ever since the incorporation of the plaintiff been, and now is, a stockholder in said corporation for the full value and amount of the stock aforesaid subscribed by him." And further found that the subscriptions of the steamship company and Goodall were accepted and acted upon by plaintiff, and have been fully paid to the company. And further found that "defendant has at all times recognized the validity of the corporation aforesaid by paying $2,000 of said original subscription of $5,000, and not otherwise, and has never dissented from or protested against any of its acts. That defendant has, since said corporation was formed, acquiesced in the building of the hotel mentioned in said agreement, and furnishing the same, and the incurring of debts and expenditures of money therefor, by paying said $2,000 of said subscription to said corporation, and not otherwise. * * * That a large indebtedness has been incurred by plaintiff, and large sums of money expended, relying upon the subscriptions aforesaid." And further found (under the head of "conclusions of law") that the defendant "has waived any defense he might otherwise have had to said subscriptions by reason of the manner of plaintiff's incorporation." The findings show that calls were made upon the subscribers, including the defendant, as follows: November 16, 1887, 20 per cent., payable November 25th; March 17, 1888, 20 per cent., payable March 25th; May 23, 1888, 20 per cent., payable June 1st; 20 per cent., payable June 15th; and 20 per cent., payable July 1st.

1. The first and principal point made by appellant is that the corporation was organized before there was a valid subscription of $70,000 of the capital stock, contrary to the agreement subscribed by defendant, inasmuch as Goodall, Perkins & Co. subscribed for the steamship company and railway company without authority, and, in part, conditionally. It appears, however, that these subscriptions were changed before the corporation was organized, the railway company being dropped, and the subscription of the steamship company being substituted for that of both of these companies, and for the full amount thereof, and the subscription of the steamship company and that of Goodall being made unconditional, and so entered in the articles of incorporation. It is also found by the court that Goodall, for himself and for the steamship company, united in the call for the meeting of the subscribers for the purpose of considering the propriety of organizing the corporation; that Goodall represented all their stock at that meeting; that he signed and acknowledged the articles of incorporation; and that the steamship company and Goodall paid all the calls upon all the stock subscribed by them. It is not expressly found, nor, it seems to me, by necessary implication, that Goodall was not authorized by the steamship company to join in the call for the meeting, to make the change in the subscription, and to represent the steamship company in the organization of the corporation; but only that the original subscription by Goodall, Perkins & Co. for the two companies was without authority. If Goodall was authorized by the steamship company to represent it in all these matters, the corporation was properly organized, according to the subscription agreement, and the defendant has no ground of complaint. As, however, the findings are not quite clear upon this point, and as I think the judgment should be affirmed on another ground, which does not involve any doubtful question of construction of the findings, the decision of the case need not rest upon this point.

2. The court found that the defendant had "waived any defense he might otherwise have had to said subscription by reason of the manner of plaintiff's incorporation." Says Mr. Cook, in his book on Stock, Stockholders, and Corporation Law, (section 181:) "A subscriber may waive the defense that the full capital stock of the corporation has not been subscribed. This waiver may be either express or implied from the acts or declarations of the subscriber." Again, at section 186, the same author says: "Where the

subscriber made his contract of subscription previous to, and in anticipation of, the incorporation, and does not, by his subsequent acts, acquiesce in the mode of incorporation, he may set up that the corporation has not been incorporated, and that he is not liable." At section 198 he says: "A subscriber to stock in a corporation may waive any defense he may have to the subscription. The waiver may be express, or it may be by implication from the acts and declarations of the subscriber. Thus a payment of a call with full knowlege of the defense is held to be a waiver; and any act indicating a clear intent to abide by or accept or pass over an objection which the subscriber might make will be held to be a waiver." See authorities cited in notes to above quotation. Thompson, Liab. Stockh. § 120; Taylor, Corp. § 519; and Railroad Co. v. Johnson, 64 Amer. Dec. 307. In Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. Rep. 244, Mr. Justice MITCHELL, speaking for the court, said: "Whether there has been a waiver is a question of fact. It may be proved by various species of evidence, by declarations, by acts, or by forbearance to act." Other authorities say it is a mixed question of law and fact, but that each case must depend upon its own peculiar circumstances and surroundings. "It is a question of intention, and a fact to be determined by the triers of fact," (Okey v. Insurance Co., 29 Mo. App. 111; Ehrlich v. Insurance Co., 88 Mo. 249; Drake v. Insurance Co., 3 Grant, Cas. 325; Witherell v. Insurance Co., 49 Me. 200;) "and, though the waiver must be intentional, and clearly proven, the sufficiency of the evidence relating thereto is for the jury." Insurance Co. v. Schollenberger, 44 Pa. St. 259. The only question of law that can be involved in the question of waiver must relate to the legal definition of the word. For example, a jury might be properly instructed as matter of law that a waiver must be voluntary, and that it implies a knowledge of the right, claim, or thing waived; yet whether it was voluntary, and whether the party had knowledge of the right or thing waived, are still questions of fact to be submitted to the jury. In this case the court found the ultimate fact that defendant had waived any right he may have had to object to the organization of the corporation. This finding implies the defendant's knowledge of the right waived and that this waiver was voluntary, since these attributes are included in the legal definition of a waiver. Nor is this conclusion affected by the fact that the court also found certain probative facts, the only tendency of which was to prove the waiver. That defendant recognized the validity of the corporation, and acquiesced in the building of the hotel, etc., "not otherwise" than by paying the first two calls on his subscription, and never dissenting or protesting against any of the acts of the corporation, are in no degree inconsistent with the waiver found, as they do not tend to prove that the waiver was involuntary, or without defendant's knowledge of his alleged right. Conceding, therefore, that the probative facts (unnecessarily) found are insufficient to prove a waiver, yet, as the record contains no part of the evidence it must be presumed that there was sufficient evidence to justify the finding of a waiver.

3. It is contended that this action cannot be maintained "on the theory that defendant is a stockholder, and, as such, liable to the corporation for assessments," for the alleged reason that it does not appear "that the corporation ever awarded any stock to defendant, or entered his name on its stock book, or anything to show that defendant was a stockholder." It is alleged in the complaint, and expressly found by the court, that defendant was the owner of 50 shares of stock at all the times when the calls were made. It was not necessary to defendant's ownership of the stock that a certificate for the stock should have been issued to him, (Mitchell v. Beckman, 64 Cal. 121, 28 Pac. Rep. 110, and authorities there cited;) nor was the corporation bound to issue such certificate until the subscription price was fully paid; nor was it necessary to a recovery on the contract of subscription that the directors of the corporation should have levied assessments upon the stock in the mode prescribed by the Civil Code. By the contract of subscription the defendant agreed to pay upon the call of the board of directors, viz., "at such time and in such manner as may be determined by the board of directors of the said corporation, to be hereafter chosen;" and the action was properly brought upon this contract. West v. Crawford, 80 Cal. 27, 21 Pac. Rep. 1123. Water Co. v. Herberger, 82 Cal. 600, 23 Pac. Rep. 134; Ang. & A. Corp. § 549. I think the judgment should be affirmed.

We concur: FITZGERALD, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

94 Cal. 166

WILSON v. CALIFORNIA CENT. R. Co. (No. 14,376.)

(*Supreme Court of California.* March 30, 1892.)

CARRIERS OF FREIGHT—LIABILITY AFTER STORAGE—NOTICE—ACTION ON CONTRACT OF AFFREIGHTMENT — NEGLIGENCE — BURDEN OF PROOF—REMOVAL OF GOODS—REASONABLE TIME.

1. A trial judge may, in a case tried by his predecessor in office, grant a new trial on the ground that the verdict was against the weight of conflicting evidence.

2. Failure of a carrier to deliver goods on demand, after storage, without lawful excuse, is a breach of the carrier's original contract, for which suit may be brought on that contract.

3. Under Civil Code, § 2120, providing that if for any reason a carrier does not deliver freight to the consignee or his agent, personally, he must give notice to the consignee of its arrival, and keep the same in safety on his responsibility as a warehouseman, until the consignee has had a reasonable time to remove it, storage of the goods does not create a new contract, which must be pleaded and distinguished from the original contract in order to recover the goods or their value.

4. Under said section, to reduce the degree of care of the carrier to that of a warehouseman on arrival and storage of the goods, it is necessary that notice be given.

5. Pol. Code, §§ 3152-3157, having been in force before the passage of act of March 30, 1874, (Amendments to Codes, 1873-74, p. 247,) anything in said sections inconsistent with Civil Code, § 2120, relative to the obligations of carriers, is repealed; said section 2120 being the original section as amended by said act of 1874, section 286 of which provides that all provisions of law inconsistent with the provisions of that act are thereby repealed.

6. Plaintiff having sued defendant on its original contract as carrier for failure to deliver the goods, and defendant having admitted the contract, and then alleged that the goods were safely carried to the point of destination, and there stored in its warehouse under circumstances that reduced its obligation to that of warehouseman, and that the goods while so stored were destroyed by fire, "without negligence or fault on its part," the burden of proving the defense, including the loss without defendant's negligence or fault, is on defendant.

7. Where household goods were shipped from Indiana to California, and the owner, being taken sick on the way, wrote to the freight agent a letter, which he received two days after the arrival of the goods, stating that she was sick, and asking him to store the goods in a fire-proof warehouse, and the evidence for plaintiff tended to prove that the only attempt at giving plaintiff notice of the arrival of the goods was a letter in answer to hers, which was defectively addressed, and by reason thereof was not received, but was returned to the sender two months thereafter, an instruction that the reasonable time within which plaintiff should have removed her goods was limited to three months from the date of their arrival was properly refused.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Action by M. Wilson against the California Central Railroad Company for goods shipped and not delivered. Verdict and judgment for plaintiff. There was an order granting a new trial, and plaintiff appeals. Affirmed.

Wells, Monroe & Lee, for appellant. *A. Brunson* and *Curtis D. Wilbur*, for respondent.

VANCLIEF, C. Action to recover from defendant the value of certain household furniture which it is alleged the defendant, as a common carrier by railroad, in consideration of a certain sum paid it by plaintiff as freightage, *pro rata itineris*, agreed safely to carry from Indianapolis, Ind., to Los Angeles, Cal., and to deliver to the plaintiff or order at the latter place, but failed and refused to do so according to said agreement, whereby said furniture was wholly lost to plaintiff, to her damage in the sum of $4,000. The answer of the defendant, for want of information or belief, denies that the furniture was worth $4,000 or any sum, and then proceeds as follows: "It denies that it did not safely carry said goods pursuant to its agreement to plaintiff's damage in the sum of $4,000, or in any other sum whatever, but, on the contrary, it alleges that it safely carried said goods from the town of Barstow, where it received the same of the Atlantic & Pacific road, and delivered the same in the city of Los Angeles, at its warehouse in said city, where said goods were received on the 19th day of July, 1887, and were on the same day unloaded into the warehouse of this defendant at said city, and the plaintiff in this action was on said 19th day of July, 1887, duly notified of the arrival of said goods, but said plaintiff wholly neglected to remove said goods from said warehouse, and negligently permitted them to remain therein until the 28th day of October, 1887, at which time said warehouse, with its contents, including the goods mentioned in this complaint, was wholly and totally destroyed by fire, and that without the carelessness or negligence of this defendant." The case was tried by a jury. Verdict for plaintiff, assessing the damages at $4,000. Judgment accordingly. Defendant moved for a new trial, which was granted; and this appeal is by the plaintiff, from the order granting a new trial. The case was tried before Hon. H. K. S. O'MELVENEY, who settled the statement on motion for new trial after the expiration of his term of office, February 18, 1890; and the new trial was granted by his successor, Hon. W. H. CLARK, December 13, 1890. On granting the motion the court filed a written opinion, which is brought up with the transcript, and acquiesced in by counsel as being a correct copy, though it does not appear to have been made a part of the settled statement. It appears by this opinion that the new trial was granted on two grounds: (1) That the verdict was against the weight of conflicting evidence on a material issue; and (2) that the court misinstructed the jury. Appellant's counsel contend that inasmuch as it is admitted, and is incontrovertible, that the evidence is substantially conflicting, the court below, not having tried the case, nor heard the evidence, should have been governed by the same rule that prevails in the appellate court as to conflicting evidence. This question has been decided adversely to the views of counsel for appellant in the following cases: Altschul v. Doyle, 48 Cal. 535; Macy v. Davila, Id. 648; Bauder v. Tyrrel, 59 Cal. 100; Blum v. Sunol, 63 Cal. 343. Therefore the order granting a new trial on the ground of insufficiency of the evidence should be affirmed, without regard to what may be said or thought of the reason of the rule established by those cases; and whether the instructions to the jury were correct or not. For purposes of the new trial, however, it is proper to pass upon other questions presented by the record and discussed by counsel, especially such as relate to the propriety of instructions given to the jury, or refused, as requested.

1. The court did not err in refusing the first instruction, as requested by defendant. As requested, the instruction was as follows: "(1) The court instructs you that in this case defendant is charged as a common carrier, and not as a warehouseman; and if you find from the evidence that the goods sued for arrived in Los Angeles July 19, 1887, and were at that time unloaded from the cars into defendant's warehouse, and plaintiff was notified of such arrival, then the court instructs you that defendant is not liable as a common carrier, and your verdict should be for the defendant." That the defendant "was a common carrier of goods

for hire," and as such received and "agreed safely to carry to Los Angeles, and there to deliver to plaintiff or order," the goods in question, is admitted by the pleadings, and that defendant did safely carry the goods to Los Angeles, and there store them in its warehouse, where they were afterwards destroyed by fire, is alleged in defendant's answer, and was proved on the trial. Therefore the requested instruction must be understood as meaning that, if plaintiff was properly notified of the arrival of the goods, she could not recover in this action, because the defendant was sued on its contract as a common carrier, and not as a warehouseman, even though the goods may have been destroyed through the negligence of defendant, and for the reason that the notice to the plaintiff and storage of the goods entirely discharged the defendant's obligations under the contract alleged in the complaint, although the goods had not been delivered as required by the admitted terms of that contract. I think this is a mistake; for, while it is true that the contract did not require of the defendant so great a degree of care after the arrival and proper storage of the goods as while they were *in transitu*, it nevertheless required ordinary care after storage. The different degrees of care required under different circumstances are seldom expressed in the carrier's contract, but are supplied by the law in reference to which such contracts are made, and which enters into and forms a part of such contracts. Hutch. Carr. § 338. These implied legal terms of the carrier's contract require different degrees of care, appropriate to changing circumstances, as well while the goods are in transit as after they reach their destination; yet the original contract is not changed by the change of circumstances, but remains the same and continues in force until the goods are delivered to the consignee, or until they are lost by some cause to which the negligence of the carrier did not contribute. Therefore a failure to deliver the goods on demand, even after storage, without lawful excuse, is a breach of the carrier's original contract, for which suit may be brought upon that contract. No authority opposed to this view has been cited by counsel, and after diligent search I have been able to find none. In Jackson v. Railroad Co., 23 Cal. 270, wherein the complaint was upon the original carrier's contract, as in this case, it was contended that, before the plaintiff could recover, he must prove that the loss occurred before the goods reached the depot at the place to which they had been consigned. The point was disposed of by the court as follows: "We do not think this objection of the defendants to the complaint sufficient to justify us in reversing the judgment on that ground. Although the complaint is very specific in charging the defendants as common carriers, yet we do not see that they have been taken by surprise in any way, or misled thereby, or prevented from setting up every defense they may have had to the action. In this class of cases there is certainly great propriety in stating the two characters in which the defendants acted; but it is not, perhaps, essential to the sufficiency of the complaint." I think the intention and effect of section 2120 of the Civil Code (hereinafter quoted) is merely to reduce the degree of care for which the carrier shall be held responsible, after the arrival and proper storage of the goods, to the same measure of care as that for which warehousemen are responsible, and that it does not imply that the storage of the goods creates a new contract, which must be specially pleaded and distinguished from the original contract in order to recover the goods or the value. It may often happen that the consignee may not know, or be able to learn, whether his goods were lost while in transit or after their arrival, or even whether they have been lost at all. In cases of this kind, by the rule contended for, he must guess, at his peril, whether he should sue on his original contract with the carrier, or upon an implied new contract with the same person; yet this great disadvantage to the consignee is not compensated by any just advantage to the carrier, as is well illustrated in the case of Jackson v. Railroad Co., supra, and, indeed, by the case at bar. When, how, and where the goods were lost, if lost at all, is presumptively known to the carrier, but not to the consignee.

2. At the request of the defendant's counsel the court gave the following instruction as to the burden of proof: "When the defendant shows that the goods sued for were destroyed by fire, then the burden of showing that such fire was the result of defendant's want of care is upon the plaintiff, and, unless such want of ordinary care is shown, your verdict should be for the defendant." As applicable to the pleadings and admitted facts, I think this instruction erroneous. While it is true, as contended by counsel for respondent, that defendant is sued upon its original contract as carrier only, it must not be overlooked that the answer admits that the defendant assumed the obligation of common carrier, as alleged in the complaint, and then, by allegations of new matter, seeks to show that by safely carrying the goods to the point of destination, and there storing them in its warehouse, the defendant reduced its admitted obligation of common carrier to that of warehouseman, and further alleges that after they were stored in the warehouse the goods were destroyed by fire without negligence or fault of the defendant. The burden of proving this defense, including the loss by fire without negligence or fault on his part, devolved on the defendant. "When the carrier claims exemption on the ground that, under the particular circumstances of the case, he held the goods, not as carrier, but as an ordinary bailee, it devolves upon him to show not only that he has done his whole duty to effect a delivery according to the course of his business, but that he has been guilty of no negligence which has caused or contributed to the loss." Hutch. Carr. (2d Ed. 1891,) §§ 354, 355, and authorities there cited. All the facts pleaded by defendant in avoidance of its confessed contractual ob-

ligation were material and necessary to constitute a defense to the action, and of course the burden of proving all such facts was upon the defendant. It will hardly be contended that the new matter pleaded would have constituted a defense without the allegation that the destruction of the goods by fire was "without the carelessness or negligence of this defendant." Had the defendant been sued as a tort feasor, and charged in the complaint with negligence whereby plaintiff's goods were destroyed by fire, the burden of proving the alleged negligence would have been upon the plaintiff. Wilson v. Railroad Co., 62 Cal. 171. But not so where, as in this case, the action is upon the carrier's contract to carry and deliver goods; the alleged breach being a failure to carry away and deliver according to the contract, and the defense being that the goods were destroyed by fire without the carelessness or negligence of the defendant. As a general rule, the burden is on the defendant to prove new matter alleged as a defense, (Osborn v. Hendrickson, 8 Cal. 31; Piercy v. Sabin, 10 Cal. 22; Kuhland v. Sedgwick, 17 Cal. 124; Bryan v. Maume, 28 Cal. 244; Mulford v. Estudillo, 32 Cal. 136,) even though it requires the proof of a negative. "It makes no difference, therefore, whether the actor is plaintiff or defendant, so far as concerns the burden of proof. If he undertake to make a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. Hence it may be stated, as a test admitting of universal application, that, whether the proposition be affirmative or negative, the party against whom judgment would be given as to a particular issue, supposing no proof be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof, which he must satisfactorily sustain. If there is a case made out against a defendant, on which, if the plaintiff should close, a judgment would be entered against the defendant, then the defendant has on him the burden of proving a case by which the plaintiff's case will be defeated." Whart. Ev. § 357, and authorities thereto cited. Again, at section 362, the same author says: "When a person who contracts to perform a particular duty to another person or thing is sued for negligent injury to such person or thing, then the plaintiff need only prove the injury; and the burden is on the defendant to excuse himself by proof of the exercise of due diligence. What such diligence is depends upon the nature of the contract, as elsewhere discussed. That must be proved as an excusatory defense by the defendant, and that the burden is on him to do so is plain. The defendant has engaged to perform a particular duty, and the suit is for the nonperformance of such duty. That the defendant failed to perform his duty through negligence is not part of the plaintiff's case. The plaintiff, it is true, in proving the nonperformance of duty by the defendant, may bring out such incidents as show negligence on the part of the defendant. But it is not a necessity of the plaintiff's case to do this, and, if the defendant desire to relieve himself by showing a due performance of duty, he must do so either by directly traversing the plaintiff's case as to the fact of injury, or by proving (and the burden is on the defendant to do this) that the injury occurrred without his particular fault. A creditor, for instance, receives a piece of silver plate in pawn. If this is lost without any *culpa* on his part, he must prove this fact in order to be released from liability. A herd of goats is taken by a herdsman to pasture. They are carried off by robbers without the fault of the herdsman. It is not necessary for the owner to prove want of due care in the herdsman, but the burden is on the herdsman to prove that the loss of the herd was not due to want of care by himself." In the following three sections (363-365) the author states the effect of the distinction between actions upon contract and actions on tort upon the burden of proof. The failure to observe this distinction has probably occasioned much of the conflict of the cases upon this point. The conflicting cases are referred to and discussed in notes to the above citations from Hutchinson on Carriers and Wharton on Evidence, and the conclusions of these authors seem to be sound in principle, and supported by a preponderance of the well-considered cases. The opposing conclusion seems utterly to disregard elementary principles of pleading and evidence. A cause of action upon contract consists merely of a breach of the contract, (the contract, of course, being a necessary condition,) and the plaintiff need allege and prove only the contract, the breach, and the debt or resulting damages; whereas a cause of action *ex delicto* consists of a tort, which the plaintiff must allege and prove, whether it be culpable negligence or other violation of plaintiff's right. Our Code of Civil Procedure, § 426, requires only the facts "constituting the cause of action" to be stated in the complaint, and section 437 requires that the answer shall contain a denial of such material allegations of the complaint as are controverted by the defendant, and a statement of any new matter constituting a defense or counterclaim. Section 1869 requires each party to prove his own affirmative allegations, and also his negative allegations, when they are "an essential part of the statement of the right or title on which the cause of action or defense is founded." Kohler v. Wells, Fargo & Co., 26 Cal. 611. Negligence of the defendant is no essential part of the statement of the right or title on which plaintiff's cause of action is founded; but the negative of such negligence is an essential part of the statement on which the defense is founded, if it may be properly called a "negative" when it is only equivalent to an "affirmative" allegation of ordinary care, and considering that it might have been proved by affirmative evidence of ordinary care. "Section 1981. The party holding the affirmative of the issue must produce the evidence to prove it. Therefore the burden of proof lies on the party who would be defeated if no evidence were given on either side." While the logic of this section seems a little obscure, the conclusion is in harmony with section 1869, and doubtless the whole section was intended to be so, and should be so construed.

3. The court did not err in refusing the following instruction, requested by the defendant: "A consignee has a reasonable time within which to remove goods from the cars of a common carrier into its warehouse, and the court instructs you that three months is a reasonable time in this case, and it was her duty to have removed them within that time, and their loss by fire subsequently to that time relieves defendant from any liability for said goods or their value, unless you find from the evidence that such fire was caused by the want of ordinary care by defendant; and the burden of showing such want of ordinary care is on the plaintiff, who must prove that the defendant had by some act or omission violated some duty, by reason of which the fire originated, or that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted or contributed to cause or permit the fire by which the property was destroyed, and, in the absence of such proof, you should find for the defendant." This instruction is erroneous as to the burden of proof, for reasons above stated. Nor do I think, under the circumstances, the jury should have been instructed, as matter of law, that three months was a reasonable time within which it was the duty of the plaintiff to remove her goods. The goods were shipped and the freightage paid at Indianapolis, Ind., on the 30th day of June, 1887, and consigned to the plaintiff at Los Angeles, where they arrived on July 19, 1887. After the shipment, the plaintiff, who is a widow, started to Los Angeles, intending to arrive there before the arrival of the goods, but on account of her sickness was compelled to stop at Chicago, from which place, on July 13th, she wrote the following letter: "Chicago, Ill., July 13, 1887. Frt. Agt., California, Sthn. or Santa Fe, Los Angeles—Dear Sir: Have you household furniture for Mrs. M. Wilson at your depot, shipped from Indianapolis, Ind., about June 30th, via I. B. W., C. & A., and Santa Fe, (I presume, I don't know?) Mrs. Wilson is sick here, and cannot come on as soon as her furniture. Will you please take care of same, and store in fireproof warehouse, if at your depot. She will be there as soon as she is able. Please answer at once, and very much oblige, yours, truly, M. L. Wilson, 1245 Michigan Ave., Chicago, Ill. P. S. If not at your depot, please tell me where it will be. Wilson." This letter was received by the defendant, as appeared by the testimony of its agents, after the arrival of the goods, but not later than July 21st, on which day the defendant wrote and posted the following answer: "Los Angeles Station, July 21, 1887. Mrs. M. Wilson, Chicago—Dear Madam: Replying to yours of the 15th inst., I beg to advise you that H. H. goods to your address were received on the 19th of this month, and are now stored in our warehouse, where I shall hold them subject to your order. Yours, truly, E. Chambers, Ag't. M." This letter, not being directed to the address of the plaintiff, as given in her letter of July 13th, viz., "1245 Michigan Ave., Chicago, Ill.," was not received by her, and was returned to defendant about two months after it was written. As to whether or not the defendant gave plaintiff the notice required by section 2120 of the Civil Code, the evidence is conflicting. On the part of the defendant the evidence tends to prove that upon the arrival of the goods—July 19th—the defendant, not knowing the address of the plaintiff, dropped a postal card in the post office at Los Angeles, addressed to her at that place, notifying her of the arrival of the goods. On the part of the paintiff the evidence tended to prove that no such postal card, or any other letter than that of July 21st, addressed to Chicago, was ever addressed to defendant at any place, and posted. Within one or two days from the time the goods arrived the defendant had notice, by the letter of July 13th, that plaintiff was sick at Chicago, and did not know when she would be able to travel, and by the same letter was directed to store the goods in a fireproof warehouse to await her arrival at Los Angeles, and requested to answer at once. The answer to this letter, being defectively addressed, was not received by plaintiff, of which the defendant had notice by its being returned two months from its date. Furthermore the evidence for plaintiff tended to prove that the defendant never in any way notified plaintiff of the arrival or storage of the goods, unless the defectively addressed letter, which was not received, constituted constructive notice, which I think it did not. Under this state of the evidence, it seems to me that the court properly refused to instruct the jury that the reasonable time within which plaintiff should have removed her goods was limited to three months from the date of their arrival.

4. As to the other instructions given by the court, it is only necessary to say that they were quite as favorable to respondent as it was entitled to ask. If any of them are erroneous, none of them is so to the prejudice of respondent. Further than this it is unnecessary to decide, since counsel for appellant have made no point on them.

5. Respondent's counsel contend that "the storage of freight by a common carrier (by railroad) in its warehouse at the point of destination, either with or without notice to the consignee of the arrival thereof, changes the liability of the common carrier, as such, to that of warehouseman. Upon this point, prior to the enactment of our Codes, the authorities were irreconcilably conflicting, and it seems to have been the object of the legislature to settle the question in this state by sections 2118–2120 of the Civil Code; section 2120 being as follows: "If for any reason a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a warehouseman, until the consignee has had a reasonable time to remove it. If the place of residence or business of the consignee be unknown to the carrier, he may give the notice by letter dropped into the nearest

post office." The plain meaning of this section seems to be that, in order to reduce the responsibility of the carrier to that of a warehouseman, the notice required by the section must be given. Nor is this meaning changed or qualified by sections 3152 to 3157, inclusive, of the Political Code, as claimed by respondent's counsel. The general subject of the article composed of these sections is "unclaimed property," which has been received by common carriers, express companies, commission merchants, innkeepers or warehousemen for transportation or safe-keeping; and the principal object of the article is to give each of these classes of bailees a lien upon such property for their reasonable charges for freightage or storage, and power to sell so much thereof as may be necessary to pay such charges. Beyond this special subject-matter, it does not purport to prescribe or define the duties or obligations of common carriers, whereas, the subject-matter of the article of the Civil Code, including section 2120 above quoted, is "obligations of the carrier;" and this article particularly prescribes and defines the obligations and duties of common carriers alone. Furthermore, section 2120 of the Civil Code is a re-enactment of the original section, as amended by act of March 30, 1874, entitled "An act to amend the Civil Code." See volume of "Amendments to the Codes," 1873-74, p. 247. Section 286 of this amendatory act (page 268) provides that "all provisions of law inconsistent with the provisions of this act are hereby repealed." Therefore, if there is anything in the sections of the Political Code above cited inconsistent with section 2120 of the Civil Code, then, to the extent of the inconsistency, they are repealed, since they were in force before the passage of the act above referred to, amending the Civil Code, and have never since been amended. The rule requiring railroad companies to give notice to consignees of the arrival of their goods, so far as practicable, in order to reduce the liability of the carrier to that of a warehouseman, irrespective of statutory enactment, seems to be founded upon the better reason, and supported by the weight of authority in other states and in England. Hutch. Carr. §§ 373, 374, and notes.

Upon the sole ground that the court below found that the verdict was contrary to the weight of evidence on the issue as to notice of the arrival of the goods, I think the order granting a new trial should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting a new trial is affirmed.

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94 Cal. 141

FIRST NAT. BANK OF SAN DIEGO v. FALKENHAN *et al.* (No. 14,398.)

(*Supreme Court of California.* March 30, 1892.)

PROMISSORY NOTES—TRANSFER AFTER PAYMENT—LIABILITY OF INDORSER—WAIVER OF PROTEST.

1. Defendant, who, as payee of a nonnegotiable note, already paid before maturity for valuable consideration, waived protest in writing thereon, and indorsed it over in blank to plaintiff, is liable as an indorser, unless a contrary intention be made to appear.

2. The expression "waiver of protest," when applied to paper which cannot or is not required to be protested, acquires the meaning of waiver of demand and notice of nonpayment.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by First National Bank of San Diego against Joseph Falkenhan and Coronado Beach Company, as maker and first indorser, respectively, of a note, to recover its amount. Judgment for plaintiff against first indorser, who appeals. Affirmed.

Hunsaker, Britt & Goodrich, for appellant. *Conklin & Hughes*, for respondent.

TEMPLE, C. This is an appeal by the defendant corporation from that part of the judgment which authorizes judgment against that defendant. The action is brought upon a promissory note executed by the other defendant to the appellant, and is not negotiable because it contains a stipulation for an attorney's fee. In the complaint the note is set out at length, and it is averred "that on the 30th day of August, 1888, before the maturity of said note, the defendant the Coronado Beach Company, for a valuable consideration, waived protest in writing thereon, and indorsed said note in blank, and then and there delivered the same to plaintiff." It also alleges demand and nonpayment, but does not aver notice to the indorser. To this complaint the appellant interposed a general demurrer, which having been overruled, it answered, denying that it waived protest, or that demand had been made on the maker, and averring that no notice of nonpayment by the maker had been given. The maker answered, alleging that he paid the note in question to the appellant April 7, 1888, which was prior to the maturity of the note or its assignment to plaintiff. The court found in regard to the assignment of the note and waiver of protest as charged in the complaint, and that no part of the principal or interest had been paid to plaintiff; and also that the other defendant had paid the appellant the amount due on the note prior to its maturity or assignment.

It is contended by appellant that the complaint does not state a cause of action, and that the demurrer should have been sustained. This raises two questions: Is one who assigns a nonnegotiable note by writing his name on the back, and delivering it to the assignee, liable as an indorser? and, if so, was appellant entitled to notice of nonpayment? Upon the first question the authorities are not harmonious, but a review of them will show that ever since the statute of 3 & 4 Anne there has been a disposition to hold one who transfers a nonnegotiable promissory note to a responsibility beyond that of an assignor of other choses in action. The rules applicable to negotiable paper have to some extent been applied to such assignments. The first departure seems to have been to hold that such indorser is liable as the maker of a new note, or as the drawer of a new bill, as had been sometimes held as to the indorser of a negotiable promissory note. Liedy v. Tammany, 9 Watts, 353. Judge Kennedy, in the above case, quotes Lord Mansfield in Heylyn v. Adamson, 2 Burrows, 676, to the effect that the indorsement is an order by the indorser upon the maker of the note to pay the amount thereof to the indorsee. This view seems to have been very widely adopted. Seymour v. Van Slyck, 8 Wend. 404; Dean v. Hall, 17 Wend. 214; Patterson v. Poindexter, 6 Watts & S. 227; Brenzer v. Wightman, 7 Watts & S. 264, and many other cases. The cases upon the subject are cited and discussed in Hare & Wallace's notes to Gerard v. La Coste, 1 Amer. Lead. Cas. 302. The learned annotators conclude, after reviewing the cases, that the true rule is that a mere indorsement is but a transfer of the note; that the question whether any, and what, liability is incurred by the delivery of such a note so indorsed, will depend upon the intention of the parties and the circumstances of the transaction. Under this rule, *prima facie*, no responsibility is assumed, but it may be shown that there was a different understanding, and the indorser held accordingly. If this rule were followed, the appellant would be held in this case. In its indorsement it waived protest. Of course this implies responsibility as indorser. But in all the text-books which I have examined it is laid down that "in respect to the immediate indorsee of the payee of a nonnegotiable promissory note, the indorsement will ordinarily create the same liabilities and obligations as the indorsement of a negotiable note." Story, Prom. Notes, § 128; Story, Bills, §§ 119-179; Bayley, Bills & N. 120; Ch. Bills, 219; Byles, Bills, 142; Daniel, Neg. Inst. § 664. A great many cases are cited in support of this proposition, although there are also a goodly number of cases which hold differently. Beyond this it is not necessary to go in this case, and it strikes me as the most convenient and reasonable rule. It is also the consequence most likely to be intended by the parties. Even a nonnegotiable promissory note is an ordinary paper, and mercantile business men are not likely to determine between instruments which are or are not governed by the law merchant.

Section 1459 of the Civil Code does not affect this question. It but states the rule that, as to the payor, the transfer is but an assignment of the instrument, subject to any defenses in his favor which he might have against the payee; and that the transferee may sue on it in his own name. Title 15 of the Civil Code, which contains all the provisions of our statute in regard to demand, notice, and protest, has no application to this case. The first section in that title is: "The provisions of this title apply only to negotiable instruments as defined in this article." Section 3086, Civil Code. Whether waiver of protest amounts to waiver of demand and notice must be determined without reference to the Code as direct authority. Neither the Code nor the law merchant requires protest in such a case, but neither is it required in the case of an inland bill. In Daniel on Negotiable Instruments it is said upon this point: "But the word 'protest' has by general usage acquired a more extensive signification than the mere formal declaration of a notary. Inland bills and promissory notes may be protested by statutory enactment in many states, and the protest is accorded the same weight to them when it is made, though it be not necessary to make it. And the weight, as well as the number, of authorities predominate in favor of construing a waiver of protest to signify as much when applied to inland bills and notes as when used in respect to a foreign bill." In fact, unless the waiver of protest in this case was meant to be a waiver of demand and notice, it would have no effect whatever. It would seem that when applied to paper which could not be or was not required to be protested, the word "protest" must have the acquired meaning of demand, nonpayment, and notice, rather than the formal evidence of dishonor. I think the judgment should be affirmed.

We concur: Belcher, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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94 Cal. 393

Fritts v. Camp *et al.* (Nos. 13,483, 14,231.)

Supreme Court of California. May 4, 1892.)

Change of Venue—Jurisdiction of Action.

Under Const. art. 6, § 5, requiring all actions for quieting the title to land to be brought in the county in which the land is situated, a court outside of the county has no jurisdiction; and the proper remedy of a defendant, sued in the wrong county, is, not an application for a change of venue, but a motion to dismiss.

Commissioners' decision. In bank. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Action by John A. Fritts against James Camp and others for an injunction. Judgment for plaintiff. Defendants appeal. Reversed and dismissed.

Lucas & Miller and *Knight & Heggerty*, for appellants. *L. F. Cooper*, (*Sawyer & Burnett*, of counsel,) for respondent.

Temple, C. There are two appeals in this case, both taken by the defendants. The first is from an order refusing to change the place of trial from Del Norte county to Siskiyou; the second, from a final judgment in favor of the plaintiff, and an order refusing defendants' motion for a new trial. As we have reached the conclusion that the case must be dismissed, it is not necessary to consider the appeals separately.

The action was brought in Del Norte county to enjoin the defendants from dumping into Indian creek, above plaintiff's premises, tailings, boulders, stones, sand, gravel, or clay from mineral lands, whereby they foul the waters of the creek, fill up his milldam, deprive him of water to irrigate his garden, stop his sawmill from running, and destroy other lands along said creek, to his damage, etc. Plaintiff charges that "since the discovery of gold on this creek, over thirty years ago, mining has always been carried on along said stream; but until the commencement of hydraulic mining on said stream on a large scale by the defendants, as hereinafter stated, the said Indian creek, in crossing the premises of plaintiff, ran on a hard rock bottom." The manner of conducting hydraulic mines is then shown, and that by such process "refuse matter, consisting of boulders, stones, pebbles, sand, and clay, generally known as 'tailings' or 'mineral *debris*,' is washed into and down said Indian creek and deposited in the beds and channels thereof throughout its entire length, below the defendants' mine and on the lands of plaintiff, and in his milldam; and that this mode of mining has been carried on to some extent on the premises now owned and occupied by defendants for over ten years." The concluding allegation of the complaint is as follows: "And plaintiff avers that the defendants refuse to discontinue said wrongful and injurious acts, and they, and each of them, threaten and intend to prosecute their mining works at the point where they are now working the same, as hereinbefore described, and to dump and discharge the *debris* from their mine into the said Indian creek in the manner they have heretofore done, as hereinbefore alleged, and they claim adversely to this plaintiff an easement to flow and deposit upon plaintiff's premises, and in said creek running through the same, their tailings or mining *debris*, whereas plaintiff alleges that none of the defendants possess any or either of the rights or easements so claimed, and that all such pretenses are contrary to law and equity, and to the wrong and injury of plaintiff." The complaint also shows that the lands of plaintiff to which the action relates are situated wholly in Siskiyou county. The defendants answered, denying, among other allegations of the complaint, those which appear to show title in the plaintiff to the lands in question, averring that the lands are mineral lands of the United States which have been and are excluded from sale as agricultural lands or for agricultural purposes; that, by permission of the government, mining has been carried on, and tailings dumped in the creek, for more than 30 years, and by the defendants Camp and Titus since 1871; that in 1877 defendant Camp received a patent from the United States for his mining claim, which granted to him the right and easement of dumping into said Indian creek, and on the lands of said government; that all the sluicing, washing, and dumping into said creek by the defendants, any or either of them, was reasonable, and necessary for working said mine. They deny the alleged injury, or their threats to continue the same, and also deny "that none of the defendants possess the rights and easements to flow and deposit their tailings and mining *debris* into said creek."

We have here, therefore, a distinct averment in the complaint that the defendants claim, and each of them claims, adversely to the plaintiff, an interest in the land, to wit, an easement to flow and deposit upon it tailings and mining *debris*. This claim of an easement plaintiff disputes. The judgment asked by plaintiff would be conclusive that they have no such easement. In their answer, they justify the alleged trespasses under the claim of an easement. Looking now to the findings, we see that the court found upon this issue. In finding 10 we have: "I find that said defendants claim adversely to the plaintiff herein an easement and right to flow and deposit upon plaintiff's premises and in said Indian creek, running through the same, the tailings or mining *debris* from the said Classic Hill placer mine; and I find that neither all nor any of said defendants have any such right or easement." In finding 16 it is found that there are no mining customs, rules, or regulations "to allow any one to flood the premises of another with mining *debris*;" and, in finding 17, "that the United States never conveyed to the defendant James Camp an easement to dump and drain the mining *debris* from the Classic Hill placer mine into either said Indian creek, or on or over the premises since settled and claimed by the plaintiff as a homestead." Thus the plaintiff in his complaint avers that the defendants claim adversely to him an easement in his land and in the creek to do the acts charged as trespasses, which claim of easement he denies, and he asks a judgment which would, in effect, quiet his title as against the claim. The defendants, in their answer, justify the alleged trespasses under the claim of an easement; and the court found against them, and, by granting a perpetual injunction, preventing them from the enjoyment of the easement, quieted plaintiff's title as against their claim.

In section 5, art. 6, of the constitution of this state, it is provided, as to superior courts, that their process shall extend to all parts of this state, "provided that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon, real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." If our reasoning so far is correct, it must be apparent, without further argument, that this case is one which, under the constitution, should have been commenced in the county where the land is situated, to wit, in Siskiyou county. Summons was issued in the action November, 1888, and on the 22d day of December following the defendants appeared and filed a demurrer to the complaint, and with it a demand that the place of trial be changed to Siskiyou county. March 14, 1889, the court denied this motion on the ground that no affidavit of merits was filed. No such affidavit was required. On the contrary, if that was the proper remedy of defendants, it was incumbent upon the court to transfer the cause upon a mere suggestion. No appeal, however, was taken from this order, and on May 20th of the same year the defendants renewed their demand. This was also denied, and from the order, as well as from the judgment and order refusing a new trial, the defendants have appealed. Admitting that the proper remedy of the defendants was to have the case transferred to Siskiyou, the failure to appeal from the first order was not a waiver. This is not one of the cases contemplated by section 396 of the Code of Civil Procedure. Under the supposition made, all that the court could do would have been to transmit the papers to the only court that had jurisdiction. But we do not think that was the proper remedy of defendants. The court had no jurisdiction, and this is an objection which cannot be waived. We see very plainly how great inconvenience may result, but the requirement of the organic law is plain, and cannot be judicially repealed. Where such questions are brought in after the suit has been commenced, or arise incidentally, there is room for argument. But where, as here, one avowed purpose of the action is to quiet an adverse claim to real estate, courts outside of the county in which the land is situated have no jurisdiction. It is so held in Urton v. Woolsey, 87 Cal. 38, 25 Pac. Rep. 154. We advise that the judgment and order be reversed, and the action dismissed, and that the appeal from the order refusing to change the place of trial be also dismissed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the action dismissed; and the appeal from the order refusing to change the place of trial is also dismissed.

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94 Cal. 347

MASTICK v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 14,820.)

(*Supreme Court of California.* April 26, 1892.)

RIGHT OF GUARDIAN TO RECOVER WILL OF LUNATIC—OBJECTIONS TO JURISDICTION—WAIVER.

1. Code Civil Proc. § 1800, providing that a guardian may recover "money, goods, or effects, or an instrument in writing belonging to the ward or to his estate," from any person who has "concealed, embezzled, or conveyed away" the same, refers to such "instruments" only as the guardian is entitled to as assets or evidence of his ward's title to property; and it does not authorize the guardian of a lunatic to recover the will of his ward from a person in whose custody the ward had placed it before she was declared insane.

2. Where defendant, in a special proceeding in the superior court, answers, offers testimony, and submits the case, he is not thereby precluded, on a writ of review, from objecting that the superior court had no jurisdiction to make such order.

In bank.

In a proceeding by R. M. Fitzgerald, the guardian of Mrs. Langdon, adjudged incompetent, the superior court ordered George H. Mastick to deliver up possession of a will placed in his custody by the ward while competent. Mastick petitions the supreme court for a writ of review. Order annulled.

Mastick, Belcher & Mastick, for petitioner. *T. C. Coogan*, for respondent.

PATERSON, J. The petitioner drew a will for Mrs. Langdon, which she executed and left in his possession, with directions to retain the same, unless otherwise directed, and at her death to deliver it to the person named as executor therein. Some time afterwards—the exact time does not appear—Mrs. Langdon sent a messenger to petitioner requesting him to deliver the package to the former. This request was complied with, and subsequently the same messenger, at the request of Mrs. Langdon, delivered to petitioner a sealed package, indorsed on the envelope, "Mrs. Langdon's will." This package was placed in the petitioner's safe, and the possession thereof has ever since been retained by him. It does not appear who made the indorsement on the envelope, nor does any one know the contents of the package. Some time after it was returned to the petitioner, Mrs. Langdon became incompetent to manage her affairs, and, after due proceedings had, R. M. Fitzgerald was on December 17, 1890, appointed guardian of her person and estate. Thereafter said guardian demanded of the petitioner the delivery of all property and instruments in his hands belonging to the estate of Mrs. Langdon. The petitioner refused to comply with this demand, whereupon Mr. Fitzgerald applied to the superior court for an order directing petitioner to show cause why he should not deliver up the instrument. After a hearing the court decided that the guardian was entitled to the possession of the package. The petitioner appeared in court, and offered to allow the court to open the package, and, if anything was found therein except Mrs. Langdon's will, to surrender the same to the guardian, but declined to deliver any document purporting to be the last will and testament of Mrs. Langdon. The court thereupon found that the package belonged to the estate of Mrs. Langdon, that the petitioner had the ability to surrender the possession of the same, but had refused to do so, and that the guardian was entitled to the order prayed for. An order was entered accordingly, and thereafter an application was made to this court for a writ of *certiorari*. A return to the writ has been filed, in which is set forth the affidavit of the guardian upon which the order of the court below was made, the citation, the answer made by the petitioner, the findings and order of the court, and also a bill of exceptions setting forth briefly the testimony taken at the hearing. Counsel for the respondent claim that the order was a proper one under section 1800, Code Civil Proc.[1] We think that this section should be read in connection with sections 1459[2] and 1460, Code Civil Proc., and that the phrase "instrument in writing," as used in section 1800, must be construed as referring to instruments to the possession of which the guardian is entitled as an asset or as evidence of his ward's title to property. The last will and testament of the ward is not an asset. Neither is it an instrument which the guardian could use in the recovery of an asset. It cannot in any way relate to any matter within his power or duties, or in any manner affect his action as a guardian, because it cannot take effect until after his authority has ceased. He certainly cannot annul, revoke, destroy, or in any way dispose of it, nor can the court authorize him to do so; and we are unable to see upon what ground he is entitled to its possession, or to a knowledge of its contents. If it were in his hands, of course it would be his duty to preserve it, but here it appears that the maker of the will, before she became incompetent, selected the petitioner as the custodian thereof, with special directions to retain the same until her death, unless she called for it, and upon her death to deliver it to her executor. The petitioner is charged with the execution of this trust. It is a trust which could be revoked only by Mrs. Langdon herself. The petitioner could not lawfully deliver it to any third person, and it would be a gross breach of trust in him voluntarily to disclose the contents to any one. Story, Bailm. § 92; Civil Code, § 1835. The guardian occupies the same position that a third person would. A person competent to make a will has a right to select the custodian, and to cause it to remain in his hands until called for, or until death makes it necessary for the custodian to deliver it to the court, or to a person named in the will. To hold that the subsequent incompetency of the maker of the will entitles the guardian to the possession of the instrument would defeat the evident purpose of the maker.

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[1] Code Civil Proc. § 1800, reads as follows: "Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate, or having a prospective interest therein, as heir or otherwise, against any one suspected of having concealed, embezzled, or conveyed away any of the money, goods, or effects, or an instrument in writing belonging to the ward or to his estate, the superior court, or a judge thereof, may cite such suspected person to appear before such court, and may examine and proceed with him on such charge in the manner provided in this title with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent."

It is claimed by counsel for respondent that if there was any trust it was extinguished when petitioner delivered the package to the messenger, and that it was only the second package with which the court dealt. We think the facts stated in the findings show that the will was called for, not with the intent of terminating the trust, but only for a temporary purpose, and that the subsequent delivery by Mrs. Langdon, without further instruction, and under circumstances showing no intention to revoke or modify her directions, left the package in the possession of the petitioner upon the terms of the original trust.

Counsel for respondent contends that we ought to deny this writ, because the petitioner appeared in person in the court below, answered, offered testimony, submitted the case, and never in any way suggested that he questioned the jurisdiction of the court; "in fact, never did question it by plea or otherwise." We do not know what was said in the argument in the court below. Of course, in fairness to the court, counsel for the petitioner ought to have called its attention fully to the points now made; but the failure to do so does not deprive him of his right to have the order annulled, if it was in fact made in excess of jurisdiction. Furthermore, he was bound to submit himself to examination; and, in his answer, and after the decision of the court, he insisted upon his right to retain the will, and denied the power of the court to compel him to surrender it.

The court found that "said sealed package belonged to said Nora Langdon, and belongs to the estate of said Nora Langdon, and said guardian is entitled to the possession of the same." It is claimed by counsel for respondent that this finding is conclusive. Assuming that the facts found, and not the issues and order, are the tests of jurisdiction, and are decisive of the question whether *certiorari* will lie, the point made is not well taken. The finding quoted is the conclusion of law which the court drew from the facts found. No one knows what is in the package; but it must be treated as containing only the will of Mrs. Langdon. The findings show that the petitioner tendered the package to the court for examination of its contents, and offered to deliver the possession of anything contained therein except the will. If we are right in the views we have expressed on the main question, this is all the petitioner can be required to do. We think that the learned judge of the court below erred in his conclusion, and that the order is void for want of jurisdiction. The order under review is annulled.

We concur: HARRISON, J.; DE HAVEN, J; GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J

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94 Cal. 430

WIDBER v. SUPERIOR COURT OF SAN JOAQUIN COUNTY *et al.* (No. 14,754.)

(*Supreme Court of California.* May 5, 1892.)

WRIT OF ERROR—ADJUDICATION IN INSOLVENCY—ELECTION OF ASSIGNEE.

1. A writ of error will not lie to review the action of the superior court in adjudicating a person an insolvent debtor; the remedy being by appeal under the insolvent act, § 67, providing for an appeal from an order granting or refusing an adjudication in insolvency.

2. A writ of error, being an original suit, and

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[2] Code Civil Proc. § 1459, reads as follows: "If any executor, administrator, or other person interested in the estate of a decedent complains to the superior court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined, either before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears, and is found innocent, his necessary expenses must be allowed him out of the estate."

not in the nature of a writ of review, can only affect parties or strangers from the service of the citation.

3. Where a claim against an insolvent is partly secured, the unsecured portion thereof may be voted at the election for an assignee.

McFARLAND, J., concurs in the judgment.

In bank.

Original proceeding by writ of error by F. H. Widber against the superior court of San Joaquin county, state of California, and Joseph H. Budd, as judge of said court. Writ dismissed.

E. S. Heller and *Carter & Smith*, for petitioner. *Nutter & De Vries*, for respondents.

GAROUTTE, J. This is an original proceeding by writ of error to review the action of the superior court of San Joaquin county in adjudging one W. W. Stockwell an insolvent debtor, and also in allowing one E. R. Stockwell and the Farmers' & Merchants' Bank to vote their respective claims held against said insolvent debtor in the election of an assignee, and in adjudging the election of said E. R. Stockwell as assignee of the estate of said insolvent debtor. Respondent has moved to quash the writ upon various grounds. Among others, it is insisted that neither the court which committed the alleged error nor the judge thereof is a proper party to the proceeding, but that the persons directly interested in the result of this litigation should be made defendants, and given an opportunity to be heard before their rights are judicially declared. The controversy upon the main questions involved appears to be so entirely without merit that we refrain from considering the motion to quash the writ, and pass directly to the alleged errors of law which we are called upon to review. It is claimed that the court erred in adjudicating Stockwell an insolvent debtor upon his voluntary petition, while an involuntary petition therefor was pending before the court. It is also claimed that the court erred in allowing the claim of E. R. Stockwell and the claim of the Farmers' & Merchants' Bank to be voted for assignee. Counsel insist that such claims were secured claims, and that holders of secured claims are not entitled to participate in the election of an assignee. As to the alleged error in adjudicating Stockwell an insolvent debtor, section 67 of the insolvent act provides: "An appeal may be taken to the supreme court (1) from an order granting or refusing an adjudication in insolvency." There being an appeal from such order of the court, a writ of error will not lie. Railroad Co. v. Harlan, 24 Cal. 334. The record and bill of exceptions make it apparent that the claim of E. R. Stockwell was not secured, and that the claim of the Farmers' & Merchants' Bank was only secured to the extent of $675. There can be no question but that the unsecured portion of this claim could be voted at the election for assignee, and that of itself was sufficient in amount to secure the election of the assignee declared by the court elected. There are many matters discussed in respondents' brief, unnecessary to consider, for the points referred to dispose of the case. The plaintiff in error appears to have considered this proceeding to have been in the nature of a writ of review, but such is not the fact. In Lessee of Taylor v. Boyd, 3 Ohio, 354, the court said: "In the obvious nature and character of the proceeding a writ of error is a new and original suit. Original process issues in it, and must be served to bring the adverse party into court. The relative character of the parties is changed. New pleadings are made up, and a final judgment upon it, though it may operate on the original cause, is nevertheless a termination of the new suit or process in error. * * * We adhere to the doctrine that the writ of error is a new suit, and can only affect parties or strangers from the service of the citation." Let the writ be dismissed and respondent have judgment for costs.

We concur: HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

McFARLAND, J. I concur in the judgment. As to whether or not a writ of error lies, in any case, under our system, I express no opinion.

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94 Cal. 435

MURRAY, Ramie Commissioner, v. COLGAN, State Comptroller. (No. 14,602.)

(*Supreme Court of California*. May 5, 1892.)

CONSTITUTIONAL LAW — ACT CONTAINING TWO ITEMS OF APPROPRIATION.

Act March 31, 1891, entitled "An act to encourage the cultivation of ramie in the state of California; to provide a bounty for ramie fiber, and to make an appropriation therefor; to appoint a state superintendent of ramie culture, and make an appropriation for his salary,"—by section 1 appropriates $10,000 "for the purpose of encouraging the cultivation of ramie." Section 2 provides an expenditure "either for the purchase of ramie roots for free distribution to farmers, or in the payment of a bounty for merchantable ramie." Section 4 provides for appointment and payment of a state superintendent. *Held*, that the act contains two distinct items of appropriation, for expressly different special purposes, and is in violation of Const. art. 4, § 34, which provides that "no bill making appropriation of money * * * shall contain more than one item of appropriation, and that for one single and certain purpose, to be therein expressed."

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Demurrer by E. P. Colgan, state comptroller, to application by W. H. Murray, ramie commissioner, requiring him to draw warrant for salary, sustained. Murray appeals. Affirmed.

Ash & Matthews and *W. H. Murray*, for appellant. *Barham & Bolton*, for respondent.

VANCLIEF, C. This was an application to the superior court of the city and county of Sacramento by the appellant, who, pursuant to an act of the legislature of March 31, 1891, (St. 1891, p. 283,) was appointed state superintendent of ramie culture, for a writ of mandate to respondent, state comptroller, requiring him to draw his warrant for the salary of the appellant.

A demurrer to the application was sustained upon the sole ground that the appropriation for the payment of such salary is in violation of section 34 of article 4 of the constitution, which reads as follows: "No bill making an appropriation of money, except the general appropriation bill, shall contain more than one item of appropriation, and that for one single and certain purpose, to be therein expressed." As no amendment of the application could avoid this ground of objection, judgment passed for defendant, and plaintiff brings this appeal therefrom. The title of the act making the appropriation is as follows: "An act to encourage the cultivation of ramie in the state of California; to provide a bounty for ramie fiber, and to make an appropriation therefor; to appoint a state superintendent of ramie culture, and make an appropriation of his salary." The first section of the act appropriates $10,000 "for the purpose of encouraging the cultivation of ramie in the state of California." The second section provides that this appropriation shall be under the control of the state board of agriculture, and may be expended "either for the purchase of ramie roots for free distribution to farmers, or in the payment of a bounty for merchantable ramie fiber; but no greater sum than one thousand dollars shall be paid in any one year for the purchase of ramie roots, and no greater amount than one cent per pound shall be paid as a bounty for merchantable ramie fiber." The third section directs the comptroller to draw his warrants upon the state treasurer in favor of the state board of agriculture, or the proper officers thereof, in the same manner as other appropriations are drawn upon and paid to the state board of agriculture. The fourth section provides for the appointment by the state board of agriculture of a state superintendent of ramie culture, whose salary shall be $100 per month, to be paid by the state treasurer in the same manner as the salaries of other state officers are to be paid, and prescribes his duties. The fifth section appropriates $2,400 for the payment of the salary of the state superintendent of ramie culture during two specified years.

The act certainly does contain two distinct items of appropriation, payable to different persons, and for expressly different special purposes, distinctly stated in both the title and the body of the act; and there is no pretense that it is a general appropriation act. It is claimed by appellant, however, that the act has but one general purpose, and that the two appropriations subserve this general purpose, viz., "to encourage the cultivation of ramie in the state of California." Conceding this, still the constitution prohibits more than one item of appropriation in the same bill, for any one purpose; and, in addition to this, requires the one item to be "for one single and certain purpose." To permit numerous appropriations for different specific purposes, more or less promotive of some general purpose, would not only be opposed to the plain literal meaning of the section of the constitution under consideration, but would evade and defeat any conceivable effect of that section which the framers of the constitution can be presumed to have intended. Indeed, the intention of the section is too plainly expressed to admit of construction, whatever may be thought of its policy. I think the demurrer was properly sustained, and that the judgment should be affirmed.

We concur: Belcher, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

94 Cal. 432

Los Angeles, P. & G. Ry. Co. v. Rumpp.

(No. 14,449.)

(*Supreme Court of California.* May 5, 1892.)

Eminent Domain—Compensation.

In an action to condemn land, where the length of the strip of land sought to be condemned was 1,001 feet, and the only evidence given at the trial as to the cost of building a lawful fence along its right of way was 30 cents per foot, a finding by the court that it would cost only $100 to build such fence was not sustained by the evidence.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the Los Angeles, Pasadena & Glendale Railway Company against Minnie Rumpp. From a judgment awarding certain damages to defendant, and refusing certain other damages claimed, defendant appeals. Reversed.

Dooner & Burdett, for appellant. *Brousseau, Hatch & Thomas*, for respondent.

Temple, C. This appeal is from a judgment and order refusing defendant a new trial, in an action brought to condemn land for a right of way for plaintiff's railroad. The case was tried without a jury, and the points made are: (1) The judge heard material evidence out of court. (2) The evidence does not justify the finding that the value of the land was $75 only, but shows that such value was $350. (3) The evidence is insufficient to justify the finding that the damage to the portion of defendant's land not sought to be condemned will be $600, whereas it appears from the evidence that such damage will be upward of $4,000. (4) The evidence does not justify the finding that the cost of building a good and sufficient fence along the line of said proposed railroad, upon the strip of land sought to be condemned, will be $100, but the evidence shows that the cost of such fence will be upwards of $500.

It is evident that, if any of these grounds be found to necessitate a reversal, no good can result from a discussion of the other points made. The length of the right of way, or strip sought to be condemned through defendant's land, is 1,001 feet. The only evidence given at the trial, as to the cost of building a lawful fence along this right of way, was 30 cents per foot. Of course the finding that it will cost $100 is not sustained by the evidence, but is contrary thereto. By stipulation of the parties, the judge during the trial visited the premises for the purpose of making a personal inspection, and it is claimed that what he saw and learned by inspection is evidence in the case; that he may have seen that there were natural obstructions which would amount to a fence, or that under the circumstances no fence was necessary or even practicable, as the proposed roadbed was the wash of Arroyo Seco creek. To this suggestion it may be replied that it is not so found, and, if it had been, such finding would be inconsistent with the other testimony in the case; and, further, by finding that good and sufficient fences would cost $100, the court concedes the necessity of a fence. It is also said that the defendant cannot complain, because it has been held that the assessment of the cost of fencing is made to enforce a duty imposed by law, and not as damages to the landowner for an injury to his land. Butte Co. v. Boydston, 64 Cal. 110, 29 Pac. Rep. 511; California S. R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. Rep. 123. But, if such be the case, it is the duty in which the landowner has a special interest, and, if the railroad company does not build the fence, the statute expressly authorizes him to collect the amount. And, on the other hand, the railroad company, by paying the amount assessed to the landowner, diminishes its responsibility, and renders the landowner liable for certain losses which may occur unless he builds and maintains the fence. Plainly, therefore, it is a matter in which the defendant has a substantial interest, and the error is prejudicial to her. We think the judgment and order should be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

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94 Cal. 470

COWDEN v. PACIFIC COAST S. S. Co. (No. 14,377.)

(*Supreme Court of California.* May 6, 1892.)

CARRIERS OF FREIGHT—DISCRIMINATION—COMMON-LAW LIABILITY.

At common law an action will lie against a common carrier for an unreasonable and excessive freight charge, but not for a mere discrimination in favor of another shipper.

In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action by J. B. Cowden against the Pacific Coast Steamship Company to recover damages for a discrimination in freight charges.

L. L. Boone, for appellant. *Luce & McDonald*, for respondent.

GAROUTTE, J. This is an action brought by plaintiff to recover damages of defendant for a discrimination in freight rates. A demurrer to the complaint was interposed upon the ground that the court had no jurisdiction of the subject-matter of the action, and that no cause of action was stated. The demurrer was sustained, and the ruling of the court in this regard is the only matter before us for review.

The complaint substantially alleges that the defendant is a common carrier of freight, by vessel, between San Francisco and San Diego, via the Pacific ocean; that between certain dates plaintiff, as a merchant of San Diego, paid to defendant, according to its regular schedule of rates, large sums of money as charges for freight; that defendant charged a second merchant 12½ per cent. less for freight of the same character and quantity than it did plaintiff; that said charges were a discrimination against plaintiff, and, though often requested so to do, defendant refused to allow plaintiff such reduced rates, whereby he has been damaged in the sum of $1,674.14. The amount sought to be recovered as damages is the difference between the freight charges made to plaintiff and those made to the more favored merchant. It would seem to be entirely immaterial, to the extent, at least, of the consideration of the merits of this appeal, whether the present action is one of contract or of tort. From either standpoint it arises from a maritime contract solely, and courts of admiralty alone have jurisdiction, unless the cause comes within the reservation found in section 711 of the Revised Statutes of the United States: "The jurisdiction vested in the courts of the United States, in the cases and proceedings hereafter mentioned, shall be exclusive of the courts of the several states; * * * (3) Of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." There can be no question but that the voyage of a carrier made upon the high seas, even though the ports of departure and destination are in the same state, is under the exclusive control and regulation of congress. It is only the internal commerce and navigation of a state that is under the control and regulation of the state. As was said in Carpenter v. The Emma Johnson, 1 Cliff. 638: "Great mischief would inevitably result from any rule denying admiralty jurisdiction in all cases where the place of the departure of the vessel and the place of her destination are both within the same state, when any part of the voyage is upon the high seas, for every navigator knows that in many such cases nearly the whole voyage is out of the limits of the state." See Lord v. Steamship Co., 102 U. S. 544; Pacific Coast Steamship Co. v. Board of Railroad Com'rs, 18 Fed. Rep. 10.

It follows from the foregoing authorities that plaintiff has no standing in the courts of this state, unless his rights are reserved to him under the reservation of the Revised Statutes previously quoted. In other words, has he a cause of action at common law against the defendant, under the facts of his complaint? The gist of the complaint is that for the same quantity and character of freight plaintiff was charged a sum 12½ per cent. greater for transportation from the same point than the other merchant. Respondent insists that at common law the right of action was based upon the rate charged being unreasonable and excessive in itself, and that a mere discrimination, as disclosed in this case, gave no cause of action; that no wrong was committed if the charge was reasonable for the service, and, there being no wrong, no remedy was demanded. Appellant insists that at common law it is the duty of the carrier to "receive and carry goods for all persons alike, and that the rates must not only be reasonable, but equal, when the conditions are substantially the same." It will thus be seen that the merits of this appeal will be concluded by a determination as to what is the common law upon this question; and that is a matter of some difficulty of solution, owing to the divergent views expressed upon the subject by the various courts of this country. This divergence of opinion among the courts has undoubtedly been caused to some extent by the fact that for more than 50 years the courts of England have had no occasion to expound the common law upon this subject; common carriers, especially railway companies, having been placed entirely under the control of the statute law. In this country, to some extent, there is a lack of direct authority upon the question, owing to the fact that constitutional and legislative provisions are common in nearly all the states of this Union, prohibiting common carriers from practicing discrimination in their rates of toll. And, while these statutory and constitutional provisions have been regarded and incidentally declared to be reiterations of the common law by many courts of this country, sound authority upon which to base such declarations is wanting in the books. The fundamental and statute law of the various states upon this subject appears to have been founded upon the principles embodied in the early acts of parliament pertaining to the conduct and control of railways as common carriers, rather than upon the common law of England. Indeed, we have been able to obtain but few direct adjudications from English courts upon this question, owing to the fact that it would seem the business of inland common carriers in that country was not a matter of great concern until railroads were operated; and, immediately subsequent to that great epoch in the world's progress, statutory enactments followed, entirely taking away from the courts the necessity of any further application of the common-law rights and remedies. If the common law were as appellant here contends it to be, there would have been no necessity for parliament to have enacted these stringent "equality clauses," as they were termed. It appears that this principle of equality of charges arose from the necessity of the times, a necessity created by the operation of railroads, which swallowed up and destroyed all other common carrier systems of England, and thereby created a monopoly of the business, and a power for wrong that at once demanded the restrictions of legislative enactments. This conclusion is fully borne out by the language of Mr. Justice Blackburn in Railway Co. v. Sutton, L. R. 4 H. L. 238, wherein he said: "I think it appears from the preamble of the 90th section of the railways clauses consolidation act (1845) that the legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And, if this be borne in mind, I think the construction of the proviso for equality is clear, and is that the defendants may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies, acting as carriers, on their line, must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable. The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material as evidence for the jury tending to prove that the reasonable charge was the smaller one. When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

It is not the purpose of the court to review the authorities of this country upon the question under discussion. For the reasons previously suggested, the matter was only indirectly involved in the great majority of them, and, as authority upon the subject, they are weakened to that extent. The case of Scofield v. Railway Co., 43 Ohio St. 571, 3 N. E. Rep. 907, is the leading case in the United States supporting appellant's contention, and it is upon this case that appellant says "he has pinned his faith and hung his hope." The case of Johnson v. Railroad Co., 16 Fla. 623, is the leading case in this country holding to the contrary view, and the opinion of the learned judge in the Scofield Case does not appear to overrule the doctrine there declared, but would seem to look to the statute law of Ohio for support, rather than to the common law. It says, in speaking of the Florida case: "Reliance is placed on the doctrine that discrimination is not necessarily unlawful, and that all the freighter is entitled to is a reasonable rate, not necessarily equal to all, and, in the absence of any statute to the contrary, we are not inclined to question the correctness of these decisions." The facts in the Florida case appear to be practically identical with the facts of this case. Florida had no statutory law upon the subject of the regulation of common carriers, and hence, as here, the merits of the case rested upon the determination as to what was the common law upon the subject. In this case the ancient, as well as the modern, authorities are ably reviewed, and the court says: "Our conclusions are that, as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he cannot refuse A. and accommodate B.; that all, the entire public, have the right to the same carriage for a reasonable price, and at a reasonable charge for the service performed; that the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; that all a shipper can ask of a common carrier is that for the service performed he shall charge no more than a reasonable sum to him; that whether the carrier charges another more or less than the price charged a particular individual may be a matter of evidence in determining whether a charge is too much or too little for the service performed; and that the difference between the charges cannot be the measure of damages in any case, unless it is established by proof that the smaller charge is the true, reasonable charge, in view of the transportation furnished, and that the higher charge is excessive to that degree." The court also says: "In the last edition of Story on Bailments we find the rule of the common law thus stated: 'At common law a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable,—nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at any unreasonably low rate, or even gratis.'"

By reason of the variance which exists in the views of the courts of this country as to what is the common law upon this subject, it would seem that the adjudications of the common-law courts of England upon such a matter should have preeminent and controlling weight with the courts of the various states. In the case of Railroad Co. v. Sutton, to which reference has already been made, Mr. Justice BLACKBURN, in a very luminous opinion, addressed in part directly to this question, said: "At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession, (unless he had some reasonable excuse for not doing so,) on being paid a reasonable compensation for so doing; and, if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform the duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was that he should not charge any more than was reasonable." The learned justice in his opinion clearly indicates that the prime object of the railway equality clauses enacted by parliament was to cover the exact case of injury by discrimination in freights, such as is claimed by plaintiff in this record. During the progress of the argument in Baxendale v. Railway Co., 4 C. B. (N. S.) 78, Justice BYLES said: "I know no common-law reason why a carrier may not charge less than what is reasonable to one person, or even carry him free of all charge." For the foregoing reasons the court concludes that the complaint is deficient in not stating that the charge to plaintiff was unreasonable; and that the allegation of discrimination or inequality is not the equivalent of an allegation of an excessive charge. Let the judgment be affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; HARRISON, J.

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94 Cal. 489

SAN BERNARDINO & E. RY. CO. v. HAVEN *et al.* (No. 14,375.)

(*Supreme Court of California.* May 7, 1892.)

EMINENT DOMAIN — COMPENSATION—ELEMENTS OF DAMAGE.

1. Under Const. art. 1, § 14, which provides that no right of way shall be appropriated until compensation is made, irrespective of any benefits from the proposed improvements, the court properly refused to permit a railroad company to show that the construction of its road would prevent the depreciation of the land not taken, by reason of making the products more accessible to the markets.

2. Where the land through which a right of way is sought to be taken is adapted to cultivation, the increased cost of cultivating it, caused by building the road, may be considered in assessing damages.

In bank. Appeal from superior court, San Bernardino county; J. H. CAMPBELL, Judge.

Proceedings by the San Bernardino & Eastern Railway Company against Frances T. Haven and others to condemn a right of way through defendants' lands. From a judgment entered on a verdict assessing damages in favor of each defendant, and from an order denying a new trial, plaintiff appeals. Judgment and order affirmed.

A. Brunson, *E. E. Rowell*, and *Harris & Gregg*, for appellant. *Rolfe & Freeman*, *Paris & Fox*, and *Geo. E. Otis*, for respondents.

PER CURIAM. The plaintiff, a railway corporation, instituted this action against certain parties, as the owners of separate tracts of land, for the purpose of condemning to the use of the corporation a portion of the land of each of the parties owning the tracts, as a right of way for the line of its road across these several tracts. Some of the parties made no answer, and the matter of their compensation is not in issue here. Some answered, setting up that the lands sought to be condemned were not necessary to be taken for the proposed use of the railroad as a right of way, but demanding that, if the lands are taken, the value thereof and damages for the taking, etc., be awarded them. Others filed an answer in the nature of a general denial of the allegations of the complaint. A trial was had before the court and a jury between the plaintiff and the defendants, J. W. Hall, A. M. Ham, H. H. Linville, H. H. Jones, F. E. Dudley, J. D. Langford, C. H. Tyler, J. B. Tyler, James Fleming, and C. A. Lamb. The jury assessed damages in favor of all the parties with respect to each tract of land affected by the taking of the proposed right of way, and upon that the court rendered its judgment, following the verdict of the jury, etc. From that and an order denying a new trial the plaintiff appeals.

The principal errors relied on for a reversal of the judgment and order seem to be the rulings of the court upon the admission and rejection of evidence. The damages alleged to have been done to the land of defendant H. H. Linville, who owned it separate from the other defendants, was being inquired into from him as a witness, and upon cross examination he was asked by plaintiff's counsel these questions: "Is it not a fact that oranges will bring a better price by reason of the railroad being there? Isn't the value of the crop dependent on the market that you have for it, and its accessibility to the market? Will not the accessibility of the produce of the land to the market by reason of the construction of that road prevent any depreciation in its value?" These were all objected to, and the objections sustained by the court on the ground that they were immaterial and irrelevant, in that they sought to show benefits accruing to the land by reason of the improvement proposed; that is, the construction of the railroad. It is argued for the appellant that these questions only sought for evidence to show that the land not taken for the right of way would not be depreciated in value; and therefore no damages could result to it, and that such evidence would not go to show a benefit. We do not so understand the questions. They certainly called for evidence which might show a benefit from the improvement proposed. Article 1, § 14, of the state constitution reads thus: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in a court of record, as shall be prescribed by law." It is argued for appellant that the prohibition contained in this section against taking into consideration the benefit to arise from the improvement is limited to that land which is taken for the right of way, and has no reference to benefits that may accrue to the land not taken. This position, however, is in direct opposition to the construction given to the section by this court in Railway Co. v. Porter, 74 Cal. 261, 15 Pac. Rep. 774, and which was afterwards expressly approved in Muller v. Railway Co., 83 Cal. 245, 23 Pac. Rep. 265. While it is true that, if it could be shown that the value of the land would be enhanced by reason of the improvement, the damage sustained by the owner would be to that extent reduced, still such evidence would be only another mode of showing the amount of benefit derived from the improvement; and inasmuch as the constitution declares that the owner is entitled to receive full compensation for the damage done to his land, as well as for the land which is taken, irrespective of any benefit to be thereafter derived by reason of the improvement, such evidence would be irrelevant and immaterial.

Other exceptions were taken by the appellant to the rulings of the court in excluding as well as in admitting evidence upon the issue of damages, but, as the rulings of the court in these particulars appear to have been made in accordance with the foregoing construction of the constitution, it is unnecessary to consider them in detail. For the same reason the following instruction, given at the instance of the defendants, and excepted to by the appellant, was correct, viz.: "In fixing the amount of damages to that portion of the tract of each defendant not sought to be condemned, which may accrue by reason of the running of the railroad through their premises, the jury must ascertain and fix the amount, irrespective of any benefit which may result to defendants from the proposed railroad." It is also claimed by the appellant that the court erred in admitting evidence of the increased cost which might result from a system of irrigation upon some tracts, which would have to be adopted if the railroad were built, beyond that which would be suitable if the road was not built. The objection urged is that the land is uncultivated, and that no such system has yet been adopted, or is in contemplation of adoption. The land appears to have been unadapted to cultivation unless irrigated, and the damage caused by the building of the railroad would be increased if, by reason of such building, the owner was compelled to incur greater expense in its irrigation. Although then uncultivated, the land was shown to be adapted to cultivation. If so, the increase of any cost for bringing it under cultivation, caused by the building of the railroad through the land involved, would be a legitimate subject of inquiry, for the purpose of ascertaining the damage sustained by the owner.

The judgment and order are affirmed.

McCreery v. Wells. (No. 14,515.)

(*Supreme Court of California.* May 7, 1892.)

Action for Money Had and Received—When Lies—Harmless Error.

1. An action for money had and received does not lie to recover money placed in defendant's hands as an officer of a land pool, and with plaintiff's consent invested in land contracts in trust for plaintiff, though defendant, after the purchase, contrary to plaintiff's wishes, transferred the contracts to a corporation formed of the members of the pool, and refused to issue to plaintiff his proportion of stock in the corporation.

2. Since, in any event, the money could not be recovered in this form of action, the error of finding, contrary to the evidence, that defendant did not receive plaintiff's money, was harmless.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action for money had and received, by Fenton R. McCreery against C. M. Wells. Defendant had judgment, and plaintiff appeals. Affirmed.

Brousseau & Hatch, for appellant. *Anderson, Fitzgerald & Anderson*, for respondent.

Foote, C. The plaintiff sues to recover $5,000 and interest from the defendant. It is alleged in the complaint that the defendant, on the 4th of November, 1887, received $5,000 of the plaintiff's money to be invested for the latter in lands of the "California Cheap Land Pool;" that the defendant did invest the money in that pool, and in some lands or other investments, but not to the use and benefit of the plaintiff, but in the name of the defendant and for himself; that the plaintiff has demanded his money thus invested in the name of the defendant, and has not received it or any part of it, or anything for and on account thereof. For a second cause of action it is alleged that the $5,000 came into the possession of the defendant for and on account of the plaintiff, and as his property, and that it still is held in trust for the plaintiff by the defendant; that the defendant has been called on by the plaintiff for an accounting for that sum of money, and that it be returned and paid to the plaintiff, with interest from the 4th of November, 1887, to which demand the defendant has failed and refused to accede, or to pay anything to the plaintiff, and that the defendant still retains it for and on account of the plaintiff; that the latter is entitled to the return of the money and interest; and, therefore, judgment is demanded, etc. The answer denies these allegations. The cause was tried by the court, and resulted in a judgment for the defendant. A motion for a new trial was made and denied. From the order made in that behalf this appeal is taken.

The findings are assailed as being unsupported by the evidence. They read thus: "(1) The defendant did not receive the sum of $5,000 or any sum of the money or property of plaintiff at any time, for the purpose of investing the same in any lands, or for any purpose, or at all; but the said $5,000 was received by parties other than the defendant, for the purpose of investing the same in said lands. (2) That defendant did not invest said money, or any money, of the plaintiff to his, the defendant's, use or benefit in any manner, or at all. That said sum of $5,000 was invested for the benefit of and on account of plaintiff in lands of the California Cheap Land Pool, and plaintiff derived the benefit and use of said investment of said $5,000. (3) That defendant has never received or come into possession of $5,000, or any sum, belonging to, or for or on account of, plaintiff, and has not held any money in trust for plaintiff, and did not and does not retain the same on account of or to the use of plaintiff. (4) That plaintiff is not entitled to said or any sum of money, or to have the same returned to him from the defendant." From these findings this conclusion of law is declared: "That the plaintiff is not entitled to any relief against the defendant, and defendant is entitled to a judgment that plaintiff take nothing, and for his costs."

The facts of the case, about which there is neither question nor conflict, are, among others, that the defendant received authority from the plaintiff's father to invest a certain $5,000 which the father had of the son's money in a certain cheap land pool, about which the father had been advised by a letter from the defendant; and in pursuance of this arrangement the defendant drew a draft on the father, and sent it for collection through a bank in Los Angeles, of which one Arnold was cashier, as also a member, as was the defendant, of this cheap land pool. The money, when collected, was directed by defendant to be placed to the credit of Arnold as treasurer of this land pool. When the draft was paid, its proceeds were accordingly placed to the credit of Arnold, and were invested, according to the original directions of the father, in the purchase of certain contracts for the purchase of lands, which contracts were taken in the names of Arnold and the defendant. The plaintiff then came to Los Angeles, and seemed to acquiesce in this disposition of his money, which we think beyond all question was in fact invested for him by the defendant, even although he may not and did not actually take the money into his hands or pay it out; for what was done with it was certainly done by his direction. Then, for certain reasons, the plaintiff became dissatisfied, and wanted the land pool to turn over certain of the lands to him as his own. This they would not consent to do, and finally, by a vote of the members of the pool, except the plaintiff and one Crawford, they formed a corporation, and Wells, the defendant, and Arnold, against the consent of the plaintiff, transferred the land contracts—that is, equities in lands which they had in their own names individually, but really as trustees for all the pool members—to this new corporation, and issued stock in certain proportions to all the members, who accepted it; but, as the plaintiff would not agree to the incorporation or transfer, or consent to the acts of Wells, the defendant, (who, all the while up to the final transfer, held the equitable interest in these lands which the plaintiff's money had purchased, in his, Wells', own name, in conjunction with Arnold as trustees for the plaintiff,) the proportion of stock which would otherwise have been the plaintiff's was issued to the defendant. Plaintiff's money having been invested in the pool by his consent, his right was to his proportionate share of the property purchased by them and held by Arnold and Wells as his trustees. If Wells, or Arnold and Wells, have, in violation of their trust,—a question which we are not now called upon to decide,—turned the property over to a corporation, he or they are responsible to plaintiff for such violation of their trust, but not for the money invested in good faith in obedience to plaintiff's orders, and this suit, which is substantially an action for money had and received, cannot be maintained. The finding that Wells did not receive plaintiff's money, though contrary to the evidence, is harmless, for, supposing that fact to have been found the other way, still plaintiff could not recover. From this it follows that the order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

94 Cal. 540

Williams v. Dennison. (No. 13,987.)

(*Supreme Court of California.* May 16, 1892.)

Pleading—Reply—Appeal—Assignments of Error—Evidence.

1. Under Code Civil Proc. § 462, which declares that the statement of any new matter in the answer, in avoidance or constituting a defense, "must on the trial be deemed controverted by the opposite party," in an action for money had and received, where defendant pleaded the statute of limitations, the jury could consider any question of fraud on the part of defendant which would take the case out of such statute, even though the complaint contained no averment as to those matters.

2. A specification by defendant that "the evidence shows that all amounts of money collected by defendant, and all amounts of cash which had been paid him by plaintiff, were more than two years before the commencement of this action, and therefore barred by the statute of limitations, except the $70 paid by R.," was insufficient to raise the question on appeal as to whether there was any evidence of fraud on his part.

3. Where a witness for plaintiff had produced a summarized statement of the account from plaintiff's books, it was not error to admit a statement as to the footings made by plaintiff's attorney, in answer to a question by one of the jurors.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by C. B. Williams against E. F. Dennison for money had and received. From a judgment on a verdict for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

B. McKinne, for appellant. *J. C. Bates*, for respondent.

Belcher, C. This is an action for money had and received. The complaint was filed September 12, 1889, and it alleged that the money sued for—$1,131.73—was received by the defendant for the use and benefit of the plaintiff on the 28th day of October, 1887, at the city and county of San Francisco. The answer denied all the material averments of the complaint, and alleged that the cause of action was barred by the statute of limitations. The case was tried before a jury, and the verdict and judgment were in favor of the plaintiff for the sum of $581.67. From this judgment, and an order denying a new trial, the defendant appeals.

The principal point made for a reversal is that all the items of plaintiff's demand, except $70, were received by defendant more than two years before the commencement of the action, and hence their recovery was barred by the statute. It appears that in 1887 the plaintiff was a street contractor, and the defendant was employed by him to solicit contracts and to collect the moneys due thereon, and that he was to receive for his services a certain percentage of the contract prices. Under this arrangement defendant proceeded to get contracts and to make collections until the latter part of September, 1887. At the trial plaintiff offered in evidence several statements made by defendant of his collections, but attached to them were no dates showing when any of the collections were made. Plaintiff also introduced evidence tending to show that defendant collected and failed to account for more money, after deducting his commissions, than was found by the verdict to be due from him. When the plaintiff rested, the defendant first introduced in evidence a bill of particulars furnished by the plaintiff, commencing as follows: "The following are the items of the account or indebtedness alleged in plaintiff's complaint in above-entitled action. All the amounts received by defendant were received by him at the city and county of San Francisco within two years prior to the commencement of said action." The items of cash received were then stated, but without dates, aggregating $1,131.73, after deducting the credits. Defendant also offered in evidence certain pages of his ledger and block book, "showing the several amounts collected by him under these several contracts, the dates of each payment, and the names of the persons from whom he collected." He was then sworn as a witness in his own behalf, and testified, among other things, that he did not receive all the items of cash charged against him in the bill of particulars, and that "all the amounts collected by me (except the seventy dollars collected from Rose Auerbach) were collected more than two years before the commencement of this action; all the cash advanced by plaintiff to me was advanced more than two years before the commencement of this action." When the case was submitted, the court gave to the jury all the instructions asked by defendant, and among them the following: "All amounts collected by defendant more than two years prior to September 12, 1889, the commencement of this action, which were known by plaintiff to have been collected by defendant, or which he had the opportunity of ascertaining, and were not ascertained by him, or unless the collection of said amounts were fraudulently concealed by the defendant, are barred by the statute of limitations. Should you find that some of said accounts were collected within less than two years prior to 12th day of September, 1889, then your verdict should be only for the amounts so collected. Facts constituting fraud must be proved. If the jury believe from the evidence that defendant was the agent of plaintiff in the collection of any moneys claimed in the complaint, and plaintiff has failed to prove that defendant made any concealment of facts, or misrepresentations, or deceit, or other facts constituting a fraud as to said collections, and for all sums that plaintiff has failed to prove were collected within two years before said 12th day of September, 1889, then said sums are barred by the statute of limitations." And when the jury retired "the books, contents, and exhibits of respective parties were, by consent of respective parties, submitted to the jury, and taken by them into the jury room."

It is now suggested that the jury had no right to consider any question of fraud, concealment, or deceit on the part of defendant, for the reason that the complaint contained no averment as to those matters. But no such averments were necessary. Under our statute "the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must on the trial be deemed controverted by the opposite party," (Code Civil Proc. § 462;) and any proper evidence is admissible to meet and overcome that defense, (Curtiss v. Sprague, 49 Cal. 301; Water Co. v. Raynor, 57 Cal. 588.) It is further suggested that there was no evidence of any fraud on the part of the defendant, and hence that the verdict was not justified. The only specification as to the sufficiency of the evidence in this regard is as follows: "The evidence shows that all amounts of moneys collected by defendant, and all amounts of cash which had been paid him by plaintiff, were more than two years before the commencement of this action, and therefore barred by the statute of limitations, except the $70 paid by Rose Auerbach." This specification is clearly not sufficient to raise the question suggested, and it therefore cannot be considered here. It follows that the judgment cannot be reversed on the ground that the verdict was not justified by the evidence.

The only other point made by appellant is that the court erred in the admission of certain evidence. It appears that one F. W. Williams was a witness for plaintiff, and produced a synopsis or summarized statement of the account from plaintiff's books. That synopsis is not brought up in the record, and the only matter referred to as erroneously admitted was a statement made as to the footings by plaintiff's attorney in answer to a question by one of the jurors. In this we see no reversible error. We advise the judgment and order be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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94 Cal. 533

PLUMMER v. SHELDON *et al.* (No. 14,493.)

(*Supreme Court of California.* May 16, 1892.)

HIGHWAYS—DEDICATION—WHAT CONSTITUTES.

A road was laid out along what was presumed to be the western boundary of a patent by persons supposing that they were acting under the authority of the board of county supervisors; and, although the proceedings were insufficient to constitute it a public road, its use as such was acquiesced in until the true line of the patent was found to be further west. Thereupon the owners of the land included in the patent moved their fences and inclosed the road, but by mutual consent they and the owners of the opposite lands left uninclosed a strip of land between them for use as a public road instead of the other, and it was so used for more than 10 years. *Held*, that it was thereby dedicated as a public highway, Pol. Code, § 2618, defining "public highways" as "roads * * * laid out or erected as such by the public, or, if laid out or erected by others, dedicated or abandoned to the public."

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Action by A. M. Plummer against W. C. Sheldon, A. Mull, and Sarah W. Belcher. From a judgment for plaintiff, defendants appeal. Affirmed.

Geo. A. Blanchard and *A. L. Hart*, for appellants. *Elwood Bruner* and *F. D. Ryan*, for respondent.

FOOTE, C. The plaintiff, a road overseer in the county of Sacramento, brought a separate action against each of the appellants here for the obstruction of a public road. For convenience, the appeals are to be heard upon a single consolidated statement on motion for a new trial and the judgment roll of each case. The court below found in favor of the plaintiff in each case, and from the judgment therein rendered, and orders denying a new trial, these appeals are prosecuted. The determination of one involves that of the others. The main questions raised for a reversal of the judgments and orders are that the evidence does not support the findings; and that, even if the findings are supported by the evidence, they do not justify the judgment. The facts, as set out in the findings, are about these: About 25 years before these actions were brought there was a certain road in Sacramento county called the "Grant Line Road," which was supposed to run along the base line of a grant of land from the Mexican government, and patented by the government of the United States to one Jared Sheldon. The parties who are defendants here owned land included in this grant, and along the westerly boundary of the grant this road ran and was much traveled. It was a thoroughfare commencing at the upper Stockton road and followed thence the line of the grant, as first surveyed by one Cleal, to a public road called the "Jackson Road," which ran from the city of Sacramento to the town of Jackson, in Amador county. This "Grant Line Road" was 60 feet wide, and was laid out on the ground, by throwing up a furrow on each side thereof, and harrowing in the center, and was plainly and visibly marked upon the ground throughout its course. It was laid out by those who supposed they were acting under the authority of the board of supervisors of the county, although the proceedings taken, as shown in the evidence, do not appear to have been entirely correct or sufficient to constitute it a public road. From the time it was so laid out it was traveled by the public, and constituted for a period of 10 or 12 years the main line of travel between the southeastern or lower part of the county of Sacramento and Jackson and Placerville, and was commonly called and known as the "Grant Line Road." After that time the travel fell off to some extent, but the road continued to be used by the public on the Cleal line, as originally laid out, until some time in the years 1873 and 1874. About April, 1873, the patent to the grant from the government of the United States was received and recorded, and it then appeared that what had been always supposed, according to the Cleal survey, to be the true base line of the grant, was not such line, but that the true line was that established by another, called the "Thompson survey." The effect of this was to throw the base line of the grant further westward, commencing at a little town called "Sheldon," and running to where the road in controversy intersects the Jackson road. Thus it happened that what was the original grant line road now appeared to be not on the line, as had been supposed, but inside the grant, and varying from a few feet at Sheldon to several hundred feet at the intersection of the Jackson road. After this last base line had become known and established, the road in controversy not having been up to that time generally fenced out by adjoining proprietors, they began to fence out to that line and inclose their lands, and, by common consent, the thoroughfare was changed from the Cleal line to the Thompson line, and the old roadbed became a part of the inclosed premises. But those building fences across the Cleal line left outside these fences enough of their land for the road along the Thompson line. That is, they all recognized the road to have been established as a thoroughfare, but changed its location, by common consent, to where it was intended originally to run; that is, along the true line of the grant. Both before and since this change, down to the year 1883, from about the year 1858, it was an open road, traveled by the public, and generally recognized in the community and by the owners upon said grant as a public highway, and was worked and repaired in different parts by the road authorities of the county. No objection was ever made by any of the landowners along the line of the road to its maintenance as a public highway, up to the year 1883, and since this road was first traveled there has been no other road on or near the grant line, pursuing the same general course, and no other road leading so directly to the towns of Jackson and Placerville, from the lower part of the county of Sacramento. When the road was changed by general consent from the Cleal to the Thompson line, the defendant Mull owned a portion of the land in the Sheldon grant, and also owned a piece of railroad land which was west of and adjoined a portion of the grant land which one Cotton then owned. The grant line of Mull has never been fenced, but about the year 1873–74 he did fence his railroad land, and in doing so left 25 or 30 feet of that land between it and the grant line where Cotton owned outside his (Mull's) fence. About that time Cotton (who owned Sheldon grant land opposite Mull's railroad land) threw up a ditch on his land which was not fenced, about 30 feet inside his land; this left about 60 feet, for a road between Mull's fence and Cotton's ditch. This space was mutually intended by Cotton and Mull for the purposes of said grant line road, and was thereafter used by the public until about 1883, when Mull fenced and obstructed the roadbed thus left by him and Cotton in 1873–74.

J. C. Belcher, the husband and immediate predecessor of Sarah W. Belcher, was the first of the grant landowners to fence his line in 1873 out to the Thompson line. He set his fence inside his line 30 feet, for the express purpose of leaving space for the grant line road. The land west of and opposite to his was at that time government land, and was unfenced. About the year 1873 he died, and the defendant, his widow, thereafter bought a piece of government land, which lay west of and adjoining her grant land. In 1883, desiring to have both her tracts of land under a common fence, she fenced across the road here involved, and up to her government land on its west side, thereby inclosing and obstructing the highway and compelling the travel to turn out at her fences and make a circuit of her government land, and these fences she has since maintained. As to Sheldon, it appears that at the time the grant line road was changed from the Cleal to the Thompson survey base line, Mr. Cotton, above mentioned, owned a portion of the Sheldon grant south of the Jackson road, which was then unfenced. When the change was made, Cotton threw up, as heretofore stated, a ditch on his land 30 feet inside his line, which was intended to mark the line of his land abutting on what he left for the road on his side thereof. About that time Mull, who owned railroad land west of and adjoining Cotton's said land, as before stated, fenced his (Mull's) land, and left outside his fence 25 or 30 feet of his land, which, with the strip left out by Cotton, made a strip of land 60 feet wide between the Cotton ditch and the Mull fence, which Mull and Cotton fenced out for the purposes of the said grant line road. This remained thus until 1883, when Mrs. Belcher obstructed the road, as above stated. After that, about 1885, Sheldon (the immediate successor of Cotton of a portion of the interest held by Cotton in the land above mentioned) fenced in about one half of the grant line roadbed so that it was inside his inclosure. The findings are supported by the evidence, as we think.

The only question, then, left for determination, is whether, from the facts as found, it follows as an ultimate fact necessarily deduced therefrom, that the land here involved was dedicated by the defendants or their predecessors in interest for the purposes of a public road. We think that the facts as found are sufficient to show that the acts of defendants or their predecessors are inconsistent with any construction except that the land was used by the public for a highway with the consent and approval of the owners thereof. We do not think that any of the cases in opposition to this view cited by the appellants involved any such state of facts as those here. And the facts of the case, as set out in the findings, make the conclusion inevitable that at least the owners of the land abandoned possession of it for a public road, and that, therefore, such road thus established on the land is the public highway; for no objections were made by the owners of the land or their predecessors for more than five years as to the use of the land for a public road, either on the Cleal or the Thompson line, and the legal presumption is that the owners abandoned possession of the land for the road. "Public highways," as defined by the Code, "are roads, streets, alleys, lanes, * * * laid out or erected as such by the public, or, if laid out or erected by others, dedicated or abandoned to the public." Pol. Code, § 2618. "A highway thus created continues to exist until it is vacated or abandoned by order of the board of supervisors of the county in which it is situated, or by operation of law or judgment of a court of competent jurisdiction." Babcock v. Welsh, 71 Cal. 402, 12 Pac. Rep. 337; Pol. Code, §§ 2619–2621; Bolger v. Foss, 65 Cal. 250, 3 Pac. Rep. 871. We conclude, therefore, that the contentions of the defendants are without merit, and advise that the judgments and orders be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgments and orders are affirmed.

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94 Cal. 443

COOK *et al.* v. SUDDEN. (No. 14,399.)

(*Supreme Court of California.* May 5, 1892.)

MOTION FOR NEW TRIAL—NOTICE—DEDICATION OF HIGHWAY.

1. Where notice of intention to move for a new trial is served by defendant, under Code Civil Proc. §§ 1010, 1011, upon attorneys representing all the plaintiffs, the inadvertent omission of one of the plaintiffs from the title at the top of the notice cannot be held to have misled the attorneys into the belief that the notice was not intended for him, or to have otherwise prejudiced him.

2. Where no offer to dedicate land as a public street is made or intended by the owner, but fences are maintained, and an attempt to open it as a street is resisted, a public map made by the city, on which the land is laid down as a street, is not of itself evidence of dedication or user, nor is a private map, which has never been filed. People v. Reed, 22 Pac. Rep. 474, 81 Cal. 70, followed.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Action by F. S. Cook and others against Robert Sudden. Judgment for plaintiffs. Defendant appeals. Reversed.

S. A. Shepperd and *A. N. Drown*, for appellant. *Blackstock & Shepherd*, for respondents.

FOOTE, C. This is an action to recover money on an alleged street assessment, for work done by certain contractors. Plaintiffs had judgment as prayed for, from which, and an order denying a new trial, this appeal is taken by defendant. It is claimed by the respondents that the judgment and order should not be disturbed because the notice of motion for a new trial, although served on the attorneys for all the plaintiffs, did not state in the caption thereof the name of one of the plaintiffs. It is perfectly clear that the notice of intention to move for a new trial by defendant was given and made under sections 1010 and 1011 of the Code of Civil Procedure, and was directed to and served on the attorneys who were the attorneys for all the plaintiffs; and the fact that by inadvertence the name of one of the plaintiffs, Robert Bell, was left out of the title of the cause, at the top of the notice, should certainly not be held to have misled these attorneys into the belief, as there is no pretense that it did, that no such notice was intended as to their client, Robert Bell. In fact, there is nothing in the record which shows any prejudice done in this regard.

We do not deem it necessary to determine any other question raised here, except as to the sufficiency of the evidence to support the findings upon the matter of the dedication of the land involved, as a public street, by its owner, the defendant. The action is based on a street assessment. If there was no public street, of course there could be no valid street assessment, for no recovery can be had for any street work done upon private property. The evidence in this case is all one way, to wit, that no offer to dedicate the land as a public street was ever made or intended to be made by the owner; and the alleged acceptance of the street by the city of San Buenaventura, by merely putting it on a map, was of no value, because no offer had been made which could have been accepted. The lease and deeds introduced, executed by the defendant, and the evidence of the defendant, in our judgment show that no offer to dedicate, or anything looking that way, was ever made or intended to be made. The private map introduced, which was never filed, was no evidence to show any offer to dedicate to the public. People v. Reed, 81 Cal. 70, 22 Pac. Rep. 474. In truth the evidence is utterly void of anything which shows either a dedication, or an offer to dedicate, and no acquiescence in any user of the public by the owner appears. The evidence, particularly that of the defendant, which was brought out by the plaintiffs, he being their witness, and which is not contradicted, plainly shows that the land in dispute was private property, and he had never dedicated or offered to dedicate it to the public use as a street; that he had it fenced at both ends, until the fences were torn down by the order of the city authorities; that there was never any user by the public in the slightest degree authorized by the defendant; that the attempted opening of the so-called "Laurel Street" by the city authorities, and its improvement by the contractors, was protested against by the defendant, who in every way seems to have endeavored not to offer to dedicate, and not to allow a user by the public. The fact that a public map had the land in dispute laid down as a street was not of itself evidence of dedication or user, and there is nothing else in the record which, in our judgment, even tends to show any offer of dedication. Under the rule laid down in People v. Reed, supra, the findings assailed are totally unsupported by the evidence, and the judgment and order should be reversed, and we so advise.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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94 Cal. 497

PEOPLE v. WALLACE. (No. 20,884.)

(Supreme Court of California. May 12, 1892.)

COMMITMENT—ORDER OF MAGISTRATE—VARIANCE BETWEEN COMPLAINT AND INFORMATION—BILL OF EXCEPTIONS.

1. Under Pen. Code, § 872, providing that, when a person is committed for trial for an offense, "the magistrate must make or indorse on the deposition an order" to that effect, signed by him, it is sufficient if such order be entered on the magistrate's docket, in which, by section 1428, all proceedings must be entered.

2. Where the complaint filed before the magistrate charges defendant with the larceny of three steers, the property of W. and J., while the information in the superior court charges him with the larceny of two steers, the property of W., defendant's motion to set aside the information should for that reason have been granted.

3. A document referred to in a bill of exceptions, and set out in another part of the record, may be deemed part of such bill, when sufficiently identified as the one so referred to.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

One Wallace was convicted of larceny, and appeals. Reversed.

Graves & Graves and *Wilcoxon & Bouldin*, for appellant. *W. H. Layson*, Dep. Atty. Gen., for the People.

DE HAVEN, J. The defendant was charged by information with the crime of grand larceny, and appeals from a judgment of conviction and an order denying his motion for a new trial.

1. Upon his arraignment the defendant moved to set aside the information, upon the ground that he was not legally committed before its filing. The motion was denied, and the exception to this ruling is made a part of the record by a bill of exceptions, from which it appears that defendant was in fact examined before a justice of the peace upon a charge of grand larceny, and, as a result of such examination, an order was made by the justice holding him to answer said charge before the superior court. This order was entered in the docket of the justice, but was not indorsed upon the complaint, nor was there any written commitment of any kind on file in the superior court, and it did not appear that the testimony of any of the witnesses upon the preliminary examination was reduced to writing. Section 872 of the Penal Code provides that, when a defendant is held to answer, "the magistrate must make or indorse on the deposition an order signed by him" to that effect, and it is claimed by appellant that this section prescribes the only evidence of the fact of the making of such order, and that the order is not made, in contemplation of law, until it is indorsed upon the complaint or upon the depositions referred to in that section. We cannot agree with appellant in this contention. It is doubtless true that the order holding to an answer must be in writing, (Ex parte Branigan, 19 Cal. 133; People v. Wilson (Cal.) 28 Pac. Rep. 1061;) but when, as a result of an examination, such an order has in fact been made and entered upon the docket of the justice, it would seem that no further action upon his part is necessary in order to authorize the district attorney to file an information against a defendant for the offense named in the order, (People v. Wilson, supra.) The law requires the justice to keep a docket in which must be entered each action, and all proceedings therein, (Pen. Code, § 1428;) and we are of opinion that an order holding a defendant to answer is in fact and in law made when it is entered upon the docket of the justice, and the failure to indorse such order upon the complaint or the depositions taken, in no manner deprives the order of its validity, or affects any substantial right of a defendant. The case of People v. Thompson, 84 Cal. 598, 24 Pac. Rep. 384, is not in conflict with what is here decided. It was there held that the court properly set aside an information because the indorsement upon the depositions returned was not in accordance with the statute; and that, having done so, there was no error in directing that such depositions be returned to the justice for proper indorsement, and that such indorsement could be made without a re-examination of the case. This case was rightly decided, but the general reasoning found in the opinion must be construed with reference to the particular point before the court.

2. The defendant further claims that he was not legally committed for the offense charged in the information, because it is not the same as charged in the complaint upon which he was examined and held to answer, and we think his motion to set aside the information should have been granted for this reason. It is shown by the record that in the complaint filed before the magistrate the defendant was charged with the larceny of "three certain steers, the personal property then and there of one Joseph Wright and E. G. Jones," while in the information he is charged with stealing "the personal property of one Joseph Wright, to wit, two certain steers." It is manifest that there is such a variance between the offense described in the complaint and that charged in the information that the one cannot be deemed the same as the other. The only attempt made in either the complaint or information to describe the stolen property, and thus to identify the offense, was by an averment as to the ownership of the property; and, this averment not being the same in both, the information describes a different offense from that contained in the complaint, and proof which would sustain one would not support the other. 2 Bish. Crim. Proc. § 723. There can be no doubt that in an indictment or information for larceny, where the stolen property is not otherwise described so as to identify the offense, the allegation of ownership is a material

part of the description of the offense charged. People v. Hughes, 41 Cal. 234. There were no depositions returned to the superior court, and the district attorney, in the information filed, should have confined himself to charging the offense named in the complaint, and for which the defendant was held to answer. That officer was certainly not authorized to go outside of the complaint, and the order holding the defendant to answer, and, upon what he may have learned from other sources, charge a different larceny in the information. People v. Parker, (Cal.) 27 Pac. Rep. 537.

It is claimed by the attorney general that this objection to the information was not made upon the hearing of the motion to set it aside, but only after verdict upon a motion to arrest the judgment. We do not so understand the record. It is true that, in the bill of exceptions settled by the court upon its ruling on the motion to set aside the information, the complaint upon which defendant was examined and held to answer is not set out in substance or in terms, but it does appear therefrom that such complaint was introduced in evidence upon the hearing of the motion, and, as it is set out in another part of the record before us, we can look at it for the purpose of ascertaining its contents. A bill of exceptions is to be read in connection with the record of which it forms a part, and a document set out in another part of the record, which is sufficiently identified as the one referred to in such bill of exceptions, may be deemed a part of it, and considered in passing upon the merits of an exception reserved by such bill. As the record shows that the complaint upon which defendant was examined and held to answer was introduced upon the hearing of the motion to set aside the information, and the point here discussed was involved in the motion made, we are bound to presume that the court considered the same in passing upon that motion, and in effect decided that the variance between the complaint and information above noticed was not sufficient to justify it in granting the motion to set aside. It is not necessary that the bill of exceptions should show that this particular objection was urged in the argument of that motion before the superior court, but it is sufficient that it arises upon the motion as made and the evidence given upon the hearing. Judgment and order reversed.

We concur: GAROUTTE, J.; SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.

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94 Cal. 502

BROWN v. PREWETT, Judge. (No. 14,772.)

(*Supreme Court of California.* May 12, 1892.)

MANDAMUS—REFUSAL TO SIGN BILL OF EXCEPTIONS—SETTLEMENT—DISCRETION.

1. A judge who refuses to settle a bill of exceptions because not presented in proper time, and because the delay was inexcusable, cannot be compelled to do so by *mandamus*, unless the refusal involve an abuse of discretion.

2. An attorney on whom a bill of exceptions was served inadvertently accepted service without reserving any objection as to time. Within an hour, however, and while the paper was still in the possession of the petitioner, he took it, and, without the consent of the petitioner, qualified his acceptance by reserving such an objection. An attorney, who was present and who was assisting him in the case, then stated that they would not insist upon the objection. *Held* not to constitute a waiver of the objection, even if such a waiver would have been binding upon the court.

3. Where a party, instead of presenting a bill of exceptions within the 10 days limited by section 1171 of the Penal Code, allowed 60 days to elapse, during which he had 13 days clear of sickness and other imperative engagements, and then, instead of presenting the bill at once upon the completion of 2 days' notice to the other party, left it for 12 days in the hands of such party, after which he gave 7 days' notice of an application for settlement, and even then, on the day noticed, was wholly unprepared to excuse his delay, but was obliged to take 10 days longer for that purpose, the refusal of the court to settle it was not an abuse of discretion.

In bank. Petition by Esther Brown for *mandamus* to J. E. Prewett, judge of the superior court. Dismissed.

John M. Fulweiler, for appellant. *Atty. Gen. Hart*, *A. K. Robinson*, Dist. Atty., and *F. P. Tuttle*, for respondent.

BEATTY, C. J. This is an original proceeding by *mandamus* to compel the respondent to settle a bill of exceptions in a criminal case. The cause has been submitted upon a general demurrer to the petition. The facts alleged in the petition and admitted by the demurrer are that on the 19th of January, 1891, the petitioner was accused by information of the crime of grand larceny, and was thereupon tried and convicted. After some delays, granted for the purpose of enabling the official reporter to transcribe his shorthand notes of the testimony, a motion for a new trial was submitted and overruled, and sentence pronounced on May 16, 1891. The petitioner at once appealed from the judgment and order, obtained the certificate of respondent that there was probable cause for the appeal, and an order admitting her to bail, and fixing the amount thereof pending the appeal. Up to this point the petitioner had been represented in all stages of the prosecution by one of two members of a firm of attorneys. Both were nominally her counsel, but actually the case had been conducted by one of them exclusively, and the other was entirely unfamiliar with it. The evidence was voluminous, covering some 800 typewritten pages. From the date of the judgment—May 16th—to June 3d, a period of 18 days, the attorney who had represented petitioner as her counsel was sick, and, although able on two or three occasions to appear in court, was too infirm to undergo the labor of reducing the reporter's notes of the trial to the form of a bill of exceptions, and his partner, also nominally of counsel, made no effort to do so, apparently because he was not familiar with the case. On June 3d another attorney was substituted as counsel for petitioner. He, on July 15th, prepared and served a draft of a bill of exceptions on the district attorney, who, inadvertently, as he claims, accepted service without reserving any objection that it had not been made in time. Within an hour afterwards, however, and while the paper was still in the possession of counsel for petitioner, he took it, and, without the consent of said counsel, qualified his acceptance of service by adding the words: "Without waiving objection that time has expired." An attorney, acting as special counsel for the people, and aiding the district attorney in the prosecution, was present at this interview, and then and there stated to counsel for petitioner that he would not insist upon the point that the bill had not been filed or presented in time. On July 27th, the district attorney having proposed no amendments, counsel for petitioner gave him notice that on August 3d he would present the bill to respondent for settlement, which he accordingly did, but the respondent refused to settle it, on the ground that the delay in presenting it was without excuse. Thereupon counsel for petitioner asked and obtained leave to file affidavits excusing the delay. On August 13th he filed his affidavits, and thereafter the district attorney filed counter affidavits on the part of the people, all of which are set out in the petition. By these affidavits the facts above stated were shown, and it was also shown that the substituted counsel for petitioner, during the 42 days that elapsed between his appointment and the service of his proposed bill of exceptions, had been sick for 6 or 7 days; that he had been kept at the bedside of his wife for 12 other days by her serious illness; and had been busily engaged upon other cases in court for 10 other days, leaving him only 13 clear days, including Sundays, to devote to the examination of the voluminous proceedings in a case with which he was entirely unfamiliar, and the preparation therefrom of a condensed statement of his exceptions, and the evidence pertinent thereto. The bill so proposed, or a copy of it, is filed as an exhibit with the petition, and covers 35 typewritten pages. There was never any application to the respondent, or agreement on the part of the people, to extend the statutory time for presenting the bill of exceptions.

The respondent having decided upon this showing that the delay in presenting the bill was not excused, and having, therefore, refused to settle and certify it, the question is whether he can now be compelled by *mandamus* to do so. The practice in preparing and presenting bills of exceptions in criminal cases is regulated by section 1171 of the Penal Code, as follows: "When a party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of a bill must be prepared by him, and presented, upon notice of at least two days to the district attorney, to the judge for settlement within 10 days after judgment has been rendered against him, unless further time is granted by the judge, or by a justice of the supreme court, or within that period the draft must be delivered to the clerk of the court for the judge. When received by the clerk, he must deliver it to the judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the judge, and filed with the clerk of the court." When the course here indicated is pursued, a plain statutory duty is cast upon the judge to settle the bill, and the party appealing has an absolute right to demand its settlement, which can be enforced by *mandamus*. But when, as in this case, the statute is wholly disregarded by the party seeking to avail himself of its privileges, his right to demand a settlement of the bill becomes conditional, and dependent upon his ability to prove that his negligence is excusable. Whether it is or not is a question to be determined by the judge acting judicially upon the evidence submitted *pro* and *con*, and his decision cannot be controlled by *mandamus*, unless his refusal to act involves an abuse of discretion. It is conceded that the rule of the statute is directory merely; that the judge of the superior court has the power to settle a bill of exceptions in a criminal case presented after the 10 days prescribed by the statute, and after such additional time as may have been granted by him or by a justice of this court, and even in a case like this, where it is presented long after the lapse of the statutory time, and no effort has been made to procure an extension. It is also conceded that he not only has the power to settle a bill so presented, but that it is his duty to settle it, if the failure to comply with the statute is shown to have been unavoidable or excusable. But, on the other hand, the rule, though directory, was intended to be enforced in proper cases, and it is the duty of the courts to uphold it. It was meant to avoid unnecessary delays, and to enable the judges to settle bills of exceptions while the facts are fresh in their memory. It is, moreover, wholly inconsistent with the notion that a defendant in a criminal action, after appealing and giving bail pending the appeal, can take his own time in bringing the appeal to a hearing. Obviously there must, in such cases, be some limit of time within which the defendant should present his bill of exceptions. The statute has prescribed such a limit, which may for good cause be extended by the judge of the superior court, or by a justice of this court. If not presented within such time, the bill may still be settled if the court, in the exercise of its discretion, finds that the delay is excused. But if the delay is not excused, the court not only may, but ought to, deny the application. Therefore, we repeat, the respondent cannot be compelled by *mandamus* to settle the bill of exceptions in this case unless his decision that the delay in presenting it was without sufficient excuse is so clearly wrong as to amount to an abuse of discretion. Sprague v. Fawcett, 53 Cal. 408.

We do not think the case discloses any abuse of discretion. The circumstances connected with the service of the bill on the district attorney, and the remarks of the special counsel for the people, did not constitute a waiver of the delay, even if they had the power to bind the court by such waiver, which we very seriously doubt. Before the petitioner or her counsel had taken or omitted any step in consequence of his first and unqualified acceptance of service, the district attorney had qualified such acceptance with a distinct statement that he did not waive the objection that the bill was not in time; and this, we think, was a sufficient warning, aside from the statute, that the petitioner must be prepared to excuse her delay when the bill was presented. The fact that the petitioner was herself blameless was one which certainly should have had great weight with the judge in determining his action, but it was not conclusive. For failure or neglect in matters of procedure in criminal cases the blame scarcely ever attaches to the defendant, who necessarily depends upon his counsel in the management of his case, but the consequences of such failure must in most instances be borne by the defendant himself.

As to the question whether there was in fact an unnecessary and unreasonable delay in presenting the bill for settlement, we do not think the decision of respondent is without substantial evidence to support it. Even conceding that out of the 60 days elapsing between the judgment and the service of the draft on the district attorney counsel for petitioner had but 13 days clear of sickness and other imperative engagements, respondent may well be justified in holding that 13 days was far more than requisite for the preparation of the bill. But this was not all. Instead of following the practice prescribed in the Code, and presenting the bill to the judge at once upon its completion on 2 days' notice to the district attorney, counsel for petitioner left it in the hands of the district attorney for 12 days, and then gave 7 days' notice of their application for settlement. And even on the day noticed they were wholly unprepared to excuse their delay, but had to take 10 days longer to prepare and serve affidavits for that purpose. The result of all this was that instead of the 10 days allowed by law petitioner took nearly 90 days to submit her application, and this without ever having obtained or asked an extension of time. If, under such circumstances, we should hold that the superior judge abused his discretion in deciding that there had been unreasonable delay in presenting the bill, we do not see where we could draw the line, or what rule could be left for the guidance of the superior courts. The result would be to substitute for their discretion our discretion. The statute would no longer serve as a guide. Neglect of its provisions would become common, and the time of the superior judges and of this court would be consumed in the trial of questions which ought rarely to arise. The writ of *mandamus* is denied, and petition dismissed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; GAROUTTE, J.

94 Cal. 509

PEOPLE v. McNAMARA. (No. 20,877.)

(*Supreme Court of California.* May 12, 1892.)

ROBBERY—EVIDENCE—INSTRUCTIONS INTIMATING BIAS—PRESUMPTION OF INNOCENCE—RE-EXAMINATION OF WITNESS.

1. Leave to re-examine a witness as to matters upon which he has already been examined having been left by Code Civil Proc. § 2050, to the sound discretion of the court, cannot be assigned as error, although the examination is an unnecessary repetition, and tends only to emphasize a particular subject.

2. An instruction asked by defendant in a criminal case, but which is argumentative in form, and so emphatic that, if given, it would have indicated a strong bias, is properly refused.

3. An instruction that a person accused of crime is presumed to be innocent until proven guilty, and that this presumption goes with him all through the case "until it is submitted" to the jury, is erroneous in intimating that the presumption ceases at that time, whereas in fact it continues until a verdict is reached.

4. Evidence that a person who had been robbed described the robber to a police officer, and that the latter arrested the defendant on the description and on information received from the defendant's brother-in-law, is inadmissible on an indictment for robbery. People v. Johnson, 27 Pac. Rep. 663, 91 Cal. 265, followed.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Indictment of McNamara for robbery. There was a conviction, and defendant appeals. Reversed.

Dunne & McPike, for appellant. *Atty. Gen. Hart* and *W. S. Barnes*, for the People.

PATERSON, J. The defendant was convicted of robbery, and sentenced to serve a term of 15 years in the state prison. It is urged with much earnestness that the judgment should be reversed, because the evidence is insufficient to support the verdict. We find, however, from an inspection of the testimony that this contention cannot be sustained without a judicial invasion of the province of the jury, and a violation of the well-established rule applicable to cases in which there is a substantial conflict of evidence. Runyon, the prosecuting witness, testified that on the night of December 31, 1890, he met McNamara and another man, and stopped and conversed with them; that they walked along together about a block, when a man came out from an alley, and, approaching him from behind, grabbed him around the throat, pulled him back, and strangled him; that while he was being thus held the other persons—McNamara and his companion—went through his pockets, and took his valuables,—a diamond pin, a watch, and $27 in gold and silver. During the redirect examination of the prosecuting witness he gave testimony of the same character, and upon the same topic, as in his direct and cross examinations. The objection of the defendant ought to have been sustained, because the testimony was an unnecessary repetition, and the re-examination indicated a disposition on the part of the prosecution to emphasize the testimony of the witness upon a particular subject. Error, however, cannot be predicated upon the ruling. The matter is left to the discretion of the court. Code Crim. Proc. § 2050.[1]

The statements made by the witness Rogers on his cross-examination, as to

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This section declares that a witness once examined cannot be re-examined as to the same matter without leave of court, and that such leave is to be granted or withheld, in the exercise of sound discretion.

the reason why he had the defendant arrested, were directly responsive to the questions asked by defendant's counsel. The court did not err, therefore, in refusing to strike them out. All of the answers to the objectionable questions put to the defendant were stricken out, and the court in its instructions to the jury directed them not to consider such questions or answers in arriving at a verdict. The question put to the defendant on cross-examination, calling upon him to state the purpose for which he went to the saloon, was proper cross-examination.

The court did not err in refusing to give the first four instructions asked by the defendant. They were given in substance in the charge of the court. The other instructions asked by the defendant were properly refused, because argumentative in form, and couched in language so emphatic that, if given by the court, would have indicated a strong bias on the part of the court in favor of the defendant. An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue. It appears to be a common practice to select certain material facts, or those which are deemed to be material, and endeavor to force the court to indicate an opinion favorable to the defendant as to the effect of such facts by incorporating them into instructions containing a correct principle of law. The vice referred to is well illustrated in the following instruction asked by the defendant in this case: "In this case you are confronted with conflicting evidence as to the identity of the person by whom the offense charged is alleged to have been committed, and in determining whether or not the complaining witness was or was not mistaken as to the identity of the person who assaulted him you have the right, and it is your duty, to take into consideration, and weigh carefully, the condition and situation of the complaining witness himself. You have a right to consider that he is the only person who swears to the identity of the defendant; you have the right to consider that he was a stranger in San Francisco, coming from his country home to this large city; you have the right to consider his condition of sobriety or insobriety. * * * I charge you that it is your duty, in passing upon the question of the guilt or innocence of this defendant, to take into consideration his conduct after his arrest. You should consider whether, after the sale of this pin to Jordan was completed, this defendant is shown to have fled the city, or to have indulged in any other conduct suggestive of a consciousness of guilt. * * * You should consider the circumstance that the defendant expressed his willingness and his readiness to do all in his power to assist the complaining witness to recover his property and capture the thieves; and, finally, you should consider the extent to which the case for the defendant has been contradicted, whether it has been contradicted at all, whether it has been contradicted as to the defendant's *alibi*, or as to his possession of the pin, or as to his conduct after the arrest; and should you, upon the whole case, or indeed upon any material part of it, feel any reasonable doubt as to the guilt or innocence of the defendant, or should you fail to be satisfied to an absolute moral certainty of the guilt of this defendant, it would be your duty to find a verdict of not guilty, and acquit him."

The instructions given by the court of its own motion, while not as full as they might have been, are correct, except the first, which concludes as follows: "This defendant, like all persons accused of crime, is presumed to be innocent until his guilt is established to a moral certainty and beyond all reasonable doubt, and this presumption of innocence goes with him all through the case until it is submitted to you." The presumption of innocence does not cease upon the submission of the cause to the jury, but operates in favor of the defendant, not only during the taking of the testimony, but during the deliberations of the jury, until they have arrived at a verdict. The prosecuting witness was permitted to testify that he gave a description of the robbers when he reported the matter to the police officers, and one of the policemen testified that he arrested the defendant on information he received from the defendant's brother-in-law, and also on the description given by Runyon. The admission of this evidence was error. In People v. Johnson, 91 Cal. 265, 27 Pac. Rep. 663, we held that the court erred in admitting testimony of the witness Briggs as to the description of the defendant given him by the prosecuting witness before the arrest; and in Com. v. Fagan, 108 Mass. 471,—a case similar to this,—the court held that evidence that the person robbed described the robber to the officer, and that the latter by means of such description recognized the defendant as the assailant, was inadmissible. The ruling of the court allowing the witness Rogers to state the conversations he had with the chief of police of San Jose was also erroneous. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; MCFARLAND, J.; DE HAVEN, J.; HARRISON, J.

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94 Cal. 425

NEALE *et al.* v. DEPOT RY. CO. (No. 14,496.)

(*Supreme Court of California.* May 5, 1892.)

NEW TRIAL—NOTICE OF MOTION—COMMUNITY PROPERTY.

1. Code Civil Proc. § 659, subd. 1, provides that a party intending to move for a new trial must, within 10 days after verdict, or after notice of the decision of the court or referee, serve a notice of his intention, designating the grounds on which the motion will be made, and whether it will be made on the minutes of the court or otherwise. Subdivision 4 provides that when the motion is to be made on the minutes of the court, and the ground thereof is the insufficiency of the evidence, or errors of law, the motion must be denied, unless the notice specifies the particulars in which the evidence was insufficient or the rulings of the court were erroneous. *Held*, that the notice of motion required by subdivision 1 must specify the particulars referred to in subdivision 4, and a notice that the motion will be brought on for hearing at a cer-

tain time, served after the 10 days have elapsed, and giving the particulars as to the insufficiency of the evidence and the errors of law, will not supply the omission in the notice of motion.

2. The right to recover damages for personal injury is a chose in action, and, if acquired by the wife during marriage, it comes within Civil Code, § 164, whereby "all other property acquired after marriage by either husband or wife or both is community property." McFadden v. Railway Co., 25 Pac. Rep. 681, 87 Cal. 467, followed.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by Annie Neale and William A. Neale against the Depot Railway Company (a corporation) to recover damages for personal injuries to wife. Judgment for plaintiffs. Defendant appeals. Affirmed.

John Haynes, for appellant. *Willis & Appel, C. C. Stephens*, and *J. A. Donnell*, for respondents.

VANCLIEF, C. The plaintiffs are husband and wife, and brought this action to recover damages for personal injuries to the wife, through the negligence of the defendant. The verdict and judgment were in favor of plaintiffs for damages in the sum of $250. In due time defendant served notice of intention to move for a new trial on the grounds (1) of accident and surprise, etc.; (2) of newly-discovered evidence, etc.; (3) of insufficiency of the evidence to justify the verdict, and that it is against law; and (4) error in law occurring at the trial, etc.; and that the motion would be made upon the minutes of the court, and upon affidavits of newly-discovered evidence; but this notice did not state any particular in which the evidence was alleged to be insufficient, nor any particular error in law. Thirty-five days after the rendition of the verdict of the jury, to wit, on December 20, 1890, the defendant's attorney notified the attorneys for plaintiffs in writing that he would "bring on for hearing his motion for a new trial, * * * a copy of which is hereto attached and herewith served," on the 26th day of December, 1890. Attached to this notice was a formal motion for new trial, together with specifications of particulars in which the evidence was insufficient, and in which the verdict was against law, and concluding as follows: "This motion is made pursuant to a notice heretofore duly given, of the defendant's intention to move for a new trial upon the minutes of the court in said cause." No affidavits were filed in support of the motion. The court denied the motion on the express ground "that defendant's notice of intention to move for a new trial, filed and served on November 24, 1890, does not specify any particulars in which the evidence is insufficient to justify the verdict, nor any error of law on which defendant proposed to rely, there being no statement of the case proposed, nor any affidavits." The appeal is from this order and the judgment upon the judgment roll, including a bill of exceptions showing the facts above stated.

I think the order is clearly right, as it appears to be in strict obedience to the fourth subdivision of section 659 of the Code of Civil Procedure, which is as follows: "When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court the motion must be denied." Where a motion for new trial is made upon the minutes of the court, a failure to make the required specifications in the notice of intention to move for new trial is subject to the same consequences as a failure to make like specifications in a statement on motion for new trial when the motion is made upon such statement, viz., that "the motion must be denied." Weyl v. Railroad Co., 69 Cal. 203, 10 Pac. Rep. 510. In the latter class of cases this penalty has been enforced by this court in cases too numerous to require citation. The Code mandate is the same in both classes. Counsel for appellant, however, claims a distinction, on the ground that the words "notice of motion," in the fourth subdivision of section 659, do not mean "notice of intention to move for a new trial," in the sense of the first paragraph of that section;[1] and claims that the specifications annexed to his notice that he would "bring on for hearing his motion for a new trial," given long after the expiration of the time for giving notice of his intention to make the motion, constituted a sufficient compliance with the fourth subdivision of the section above quoted. This construction needs no other refutation than the reading of the whole section.

The objection that the judgment was improperly given in favor of the husband and wife jointly is answered by the case of McFadden v. Railway Co., 87 Cal. 467, 25 Pac. Rep. 681, where it is said: "The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action, (Railroad Co. v. Dunn, 52 Ill. 260; And. Law Dict.;) and if this right to damages is acquired by the wife during marriage, it, like the damages when recovered in money, is, in this state, community property of the husband and wife, (Civil Code, §§ 162–164,[2] 169,) of which the husband has the management, control, and absolute power of disposition other than testamentary." I think the judgment and order should be affirmed.

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[1] Code Civil Proc. § 659, subd. 1: "The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court or a bill of exceptions or a statement of the case."

[2] Civil Code, § 164: "All other property acquired after marriage, by either husband or wife or both, is community property."

We concur: Belcher, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(94 Cal. 515)

Pennie v. Roach. (No. 14,838.)

(*Supreme Court of California.* May 13, 1892.)

Appeal—Review—Question not Raised Below—Superior Court—Jurisdiction.

1. The want of proofs to sustain a finding will not be considered on appeal where the question was not raised below.

2. Since the superior court has jurisdiction, both in equity and in probate, having jurisdiction of the person and subject-matter, it may administer relief in equity, and also in accordance with the law relating to matters in probate.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action for an accounting by James C. Pennie, administrator, against John Roach, executor. From the judgment entered, plaintiff appeals. Affirmed.

Naphtaly, Friedenrich & Ackerman, for appellant. *Smith, Wright & Pomeroy* and *John A. Wright*, (*Wm. F. Herrin* and *H. L. Gear*, of counsel,) for respondent.

Foote, C. This is an action by Pennie, the administrator of the estate of Thomas H. Blythe, deceased, for an accounting, against John Roach, as the executor of the last will and testament of Philip A. Roach, deceased, who had preceded Pennie as the administrator of Blythe's estate. Judgment was given and made in the premises, from which the plaintiff prosecutes this appeal upon the judgment roll and a bill of exceptions.

The first contention of the plaintiff is that the judgment is void, because it is in favor of Mr. John A. Wright, an attorney at law, not a party to the action. Conceding, without deciding, that under the decision in Sharon v. Sharon, 75 Cal. 39, 16 Pac. Rep. 345, so much of the judgment as orders the payment to John A. Wright, Esq., of a certain sum of money is void, yet that part of the judgment may be disregarded, and still the judgment can stand and be enforced, so far as it directs the payment to the defendant Roach, executor, of that sum of money for the use and benefit of said Wright. It is certainly competent for this court, if it were necessary, to modify the judgment, by striking out the words "or to the said Wright in person." But we do not perceive how the plaintiff can be injured by the judgment remaining as it is. All that he can ask is such a judgment as will be a proper voucher to him in his settlement of his decedent's estate. He can pay the executor, defendant, and refuse to pay Wright in person if he desires, as the judgment now stands, and there is no compulsion to pay Wright anything. If it is error, therefore, it is harmless.

So far as the evidence of the value of Wright's services is concerned, the preponderance is in favor of the correctness of the decision made by the trial court. The defendant introduced the testimony of six prominent members of the bar of San Francisco, who stated that the services of Mr. Wright were reasonably worth $150,000. Another prominent attorney estimated his services to be worth $136,600. It is true, three witnesses for the plaintiff, equally eminent in the profession, testified that his services were worth only $75,000, but it was for the court to decide the conflict, and in such cases its ruling will not be interfered with by the appellate court, unless there is a clear abuse of discretion. Stuart v. Boulware, 133 U. S. 78, 10 Sup. Ct. Rep. 242. It appears that the affairs of the estate, which was valued at nearly $3,000,000, were in great disorder, and a successful administration thereof depended upon diligent, intelligent, and systematic labor. Claims amounting to nearly half a million dollars were presented against the estate, but through successful litigation and arbitration, conducted chiefly by Mr. Wright, such claims were reduced over a quarter of a million of dollars. His labors covered nearly six years of time, ten months of which were spent in Mexico and Europe.

The point is made that there is no allegation in the answer that the claim of Wright was ever presented for allowance to the executor of Philip A. Roach, or proof made of its presentation. The point as to the want of proof is made here now for the first time, and cannot be considered. Drake v. Foster, 52 Cal. 227. It is said by the appellant that the answer does not allege that Mr. Wright had any valid claim against the estate of Philip A. Roach, and hence the executor of Roach could claim nothing from the estate represented by the plaintiff, Pennie. In this behalf it is urged that the pleading in question does not aver, as it should, that the claim of Mr. Wright for legal services had been presented to the executor of Roach within the time required by law for such presentation for allowance. As the answer avers the liability of Roach to Wright for the services he performed at Roach's request, it sufficiently states a cause of action.

It is urged also for a reversal of the judgment that the court below had no jurisdiction, as a court sitting in equity, to determine the amount of Mr. Wright's fee, or to withhold for further consideration and determination the amount of commissions due P. A. Roach for administering upon the Blythe estate. But under the present state constitution the superior court has jurisdiction both in equity and matters of probate. It is the same superior court for all purposes where it has jurisdiction. If it has jurisdiction of the person and subject-matter, and it is admitted that as to matters of accounting between the estate of a deceased administrator and his successor it can assume such jurisdiction, then it can administer full and entire relief according to the principles of equity, and also in accordance with the statutes which exist with reference to matters of probate, or any others within the court's jurisdiction. This, we think, disposes of the objection made on this head, and what we have said is in accordance with the views of this court in Estate of Burton, (No. 14,450,) 29 Pac. Rep. 36.

As to the point made that the claim of Wright must have been first paid by Philip A. Roach, deceased, in his lifetime, before it could be allowed, it is disposed of against the contention of appellant in Estate of Couts, 87 Cal. 480, 25 Pac. Rep. 685. We perceive no error in the record, and advise that the judgment be affirmed.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

HARRISON, J., deeming himself disqualified, did not participate in the decision of the above cause.

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94 Cal. 446

JACKSON v. JACKSON. (No. 14,582.)

(*Supreme Court of California.* May 6, 1892.)

MARRIAGE — VALIDITY — FORMER WIFE LIVING — CONVEYANCE BY HUSBAND TO WIFE—FRAUD OF WIFE—AMENDMENT OF PLEADINGS.

1. A wife, who was married to and lived with her husband in Australia, afterwards left him, and went to live with her parents, who also resided in Australia. The husband then removed to California, where he married again, eight years afterwards. *Held*, that the first wife was "absent" from her husband, within Civil Code, § 61, which provides that a second marriage during the life of a former spouse is valid until legally annulled, where the former spouse was absent, "and not known to such person to be living, for the space of five successive years immediately preceding such subsequent marriage."

2. By Civil Code, § 158, transactions between husband and wife are declared to be confidential, as defined by the title on "Trusts;" and, by section 2235, all transactions between a trustee and his beneficiary, by which the trustee obtains advantage, are, as regards the beneficiary, presumed to be without sufficient consideration, and under undue influence. *Held*, that a wife who, by solicitation, induced her husband to convey to her his property, so that, in the event of annulment of marriage, she might hold it in her own right, violates section 2231, which declares that "a trustee may not use the influence which his position gives him to obtain advantage from his beneficiary," and is thereby guilty of fraud, under section 2234, declaring such violation to be a fraud.

3. To allow amendments after the trial has commenced is in the discretion of the trial court, and error cannot be predicated on the allowance of such an amendment, whereby issues were raised which were not raised by the original pleadings, unless the adverse party asked to have the case reopened for the purpose of trying the new issue.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Action by Dolores C. Jackson against John Eugene Jackson for annulment of marriage upon ground of his then having another lawful wife living, and cross complaint by defendant to have annulled and vacated certain deeds fraudulently obtained from him by plaintiff. Judgment for defendant. Plaintiff appeals. Affirmed.

Finlayson & Finlayson, for appellant. *John D. Bicknell* and *D. P. Hatch*, for respondent.

BELCHER, C. In July, 1873, the plaintiff and defendant intermarried at the city of Los Angeles, in this state. In May, 1890, the plaintiff commenced this action to have her marriage with defendant annulled, upon the ground that, at the time it was contracted, he had another wife living, and that such former marriage had never been dissolved by a decree of divorce or otherwise. The defendant, by his answer, admitted a prior marriage, but alleged that for five successive years immediately preceding his marriage with the plaintiff his former wife had been absent from him, and was not known by him to be living, and that he believed she was dead. Defendant also filed a cross complaint, in which he alleged that in the month of February, 1864, he was married to one Elizabeth Wharton, in Australia, and that they lived together as husband and wife for the period of one year, when they separated by mutual consent, and he, in 1865, removed thence to the state of California, where he had ever since resided; that for more than seven years prior to July, 1873, when he married the plaintiff, he had not heard from his former wife, although he made diligent inquiry and wrote to her several times to know of her whereabouts, and also wrote to several others, her relatives, friends, and acquaintances, inquiring as to her whereabouts, and, receiving no answers to any of his letters, he believed her to be dead. He further alleged that in January, 1884, in consideration of love and affection, and to secure to the plaintiff and to their children a competency, and to save the making of a will and the expense of probate in case of his death, and believing at the time that the plaintiff was his lawful wife, and would continue their marital relations in the future as she had in the past, he, at her earnest and frequent solicitation, made, executed, and delivered to her a deed of certain real property, situate in the city of Los Angeles, a copy of which deed is set out; that again, in April, 1888, for the same consideration, and reposing implicit confidence in the plaintiff as his lawful wife, and merely for the purpose of correcting the former deed, he, at plaintiff's repeated request and solicitation, executed and delivered to her another deed of the same property, a copy of which last deed is also set out; that the property described in the deeds was of the value of $125,000, and was all the property owned by defendant at the time of the execution of the first deed, except a piece of property in the county of San Diego, which was afterwards sold, and the proceeds applied towards the payment of a balance due on the property conveyed, and for improvements thereon; that at the time of the execution and delivery of the said deeds to plaintiff she had been fully informed of defendant's former marriage to Elizabeth Wharton, and that they had separated by mutual consent, and that defendant had not heard from his former wife for more than seven years prior to his marriage with the plaintiff, and believed her to be dead, and that plaintiff, with full knowledge of all these facts, solicited and requested the conveyance of the property from defendant, "with intent on her part to deceive this defendant, and did deceive this defendant, in this: that she did intend to hold and retain said property as her own, and for her separate use and benefit, and to procure as soon as she was able a nullity of her marriage with this defendant, if the fact should be that said former wife was living, and thereby to defraud this defendant out of all of said property so conveyed;" that plaintiff's conduct towards defendant prior to the execution of said conveyances was that of a dutiful, faithful, and devoted wife, and he had implicit confidence in her that she would continue such relation to him during their lives; that said conveyances were executed and delivered by defendant to plaintiff "under a mistake of the facts as they existed at that time, and had it not been for said mistake of facts, and that this defendant believed his former wife to have been dead, and the plaintiff in this action was his lawful and legal wife, and having implicit confidence and faith in her, and that she would continue their marital relations as heretofore, he would not have made, executed, or delivered said deeds of conveyance, or either of them, as hereinbefore set forth;" that defendant requested plaintiff, before the commencement of this action, to reconvey to him the property he had so conveyed to her, and that she refused to reconvey the same, or any part thereof; that defendant did not know that his former wife was living until December, 1890, when he ascertained that fact from her deposition taken in this case, although he had what purported to be a declaration or statement made by her in September, 1889, under the name of Ann Walker, and received by him in November, 1889; that, upon receiving such declaration or affidavit, he delivered it to the plaintiff, who in May following commenced this action to have their marriage annulled. It is then alleged that there were two children, one a boy 16 years of age, and the other a girl 10 years of age, the issue of the marriage between plaintiff and defendant, and that plaintiff was not a fit or suitable person to have the care and custody of said children, and that defendant was a fit and proper person to have the care and custody of them. And the prayer is that the said deeds be set aside and vacated, and that the property described therein be adjudged to be the property of defendant, and that plaintiff be required to execute a deed thereof to defendant, and also that defendant have the care, custody, control, and education of the said children. The plaintiff, by her answer to the cross complaint, denied, among others, all of its averments to the effect that defendant was induced to execute and deliver the said deeds by fraud and deceit on her part, or by mistake on his part.

When the case was called for trial the parties stipulated, as to the children, that the custody of the son should be given to the defendant, and that of the daughter to the plaintiff. It was also stipulated that each party might introduce all of his or her testimony, subject to the right of the other party, after all the testimony should be put in, to object to or move to strike out any part of it. Counsel for defendant then stated that, if they were so advised, they would, after all the evidence should be introduced, file an amended cross complaint to fit the evidence put in, and counsel for plaintiff stated: "We have no objection to your filing an amendment to the cross complaint at any time to-day, and that it may be considered as answered."

In support of her side of the case, the plaintiff testified that she was married to the defendant on the 10th day of July, 1873, at the city of Los Angeles; and she read in evidence the deposition of his former wife, in which deponent stated that she was born and had always lived in Australia; that she first met defendant at Forbes, in the colony of New South Wales, where her parents were living, and near which place he was working as a miner; that she was married to defendant at Orange, in that colony, 192 miles west of Sydney, on the 11th day of February, 1864; that she and defendant lived together and cohabited as husband and wife until December, 1865; that in January or February, 1866, she received a letter from him, dated at Sydney, in which he said he was about to go to America, and that she had never heard from him since; that a female child, the issue of her marriage with defendant, was born to her in March, 1865, and that in 1866 she, with her child, left her then place of residence, and returned to her parents' house at Forbes, and that in June, 1873, she was again married, to one James Walker, and had, as the issue of that marriage, six children. The defendant then testified as a witness in his own behalf, and in rebuttal the plaintiff and two other witnesses were called and testified. The case was submitted for decision, on the day the trial commenced, on briefs to be thereafter filed by the respective parties. Twelve days later the defendant, after due notice, asked permission, and was allowed by the court against the objections of plaintiff, to file an amended cross complaint. To this cross complaint the plaintiff, reserving her objection and exception to the order allowing the same to be filed, demurred and answered at the same time. Subsequently the court found all the facts of the case to be substantially as they are stated in the amended cross complaint, and entered its decree dissolving the bonds of matrimony existing between the parties, and awarding to them the custody of the children in accordance with their stipulation, and adjudging that the deeds executed by the defendant to the plaintiff be vacated and set aside, and that the property described therein be allotted to them in equal shares; that is to say, that an undivided one half interest in and to all of the lands and premises described in the deeds be awarded and allotted to the plaintiff, and a like interest to the defendant, and requiring the plaintiff to execute to the defendant a deed to an undivided one half interest in the property within 10 days after the entry of the decision. From this judgment and an order refusing a new trial the plaintiff has appealed.

1. The appellant contends that her marriage with defendant was invalid and void from the beginning, and that no relations of trust and confidence, such as ordinarily arise between husband and wife, ever existed between them. This position is rested upon the rule of the common law that a marriage was void when one of the spouses had contracted a prior marriage which had never been dissolved by death, divorce, or otherwise. But this rule of the common law has been changed in certain respects in this state by the Codes. Section 61 of the Civil Code provides as follows: "A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning: * * * (2) Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal." The appellant, however, contends that this change in the law does not affect the case or make valid her marriage, for the reason that defendant's former wife remained at her home in Australia, and was not absent from him, within the meaning of the statute, but he, having left her and come to California, was himself the absentee. And it is said: "The 'absent' spouse is the spouse who has left his or her residence, home, or domicile." The court found that "the said Elizabeth Wharton, then the wife of the said defendant, John Eugene Jackson, left the said defendant, Jackson, and went to live with her parents in Australia," and that afterwards the defendant came to this state. This finding is supported by the testimony of the defendant, and must be accepted as stating the fact truly. This being so, we think it must be held that the former wife was, in a legal sense, as really and truly absent from defendant as she would have been if he had remained in Australia, but had continued to live separate and apart from her. But, conceding this view to be correct, it is earnestly insisted that there was no sufficient evidence to show that defendant did not know his former wife to be living for the space of five years before he married the plaintiff, or that he believed her to be dead. The defendant testified: "I never heard from my former wife prior to November, 1889. I made efforts to hear from her from the time I separated from her until the time of my marriage with my present wife. These efforts were made as follows: It might have been a year or so after I arrived at San Francisco I wrote to her, and wrote to some friends of mine, making inquiries about her. I know it was within two years of the time that I arrived in San Francisco that I met an old miner who used to work with me on these mines, and he was familiar with the circumstances, and he informed me that she was dead. After writing and talking with him I made no other effort to hear from her other than by writing. I wrote to several parties that I knew; got no answer from them at all. I got no answer from her. I believed her to be dead." The court found that all the facts testified to by the defendant in this regard were true, and the finding cannot be disturbed here, for want of evidence to justify it.

2. Appellant also contends that the findings as to the alleged fraud and mistake, under which the deeds were executed to the plaintiff, were not justified by the evidence, and that, if justified, they did not warrant the conclusions of law that the deeds should be vacated and set aside, and the property allotted to the parties in equal shares. We do not think this contention can be sustained. The testimony on the part of defendant tended to show that the deeds were executed at the earnest and repeated request and solicitation of the plaintiff, and that she intended thereby to get all the property in her own name, so that, if it should turn out that the former wife was living, she could have her marriage annulled, and yet claim and hold the property in her own right; and that defendant, honestly believing his former wife to be dead, and having full confidence in the plaintiff, as a true, dutiful, and affectionate wife, and expecting their marital relations to continue so long as both should live, yielded to her wishes and solicitations in every respect. The Civil Code contains the following provisions: "Sec. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on 'Trusts.'" "Sec. 2235. All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." By these sections the relations between husband and wife are declared to be confidential, and all transactions between them respecting property are made subject to the same rules that control transactions between a trustee and his *cestui que trust.* One of these rules is that a trustee must not use the influence which his position gives him to obtain any advantage of his beneficiary, (section 2231, Civil Code;) and, if he does, it is a fraud against the beneficiary, (section 2234, Id.,) for which equity will grant appropriate relief, (Brison v. Brison, 75 Cal. 525, 17 Pac. Rep. 689.) In our opinion, therefore, there was evidence to justify the findings complained of, and they must be upheld.

3. It is objected that the court erred in

permitting the amended cross complaint to be filed after the case had been submitted for decision, because it raised new issues as to fraud, no such issues having been tendered by the original cross complaint; and also in denying the plaintiff's motion, made after the amended cross complaint was filed, to strike out all those parts of defendant's testimony tending to show fraud, upon the ground that when the testimony was given there was no issue as to fraud, and hence it was irrelevant and immaterial. Whether a party to a suit should be permitted to amend his pleading after trial commenced or not is a matter which is ordinarily addressed to the discretion of the court, and the action of the court in granting or refusing permission is never disturbed on appeal, unless it clearly appears that it abused its discretion. In this case we see no abuse of discretion. The testimony was all in, and it was proper that the pleadings be amendedd so as to conform to it. But it is said that the plaintiff did not, in giving her testimony, deny defendant's charges of fraud, because they were not based on any issue in the case, and that by permitting the amendment, and refusing to strike out the portions of defendant's testimony objected to, the court prevented her having that fair and impartial trial to which she was entitled. If it be true that the plaintiff could and would have denied any of the defendant's charges, which she did not deny, provided the amended cross complaint had been on file at the time, then she might, and we think should, have asked to have the case reopened for that purpose. If she had done so, doubtless her request would have been granted. In the absence of such a request, we see no reversible error in the rulings of the court.

4. It is further objected that, in dividing the property equally between the parties, the court should have ascertained whether there was any other community property at the date of the decree, and, if so, should have divided all of it, and not that only which was described in the deeds. Conceding this to be so, still we cannot say that there was any error. It does not clearly appear that there was any other community property, and, if there was, the attention of the court should have been directly called to it.

5. It is suggested that the decree is not in proper form to effect the ends probably intended by the court, for the reason that it first vacates and sets aside the deeds, then allots an undivided one half of the property to the plaintiff and the other undivided half thereof to the defendant, and then requires the plaintiff to execute a deed to an undivided one half of the property to the defendant. It is said that the deed to be executed by the plaintiff may be claimed to be a deed to the undivided half allotted to her, thus giving the defendant the whole property, and leaving nothing to her. The decree was not happily drawn, but its obvious meaning is to divide the property equally between the parties, and to vest in each of them the title to an undivided half of it. The deed required of the plaintiff was not to convey her half, and does not affect it. What has been said above disposes of all the material points in the case. We have carefully read the very elaborate and able briefs presented by counsel on both sides, but have not deemed it necessary to follow them at length, or to cite and comment upon the numerous authorities referred to. Looking at the whole record, we find no good ground for reversal, and therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

HARRISON, J., (*concurring.*) In my opinion the finding of the court that the former wife of the defendant "left" him is not sustained by the evidence. The defendant alleged in his answer that they "separated by mutual consent, and this defendant, in the year 1865, removed to the state of California." Upon the trial he testified to the same effect, saying: "I left in 1865. She left and went home to her father and mother. I came on to Sydney, and after a while came to San Francisco." His testimony that she "left," not that she left him, and that he "came on to San Francisco," accords with the allegation in the answer that they separated by mutual consent. There is no other testimony in reference to this subject, except that of the former wife, which is to the effect that he left her. If they did separate by mutual consent, she was not "absent" from him, in the sense in which that term is used in subdivision 2, § 61, Civil Code. I do not, however, think that this finding of the court, or the construction given by the commissioner to the word "absent," is material to the determination of the action. It may be conceded that the parties to this action entered into the contract of marriage with each other under such circumstances that it was valid to all intents and purposes until annulled by decree of the court; but the fact that the defendant had at that date a former wife living, from whom he had not been divorced, gave to the plaintiff the right to have the marriage annulled upon the discovery of such fact. Civil Code, § 82, subd. 2.[1] Upon its dissolution there would arise the same equitable grounds for an equal division of the property that had been acquired by the parties during the existence of the relation of husband and wife as would exist upon the dissolution of any valid contract of marriage for a cause other than adultery or extreme cruelty. I therefore concur in affirming the judgment and order denying a new trial.

I concur: PATERSON, J.

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[1] Civil Code, § 82, subd. 2: "That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force."

(94 Cal. 523)

In re FISCHER. (No. 13,785.)

(*Supreme Court of California.* May 13, 1892.)

CHATTEL MORTGAGES—VALIDITY—MORTGAGOR'S POSSESSION.

Civil Code, § 2955, authorizes a mortgage, among other chattels, on "printing presses and material," without any change in the possession of the property. Section 3440 provides that every transfer of or lien on personal property, other than a mortgage, when allowed by law, is conclusively presumed, if made by a person having at the time possession, and not accompanied by an immediate delivery, and followed by an actual and continuous change of possession, to be fraudulent against creditors. *Held*, that a mortgage to secure a just indebtedness was not void as to the printing presses and material because it also covered other articles, as to which it was void without a change of possession.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; JOHN ELLSWORTH, Judge.

Petition of F. L. Fischer, an insolvent debtor, that certain of his assets be sold to pay a mortgage. From a judgment granting the petition as to a portion of the property William P. Lawlor, assignee, appeals. Affirmed.

William Rix, for appellant. *Metcalf & Metcalf*, for respondent.

BELCHER, C. On the 16th day of April, 1889, F. L. Fischer executed and delivered to Hermann Meese his promissory note for $4,400, bearing interest at the rate of 10 per cent. per annum, and to secure the payment of the note he at the same time executed and delivered to Meese a chattel mortgage upon "all the printing presses and material situated at Nos. 310 and 312 Battery street, in the city and county of San Francisco, state of California, belonging to said mortgagor, and more particularly described as follows, to wit." Then followed a long list or schedule of the articles intended to be covered by the mortgage, including, among others, "four tables, shelving, partition, desk, office furniture, one stove, lamps, signs, glass show case, clock, and one iron safe." The mortgage was properly signed, acknowledged, certified, and recorded, and was accompanied by the affidavit required by the statute in such cases. On the 24th of July, 1889, Fischer was adjudged by the superior court of Alameda county to be an insolvent debtor, and at a meeting of his creditors held on the 26th of August following, William P. Lawlor was duly elected assignee of his estate. Thereupon Lawlor duly qualified as such assignee, and the clerk of the court assigned and conveyed to him all the estate, real and personal, of the insolvent. On the 26th of November, 1889, Meese, under section 44 of the insolvent act, filed in court a petition which was in all respects sufficient, praying that the property mentioned in his mortgage be sold, and the proceeds applied in payment of his said promissory note. To this petition Lawlor, as assignee of the estate, filed an answer, contesting the validity of the mortgage as against the creditors of the insolvent. Upon the issue thus raised the case was tried, and judgment given and entered that all the property described in the mortgage, except the "four tables," etc., above mentioned, be sold by the assignee, and that the money realized from the sale, after deducting therefrom certain costs and disbursements, be turned over to Meese, to be applied on the debt secured by his mortgage. From this judgment and an order refusing a new trial the assignee appeals; and, as stated by his counsel, the only question presented for decision is: "Is the chattel mortgage given by Fischer void as against creditors as to all the property included in it, or is it valid as to the printing presses and material, and void only as to the rest of the property?"

Section 2955 of the Civil Code provides that mortgages may be made, among other things, upon "printing presses and material," and when the subsequent sections are complied with such mortgages are valid without any change of possession of the mortgaged property; and section 3440 of the same Code provides that every transfer of or lien upon personal property other than a mortgage, when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continuous change of possession, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself. The contention is that the schedule included a few articles which do not belong to any of the classes of property mentioned in section 2955, supra, and that the mortgage of these articles was not allowed by law, and hence was void, not only as to them, but *in toto*. We do not think this contention should be sustained. It is admitted that Fischer was justly indebted to Meese in the sum named in the note, and it is not pretended that the mortgage was made with any intent to hinder, delay, or defraud any creditor or other person in the collection of his demands. This being so, we know of no statute or rule of law declaring the mortgage wholly void for the reason urged. As well might it be said, if one should by a single instrument transfer several articles of personal property, and the transfer should be accompanied by an immediate delivery, and followed by an actual and continued change of possession of a part only of the things transferred, that the whole transaction would be fraudulent and void, as against the creditors of the transferrer, and they could claim and take from the transferee the property of which possession was taken as well as that of which it was not taken. But this, in our opinion, would be an unreasonable construction of the statute, and cannot be the law. None of the cases cited by appellant are directly in point, and they need not be specially noticed. We advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

94 Cal. 526

In re ROGERS' ESTATE. (No. 14,537.)

(*Supreme Court of California.* May 14, 1892.)

CONSTRUCTION OF WILL—NATURE OF ESTATE.

A will gave to the testator's grandson $10,000, the income to be paid to him "from the time he be fifteen years old till he be twenty-one years," when he was to be paid one half of the bequest, and the other half at the age of 25 years. If the grandson should die before arriving at the ages mentioned, then the unpaid amounts, "together with the income thereon," were to be distributed among others mentioned in the will. *Held*, that the bequest was not present and absolute, but was contingent on his reaching the ages mentioned, and, he having died before reaching the age of 15 years, the bequest was properly distributed among the others.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

In the matter of the estate of Stephen Rogers. From the decree of distribution, Ella Rogers appeals. Affirmed.

L. J. Maddux, for appellant. *Wright & Hazen*, for respondent.

BELCHER, C. Stephen Rogers died testate on the 21st day of March, 1888, leaving, surviving him, his widow, Caroline Rogers, and his grandson, Stephen Roy Rogers. The will of decedent was admitted to probate, and the widow was appointed and duly qualified as executrix thereof. During the administration of the estate, on May 15, 1889, Stephen Roy died, being then between six and seven years of age. When the estate was ready for distribution, all the residue thereof was, on petition of the executrix, distributed to her and another legatee named in the will From this order or decree the present appeal is prosecuted by the mother of Stephen Roy, and the only question presented for decision is as to the construction to be given to the third clause of the will. That clause reads as follows: "*Third.* I give and bequeath to my grandson, Stephen Roy Rogers, son of S. P. Rogers and Ella Rogers, the sum of ten thousand ($10,000) dollars, to be paid to him as hereinafter directed, and only after the death of my said wife, Caroline, if she survive me. The income from the said ten thousand dollars is to be paid to said Stephen Roy Rogers personally, for his own private use, from the time he be fifteen years old till he be twenty-one years old, and then, when he be twenty-one years old, I direct that he be paid five thousand dollars, being half of the above-named bequest; and that, from the time he be twenty-one till he be twenty-five (25) years old, I direct that the income from the remaining five thousand dollars be paid him annually for his private use, and then when he, the said Stephen Roy Rogers, be twenty-five years old, I direct the remaining five thousand dollars paid to him personally, for his own and exclusive and private use. If my said grandson die before arriving at the ages herein named, then the remaining or unpaid amounts of said bequest, together with the income thereon, I direct shall be distributed as the other portion of my estate shall be or shall have been distributed, namely, to the brothers and sisters of myself and wife, Caroline, share and share alike." By the fourth clause of the will the testator gives to his wife, Caroline, if she survives him, all the residue of his estate, both real and personal, and wheresoever situated; and by the fifth clause he gives, if he survives his wife, to his said grandson, if he be then living, and to the brothers and sisters of himself and wife, all the residue of his estate, share and share alike.

It was claimed by the appellant when the order of distribution was made, and is claimed here, that by the will a valid bequest of $10,000 was made to Stephen Roy; that the bequest took effect and vested in the legatee immediately on the death of the testator; and that she, (the appellant,) as the sole heir of Stephen Roy,—his father having died in October, 1886,—was entitled to receive his distributive share of the estate, to wit, the said sum of $10,000, to be paid to her as in the will provided. And it is said by counsel that the rule is "that a bequest 'payable' or 'to be paid' to a person 'at' or 'when' he shall attain a certain age, etc., vests the estate immediately, and his interest is transmissible to his representatives." In support of this position, counsel cite, among other authorities: Reed's Appeal, 118 Pa. St. 215, 11 Atl. Rep. 787; 6 Lawson, Rights, Rem. & Pr. § 3208; and notes to Goebel v. Wolf, 10 Amer. St. Rep. 470, 113 N. Y. 405, 21 N. E. Rep. 388. In Reed's Appeal, it is said: "The general rule, undoubtedly, is that when a legacy is given to a person, to be paid at a future time, it vests immediately; but, where it is not given until a certain future time, it does not vest until that time, and, if the legatee dies before, it is lost." In the section cited from Lawson's work, and in the notes to Goebel v. Wolf, the law is stated as follows: "The leading inquiry, upon which the question of vesting or not vesting turns, is whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age or surviving some other person, or the like. * * * According to the prevailing doctrine, a postponement of the time of payment will not, of itself, make a legacy contingent, unless it be annexed to the substance of the gift, or, as it is sometimes said, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened. Thus where the legacy is given, payable or to be paid when the legatee attains the age of twenty-one years, the legacy vests immediately upon the death of the testator. It is a present gift, the time of payment only being postponed; but when the time is annexed, not to the payment only, but to the gift itself,—as when the legacy is given to the legatee at twenty-one, or 'if' or 'when' he attains the age of twenty-one,—the legacy does not vest until the legatee attains that age. His attaining the age specified is a condition precedent, and if the condition be not fulfilled the legacy never vests." The above are undoubtedly well-settled rules of law, and, so far as applicable, are controlling in the construction of wills. There are, however, other rules equally well settled, which cannot be overlooked. One of these is that wills are to be liberally construed, so as to effectuate the intention of the testator, (Welch v. Huse, 49 Cal. 506;) and another: "The first great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law," (Smith v. Bell, 6 Pet. 68.) In the case last cited the will under review contained the following clause: "Also, I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind, and quality soever, after payment of my debts, legacies, and funeral expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal, absolutely; the remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin," the testator's son. On the death of the testator, his wife took possession of the property bequeathed to her, and held it till she died; and the question was whether, under the will, she acquired a title absolute or only for life. It was held (Chief Justice MARSHALL delivering the opinion of the court) that she took only a life estate in the property, and that Jesse Goodwin had a vested remainder in the property that would come into his possession on the death of the said Elizabeth.

The question, then, is, what was the intention of the testator when he made the will, the construction of which is involved in this case? Did he intend to give to Stephen Roy the $10,000 absolutely, or only on condition that he should reach the ages named for its payment? It will be observed (1) that no part of the bequest was to be paid to the legatee until after the death of the testator's wife; (2) that the legatee was to receive nothing until he reached the age of 15 years; (3) that, between the ages of 15 and 21, he was to receive the income of the bequest, only; (4) that, on arriving at the age of 21, he was to be paid one half of the bequest, and thereafter the income from the other half till he reached the age of 25, when the balance was to be paid; (5) that, if he should die before arriving at the successive ages above named, then such portion of the bequest as had not theretofore been paid, "together with the income thereon," was to be distributed as the other portion of the estate "shall be or shall have been distributed, namely, to the brothers and sisters of myself and my wife, Caroline, share and share alike." If the last clause had been omitted, it might, no doubt, be successfully claimed that there was a present and absolute bequest, the times of payment only being deferred, and that it vested in the legatee on the death of the testator. That clause, however, makes it clear, we think, that the intention was not to make an absolute bequest, but a conditional one, to take effect only if the legatee should reach the ages named for its payment. It is argued for appellant that this construction is not in harmony with the subsequent clauses of the will, because the bequest to the wife was of the "residue" of the estate, meaning the residue or what remained after the $10,000 bequest to Stephen Roy, and that the bequest to the brothers and sisters was only to take effect in case the testator survived his wife. We see no force in this argument. If Stephen Roy had lived, the property of the estate would all have been distributed to the surviving wife, subject to a trust in his favor. He could have claimed nothing till he reached the ages when he was to be paid. As he died before he arrived at the age of 15, and before distribution, it was proper that the decree be made as it was. We advise that the order and decree appealed from be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order and decree appealed from are affirmed.

94 Cal. 588

HUDEPOHL v. LIBERTY HILL CONSOLIDATED MINING & WATER CO. *et al.* (No. 14,318.)

(*Supreme Court of California.* May 26, 1892.)

EXECUTION—SALE EN MASSE—SETTING ASIDE—COMPLAINT—SUFFICIENCY.

1. A judgment creditor sought to set aside a sale on execution under a prior judgment, on the ground that the land, consisting of separate parcels, was sold together. The complaint showed that the land had been redeemed by a prior judgment creditor, and by him sold. *Held* that, as the complaint failed to allege that the purchaser had notice of the irregularity, a demurrer thereto was properly sustained.

2. The complaint is also subject to demurrer where it does not show that the proceeds of the sale were less than they would have been, had the land been sold in parcels.

3. Since an execution sale *en masse* of separate parcels of land is not void, but only voidable, one who seeks to set it aside must show that none of the conditions which would authorize a sale of all the parcels together existed at the time of the sale.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action by one Hudepohl against the Liberty Hill Consolidated Mining & Water Company et al. to set aside a sheriff's sale. Defendants had judgment on demurrer, and plaintiff appeals. Affirmed.

Gaylord & Searles and *C. A. & F. P. Tuttle*, for appellant. *Byrne & Cross*, for respondents.

PATERSON, J. This is an action to set aside an execution sale on the ground that the property, consisting of several disconnected parcels of land, was sold *en masse.* The court below sustained a demurrer to the complaint, and we think its action was right. The plaintiff's right to maintain the action rests upon his claim to be a redemptioner by virtue of a judgment rendered in his favor against the defendant corporation in the superior court of San Francisco, of which a transcript of the docket was filed in the county recorder's office in Nevada county on March 28, 1887. The property had, however, been sold by the sheriff of Nevada county, October 9, 1886, upon a judgment against the same defendant in favor of one Todd; and the defendant Marshall, who also held a judgment lien against the same property, had redeemed the property from the sale on the 13th of October, 1886.

1. The complaint shows that Marshall, the redemptioner who redeemed the property from the purchaser, sold and conveyed all his rights, including the right to a deed from the sheriff, to defendant Anna E. Smith, before plaintiff's judgment be-

came a lien on the property, and it is not alleged that she (Smith) had notice of any irregularity in the sale. "Innocent vendees of the original purchaser will always be protected, whether proceeded against by bill or motion." Freem. Ex'ns, (2d Ed.) § 226; Miexe v. Sibley, 53 Ill. 61; Nelson v. Bronnenburg, 81 Ind. 199. The doctrine of the Indiana case cited by appellant (Piel v. Brager, 30 Ind. 332) has been expressly repudiated in that state. Jones v. Association, 77 Ind. 344.

2. It is not alleged that the proceeds of the sale were less than they would have been if the land had been sold in separate parcels. Unless it is made apparent to the court that a larger sum would have been realized from the sale if the property had been sold in parcels, or that the sale of less than the whole tract would have brought sufficient to satisfy the writ, the sale will not be set aside. The question is not what would the property bring if sold now or in the future, but whether the proceeds would have been materially increased or the execution satisfied by a sale of less than the whole, if the land had been offered and sold in parcels.

3. It is not sufficient to allege merely that several separate tracts were sold in the lump by the sheriff. Riddell v. Harrell, 71 Cal. 262, 12 Pac. Rep. 67. Such sales are voidable, not void; and one who seeks to have a sale *en masse* set aside should show that none of the conditions which would authorize the sale of all the parcels together existed at the time of the sale. There was no lien on the property, except that of the judgment creditor, at the time of the sale. The sale may have been made *in solido* by express direction of the judgment debtor, or it may have been offered in parcels, and no bids received. The judgment debtor may by parol waive a sale of the land in parcels, and give authority to sell in mass. Smith v. Randall, 6 Cal. 52; San Francisco v. Pixley, 21 Cal. 59; Smith v. Meldren, 107 Pa. St. 348. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

94 Cal. 481

PEOPLE v. BARRY. (No. 20,865.)

(*Supreme Court of California.* May 6, 1892.)

BURGLARY—EVIDENCE.

1. Pen. Code, § 459, provides that every person who enters any house, room, or store with intent to commit larceny is guilty of burglary. *Held*, that the offense is complete when the entry is made with intent to commit larceny, even though such entry was made into a store through the public entrance, while open for business. DE HAVEN, MCFARLAND, and HARRISON, JJ., dissenting.

2. Defendant's attempted larceny while in the store did not constitute a *prima facie* case of burglary, so as to cast on him the burden of proving himself innocent.

BEATTY, C. J., dissenting.

In bank. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

Michael Barry was convicted of burglary, and appeals. Reversed.

John G. Pressley, Thos. Rutledge, and *J. C. Sims,* for appellant. *Atty. Gen. Hart,* for the People.

GAROUTTE, J. The appellant was convicted of the crime of burglary, and appeals to this court from the judgment and order denying his motion for a new trial. The most important assignment of error relied upon to reverse the judgment may be reviewed by a consideration of a certain instruction which was requested to be given to the jury by appellant, and which request was refused by the court. The proposed instruction was based upon the evidence, which disclosed that the offense of burglary was committed, if committed at all, by appellant entering a grocery store during business hours, and attempting to commit larceny therein. The instruction is as follows: "The defendant cannot be convicted of the crime if he had a right to enter the store of Murry & Seegelkin at the time alleged in the information, even if you believe from the evidence that, at the time he entered, he intended to commit larceny." Viewed in the light of section 459 of the Penal Code, which says, "every person who enters any house, room, store, * * * with intent to commit grand or petit larceny, or any felony, is guilty of burglary," the ruling of the court is correct. This section of the Code is clear and concise, and its meaning obvious. By its express terms the offense is perfect and complete when the entry is made with the intent to commit grand or petit larceny, or any felony. At common law, burglary was defined to be "a breaking and entering of the mansion house of another in the night, with the intent to commit some felony within the same, whether such felonious intent be executed or not." Russ. Crimes, 785. It will thus be seen that common-law burglary and the statutory burglary of this state have but few elements in common, and consequently English cases give us but little light upon the question under examination. Even under the present section of the Penal Code, many acts constitute burglary which but a few years ago were a different offense, or no offense whatever. As to the acts which shall constitute the crime of burglary, that is a matter left entirely to the policy of the legislature, within its constitutional powers; and, when that body has said that every person who enters a store with the intent to commit larceny is guilty of a burglary, the language is so plain and simple that rules of statutory construction are not required to be consulted. The meaning is patent upon the face of the statute. No words are found in the statute, qualifying the character, kind, time, or manner of the entry, save that such entry must be accompanied with a certain intent; and it would be judicial legislation for this court to interpolate other conditions into the section of the Code.

Appellant contends that a grocery store, during business hours, is a public place, and the defendant, as one of the public, had a legal right to be there, or rather to enter there; that the proprietors were doing business with the general public; the public were invited to enter; that therefore the defendant entered under an invitation of the owners; and that, consequently, his entry was lawful, and there can be no burgiary when there is a lawful entry. To this reasoning, we can only say a party who enters with the intention to commit a felony enters without an invitation. He is not one of the public invited, nor is he entitled, to enter. Such a party could be refused admission at the threshold, or ejected from the premises after the entry was accomplished. If the presence of such a party in the store is lawful the fact that he gained ingress openly and publicly, through the front door, rather than clandestinely, by way of the skylight or the cellar, is not material, and the result would be that no burglary could be committed in a store during business hours, regardless of the nature of the entry. As supporting contrary views, appellant relies upon State v. Newbegin, 25 Me. 502, and State v. Moore, 12 N. H. 42. The Maine case is not authority here; for the statute of that state, as at common law, requires that, in order to constitute burglary, there must not only be an entry, but also a breaking. The facts of the case were quite similar to those of the present case, and the court held that, while the evidence disclosed an entry with intent to commit a larceny, (exactly what is required by our statute,) there was no evidence of a breaking, and necessarily ordered a new trial. Quite a similar state of facts were present in Clarke v. Com., 25 Grat. 908, and the court held that there was no breaking, either actual or constructive, but said.: "While the legislature might make such a change, we think it would be judicial legislation in us to do so." In State v. Moore, the primary question involved was as to the sufficiency of the evidence to show a criminal intent in entering the building, and does not reach the matter as to the character of the entry. The common-law element, to wit, the use of the force by breaking, in order to constitute burglary, was originally a part of our statute; but it has long since ceased to exist, by express enactment of the lawmaking power. As the law now reads the instruction was properly refused. Any other construction of the statute would interpolate words therein, and this we have no power to do. That the entry is made in the daytime, when the store is open for business, may render it more difficult to prove the criminal intent present in the mind of the defendant when he enters; but that is a matter of evidence, and not a question of law.

The court refused to give to the jury the following instruction, asked by the defendant: "The fact that a person attempts to steal while in a building is not sufficient, without other circumstances proved, to cast on him the burden of proving himself not guilty of burglary." It is only in cases of homicide, where certain conditions exist, that the burden of proof ever shifts to the defendant, and to that extent the instruction may be somewhat misleading; but its plain intent is that the single fact of a defendant being apprehended in a building while in the act of stealing does not of itself establish a *prima facie* case of burglary. The instruction states a correct proposition of law, and should not have been refused, especially, in view of the peculiar facts of this case, where the entry was made during business hours, and by way of the public entrance. The instructions given upon the question of intent do not cure the error; and it may be said they are somewhat confusing in respect as to whether they refer to the intent with which the entry was made, or the intent of the defendant in manipulating the money drawer.

Let the judgment be reversed, and the cause remanded.

We concur: PATERSON, J.; SHARPSTEIN, J.

BEATTY, C. J. I dissent. I find no error in the record.

DE HAVEN, J. I concur in the judgment, but dissent from so much of the opinion of Mr. Justice GAROUTTE as seems to hold that one who enters the store of another with intent to commit larceny therein is guilty of burglary, although the entry was open, and with the actual and free consent of the owner. I do not think that this is a correct interpretation of our statute defining the offense of burglary. I think, in order to constitute a burglarious entry, the act of entering must be itself a trespass,—an intrusion against or without the consent of the owner of the building alleged to have been entered. State v. Moore, 12 N. H. 42. The evidence was wholly insufficient to justify the verdict in this case, and the jury should have been advised to acquit the defendant.

We concur: MCFARLAND, J.; HARRISON, J.

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94 Cal. 573

PEOPLE v. PERINI *et al.* (No. 20,883.)

(*Supreme Court of California.* May 25, 1892.)

LARCENY—WHAT CONSTITUTES—BURDEN OF PROOF—PUNISHMENT—CONSTITUTIONALITY.

1. Pen. Code, § 496, prescribing the punishment for receiving stolen goods at imprisonment in the penitentiary not exceeding five years, or in the county jail not exceeding six months, or both, is not unconstitutional, in authorizing a double punishment.

2. An assistant foreman of a warehouse, who has no authority to sell any of the property stored therein, but only to deliver it upon proper orders, is guilty of larceny, rather than embezzlement, in attempting to sell it.

3. An instruction that, when the doing of an act is proven which, if done with guilty intent, would be a violation of law, the burden of proving the act to have been without such intent is, to the extent of creating a reasonable doubt of the defendant's guilt, thrown in most cases upon the accused, is erroneous.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. HEBBARD, Judge.

Perini and others were convicted of receiving stolen goods, and appeal. Reversed.

Lawler & Gray, for appellants. *Atty. Gen. Hart*, for the People.

PATERSON, J. The defendants were convicted of the crime of receiving stolen goods knowing the same to have been stolen, and were sentenced to serve a term of 60 days in the county jail. It is claimed that section 496 of the Penal Code, under which the defendants were prosecuted and convicted, is unconstitutional, because it provides for punishment "by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding six months, or by both." We are unable to appreciate the force of the argument that this section authorizes a double punishment, and know of no provision of the constitution which it violates. The power to define offenses and affix penalties therefor rests entirely with the legislature. Whether a person convicted of this offense has committed a felony or a misdemeanor can be ascertained by the nature of the judgment. If the defendant is sentenced to serve a term in the state prison, the crime is a felony; otherwise, a misdemeanor. Sections 16, 17, Pen. Code. The evidence is sufficient to sustain the verdict. The evidence introduced by the prosecution shows that Gelston stole the property and sold it to the defendants. Gelston was an assistant foreman of the warehouse where the property was stored, but had no authority to sell any of the property. His offense was therefore larceny. 2 Russ. Crimes, (8th Amer. Ed.) pp. 178-180; Steph. Dig. Crim. Law, pp. 247, 248; Reg. v. Norval, 1 Cox, Crim. Cas. 95. He had authority to deliver property stored in the warehouse upon proper orders presented to him, but the legal possession of the property remained in the owner of the warehouse. If it be assumed, however, that the acts of Gelston constituted technical embezzlement, the result must be the same; the goods were stolen. "Embezzlement is a species of larceny. * * * It is distinguished from larceny, properly so called, as being committed in respect of property which is not at the time in the actual possession of the owner." People v. Burr, 41 How. Pr. 293, 294. It is frequently termed "larceny by bailee." And. Law Dict. "Embezzlement." Statutes defining embezzlement are intended to punish certain kinds of theft which were not criminal offenses at common law. The offense in this state is punishable "in the manner prescribed for feloniously stealing property of the value of that embezzled." Pen. Code, § 514. The court gave to the jury the following instruction: "The effect of the statutory rules of evidence is that when the doing of an act which, if coupled with a guilty intent, would be a violation of the law, is proven, the burden of proving the act to have been done without intent, to the extent of creating a reasonable doubt of the defendant's guilt upon the whole case, is, in most cases, thrown upon the accused." This was error. People v. Ribolsi, 89 Cal. 498, 26 Pac. Rep. 1082. The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: GAROUTTE, J.; HARRISON, J.

Dougherty v. Austin. (No. 13,323.)

(Supreme Court of California. May 30, 1892.)

Constitutional Law—Delegation of Legislative Powers—Compensation of County Officer.

Laws 1887, p. 207, providing that whenever, in the opinion of the board of supervisors, the salary of any county officer in certain classes of counties is insufficient to pay a reasonable compensation, the board should allow such officer a deputy at a certain salary, to be paid for by the county, is invalid as an attempt to delegate the power to change a law exclusively confided to the legislature by Const. art. 11, § 5, which provides that it shall provide for the election or appointment of county officers, and regulate their compensation. McFarland and Paterson, JJ., dissenting. State v. Field, 17 Mo. 529, followed. 28 Pac. Rep. 834, affirmed.

In bank. On rehearing.

Smith & Pomeroy, for appellant. *Hepburn Wilkins*, for respondent. *Works, Gibson & Titus, amicus curiæ.*

De Haven, J. In the former decision of this case (28 Pac. Rep. 834) the court, in its opinion, held that the order of the board of supervisors of Marin county, upon which the respondent bases his right to the relief which he asks, was, in effect, an increase of the compensation of the county clerk of Marin county, made after his election to such office, and was for this reason void, as being in conflict with section 9 of article 11 of the constitution of this state; and, secondly, that section 211 of the county government act, as amended in 1887, (St. 1887, p. 207,) under which the board of supervisors acted in making such order, was invalid, as it made the county government act, of which it formed a part, lacking in that uniformity of operation which is required by section 11 of article 1 of the constitution of this state. It being supposed that the decision thus made would affect officers in other counties who had not been heard, and that the question presented for decision was of sufficient importance to justify it, it was deemed proper by a majority of the members of the court to grant a rehearing, in order to give an opportunity for further argument. The case has been reargued, and upon a reconsideration of the questions involved we adhere to the conclusions announced in the former opinion of Mr. Justice Garoutte, and the reasoning by which those conclusions were reached.

There is, however, an additional ground which is equally fatal to the right of respondent to maintain this action, which will be briefly referred to. The constitution of the state declares: "The legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of boards of supervisors, sheriffs, county clerks. * * * It shall regulate the compensation of all such officers in proportion to duties, and for that purpose may classify the counties by population." Article 11, § 5. Under this section it is made the imperative duty of the legislature to regulate—that is, to fix or adjust—the compensation of all county officers in proportion to their duties. In the exercise of the authority thus conferred upon it by the constitution, the legislature, in the county government act of 1883, (St. 1883, p. 299,) and the act amendatory thereof, passed in 1885, (St. 1885, p. 178,) fixed the salary of the county clerk in the class of counties to which Marin belonged at $2,500 per annum, with the special provision that this sum should be in full compensation for that officer, and that all deputies employed by him and deemed necessary to properly discharge the duties of such office should be paid by him out of the salary thus fixed by the act. But in 1887 section 211 of the county government act was again amended, and by such amendment the legislature undertook to confer upon the supervisors of Marin—and certain other counties—the power to change that provision of the law which required their county officers to pay their own deputies. This amended section, so far as it is necessary to be here set out, is as follows: "That whenever, in the opinion of the board of supervisors, the salary of any county officer in the third, fourth, * * * twentieth, * * * classes, as fixed and provided in this act, is insufficient to pay a reasonable compensation for the services required to be performed, the said board shall allow such officer a deputy, or such number of deputies as in their judgment may be required to do the business of such office in connection with the principal, at a salary not to exceed one hundred dollars per month, to be paid, etc.: * * * provided, that an affidavit shall be filed by such officer with the said board, showing that such deputy or deputies are required by him in the proper discharge of his duties as such officer." It was under this section, as thus amended, that the board of supervisors of Marin county acted in making the order by virtue of which plaintiff claims the right to be paid his salary as deputy county clerk from the treasury of the county.

The question is thus squarely presented whether it was competent for the legislature thus to delegate to the board of supervisors of that county the power to change or suspend that part of the general law fixing the salaries of county officers, which provided that the county clerk of Marin county should himself pay the deputy or deputies employed by him. There can be, under well-settled principles of constitutional law, but one answer to this question, and that is one which denies to the legislature any right to thus delegate to any other body or tribunal what is most clearly a legislative power, the exercise of which the constitution has confided to that department of the state alone. This principle is one so universally accepted as true, that Judge Cooley, in his work on Constitutional Limitations, states it as a maxim of constitutional law. He says: "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." Page *117. A general statute of the state of Missouri concerning roads and highways contained a provision that, "if the county court of any county should be of opinion that the provisions of the act should not be enforced, they might, in their discretion, suspend the operation of the same for any specified length of time, and thereupon the act should become inoperative in such county for the period specified in such order," and in that event roads in such county should be opened and kept in repair under previous statutes. The supreme court of that state, in State v. Field, 17 Mo. 529, held such act unconstitutional, as an attempt to delegate to the county court of the county a power vested exclusively in the legislature. There is no difference whatever, in principle, between the statute held invalid in the case just referred to and section 211 of the county government act as amended in 1887, and under which the board of supervisors acted in making the order upon which the plaintiff relies. By this section, as thus amended, an attempt is made to delegate to the board of supervisors of Marin county the authority to change the law fixing the salary of the county clerk of that county whenever it shall appear to such board that the salary as thus fixed is insufficient to pay him a reasonable compensation for his services. The salary of this officer was fixed by the legislature, with direct reference to the fact that out of it he was to pay his own deputies, and the purpose of this amended section is to authorize the board of supervisors of that county to suspend the operation of this law, in so far as he is thereby required to pay such deputies, and to place that burden upon the county. The power thus to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it to the board of supervisors of the county. It follows from this that the order of the board of supervisors of Marin county, allowing the plaintiff a salary of $50 per month as deputy county clerk of that county, and payable out of the treasury, is void, and plaintiff is not entitled to the judgment which he demands. As already stated, the constitution of this state has made it the imperative duty of the legislature to fix the salaries of county officers in proportion to their duties. Whether, if that body should wholly fail to discharge this obligation in respect to any county, the board of supervisors of such county would, by virtue of its general authority in relation to the government of such county, have power to provide for the payment of its officers, is a question not involved in this case, and upon which we express no opinion. Judgment reversed, with directions to dismiss the proceeding.

We concur: GAROUTTE, J.; HARRISON, J.; SHARPSTEIN, J.

BEATTY, C. J., (*concurring*.) At the first presentation of this case I was impressed with the conviction that very serious consequences must flow from any conclusion the court might reach, and have therefore given it the most careful and anxious consideration. It was apparent that so important a provision of the county government act as that which is in question here could not be held unconstitutional without producing disorder and confusion in the public business of a number of the most populous counties of the state, besides injuriously affecting the pecuniary interests of the deputy county officers whose compensation it was intended to secure. It was therefore with great reluctance that I yielded to the conviction that, upon any construction of the proviso under which the respondent claims, it could not be upheld without disregarding the manifest intention of the constitution. Actuated by the same feeling, I willingly united in the order for a rehearing, hoping that a fuller discussion of the case by additional counsel representing the state and the several counties affected by the decision might lead to the discovery of some happier solution of the difficulty. I regret to say, however, that, after carefully weighing and considering every argument that has been advanced from the beginning to the end of the discussion, the conflict between the act of the legislature and the constitution still seems to me plain and irreconcilable. Unless by express words declared to be otherwise, every provision of our constitution is mandatory and prohibitory. Article 1, § 22. Among these mandatory and prohibitory provisions are found the following: Article 11, § 5: "The legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of the boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office. It shall regulate the compensation of all such officers in proportion to duties, and for this purpose may classify the counties by population; and it shall provide for the strict accountability of county and township officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them, or officially come into their possession." Article 11, § 9: "The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed." It is not denied, and it cannot be, that by section 5 of this article the legislature is commanded to regulate the compensation of all county officers in proportion to duties. A comparison of sections 5 and 9 makes it equally plain that such regulation must be made to take effect before the election of the officers whose compensation it controls, and that it cannot be subsequently changed so as to increase the compensation of any officer during the term for which he has been elected. It may be conceded that to regulate the compensation of an officer does not necessarily mean to ascertain or fix the exact amount which he is to receive for discharging all the duties of his office. Indeed, it seems plain to me that the legislature might have satisfied this requirement of our organic law, without any classification of counties according to population, by the simple expedient of adopting a uniform fee bill, and allowing each county officer to retain for his compensation all the fees by him collected, not exceeding a certain amount, and a percentage computed according to a sliding scale, such as that used in determining the compensation of executors and administrators, upon all higher amounts collected. This is one example of a regulation by which a just correspondence between the duties and compensation of county officers might be maintained without trenching upon the apparent design of the last clause of section 5, requiring provision to be made for the strict accountability of county and township officers for all fees by them collected, and without the necessity of dividing the counties into classes. No doubt other, and perhaps better, examples might be suggested of regulation by other means than the fixing of a definite sum to be paid to each officer for discharging all the duties of his office, and requiring him to provide all necessary deputies.

But the legislature has not seen fit to adopt a regulation of the character suggested. On the contrary, by the first county government act, (St. 1883, p. 299,) the duties of all county and township officers were prescribed by general provisions, and every county and township officer, except supervisors and judicial officers, was authorized to appoint as many deputies as might be necessary for the prompt and faithful discharge of the duties of his office. Section 61, p. 316. The act then proceeded to classify the counties of the state by population for the express purpose of regulating the compensation of the officers therein provided for. Section 162, p. 332. By the next section (section 163) the compensation of each officer in every class of counties except the first (the city and county of San Francisco alone constituted the first class, and was left subject to the provisions of its old charter) was fixed at a certain sum of money, (or sometimes certain fees,) which, by a subsequent and general provision, (section 164, p. 361,) was declared to be "in full compensation for all services of every kind and description rendered by the officers named in the act, their deputies and assistants." To leave no doubt of the meaning of this clause the act proceeds: "and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided." As an example of the provisions of section 163 we quote those relating to counties of the second class: "Sec. 163. In counties of the second class the county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries, to wit: (1) The county clerk, thirteen thousand dollars per annum; (2) the sheriff, fifteen thousand dollars per annum; (3) the recorder, fifteen thousand dollars per annum; (4) the auditor, two thousand dollars per annum; (5) the treasurer, four thousand five hundred dollars per annum; (6) the tax collector, eight thousand dollars per annum; (7) the assessor, fourteen thousand dollars per annum; (8) the district attorney, six thousand five hundred dollars per annum; (9) the coroner, such fees as are now or hereafter may be allowed by law; (10) the public administrator, such fees as are now or hereafter may be allowed by law; (11) the superintendent of schools, twenty-four hundred dollars per annum; (12) the surveyor, such fees as are now or hereafter may be allowed by law; (13) justices of the peace, such fees as are now or hereafter may be allowed by law; (14) constables, such fees as are now or hereafter may be allowed by law; (15) supervisors, one thousand dollars each per annum." Now, conceding again that to regulate the compensation of officers does not necessarily mean to fix the exact amounts to be paid them for discharging all the duties of their offices, including the services of deputies, it cannot be denied that this is one method of regulation by which the requirement of the constitution is satisfied, without denying that the county government act of 1883, and all subsequent acts on the same subject, were and are in this respect unconstitutional and void. But the contrary has been decided in Longan v. Solano Co., 65 Cal. 122, 3 Pac. Rep. 463, and no one here—least of all the respondent—is disputing the correctness of that decision. Assuming, then, what is conceded on all sides,—that the act of 1883 did regulate the compensation of county officers according to duties,—let us consider for a moment the nature of that regulation and its effect in limiting the compensation proper of the officers themselves. The sum allowed to any given officer being a lump sum, out of which he must pay for the services of all deputies and assistants necessary for the prompt and faithful discharge of all the duties of the office, it is evident that his own compensation consists of the residue remaining after payment of such deputies and assistants; and it is equally evident that, just so far as the county assumes the payment of such deputies and assistants, such residue is enlarged and the compensation increased.

The cases reviewed by the supreme court of Illinois in deciding Daggett v. Ford Co., 99 Ill. 334, cover this point very completely. By the constitution of Illinois the duty of "fixing the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel, and other expenses," is imposed upon the respective county boards, with the proviso that the compensation of no officer shall be increased or diminished during his term of office. It was shown in the opinion delivered in the case cited that this clause of the Illinois constitution had been construed in a series of decisions, by which it had been held, among other things, that the county boards might either allow a lump sum to cover the compensation of the officer and his expenses for clerk hire, etc., or that they could allow a certain amount for his proper compensation, and a separate amount for his expenses; that, if the latter method was pursued, he could retain out of the fees collected by him the amount of his fixed compensation, and also the actual amount of his expenses, and no more, provided they did not exceed the amount allowed; that, if the board, after allowing a separate amount for expenses, found that it was insufficient, they could from time to time during the term increase such allowance, though they could not increase or diminish the certain sum fixed as the compensation of the officer. In other words, the supreme court recognized this distinction between the allowance for compensation and for clerk hire, etc., when separately fixed: that the latter could, but the former could not, be increased or diminished during the officer's term. But when the board allowed a lump sum to cover compensation and expenses, so that the compensation proper consisted of the residue remaining over after payment of expenses, it was held that they could not, during the term of the officer, make any increased allowance, though convinced that their original estimate of expenses had been too low; nor could they require the officer to refund any part of the gross amount allowed upon the ground that his actual expenses had fallen below the estimate upon which the gross allowance was based; and this for the reason that any increase or decrease of the gross allowance necessarily increased or diminished the compensation of the officer. Here, then, is most respectable authority—if authority were needed—for the proposition that our legislature could not, either by direct enactment or by authorizing the boards of supervisors to so order, impose upon a county treasury the payment of the salary of any deputy of a county officer elected while the act of 1883 remained in force and unamended as to the provisions under discussion.

This being so, it remains to consider what changes have been made by amendments or additions to the original act. By the amendments of 1885 the sections of the act were renumbered, and salaries in some counties reduced, but no change was made that need be considered here. In 1887, however, the act was revised and reenacted. In the revision, section 164 of the original act became section 211, and among other changes therein were the following: Instead of the words above quoted from section 164, section 211 was made to read as follows: "Sec. 211. The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers herein named either as officers or *ex officio* officers, their deputies and assistants, *unless in this act otherwise provided*, and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, *unless in this act otherwise provided.* * * * *And provided, further, that whenever, in the opin-*

ion of the board of supervisors, the salary of any county officer in the third, fourth, fifth, *twelfth, thirteenth, fifteenth, twentieth, twenty-second, twenty-third, twenty-fourth, twenty-sixth, twenty-ninth, thirty-third, thirty-fourth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, and forty first classes, as fixed and provided in this act, is insufficient to pay a reasonable compensation for the services required to be performed, the said board shall allow such officer a deputy, or such number of deputies as in their judgment may be required to do the business of such office, in connection with the principal, at a salary not to exceed one hundred dollars per month, to be paid at such times and in the manner that said principal is paid: provided, that an affidavit shall be filed by such officer with the said board showing that such deputy or deputies are required by him in the proper discharge of his duties as such officer.*" By their terms these amendments (which I have put in italics) were applicable to the county officers then in office, and who had been elected while the system of compensation established by the act of 1883 was in force, and (if so construed) were, for the reasons above given, clearly unconstitutional. But the respondent's case does not require such a construction, and he does not contend that said amendments went into operation until after the expiration of the term of the county officers in office at the date of their enactment. His principal, Bonneau, was clerk of Marin county—a county of the twentieth class—when the act of 1887 was passed, and respondent was his deputy. But Bonneau was re-elected for a new term in November, 1888, and entered thereon January 7, 1889. On January 10th he filed the affidavit prescribed by the statute, showing that he required a deputy in his office, and on the same day the board of supervisors made an order allowing him such deputy at a salary of $50 per month, to take effect from January 7th. In pursuance of this order respondent was appointed, and, having obtained a warrant for the amount of his salary for the month of January, presented it to the appellant, the county treasurer, who refused to pay it on the ground that the proviso above quoted from the act of 1887 was unconstitutional, and the order of the board of supervisors therefore void. Thereupon this proceeding by *mandamus* was commenced for the purpose of enforcing payment. The learned judge of the superior court, in awarding a peremptory writ of *mandamus*, held (if he is correctly quoted in the respondent's brief) that Bonneau, having been elected subsequent to the passage of the act of 1887, went into office with "a right to the amount of salary named in the statute, and a contingent right, dependent on the facts, to have additional clerical assistance."

This being a fair statement of the proposition for which the respondent contends, it becomes necessary to consider whether it will bear the test of a critical examination. It is to be observed, in the first place, that it assumes a construction of the proviso which is more restricted than its terms, and more restricted than its application in this case, viz., that it was intended to apply only when, from change of conditions, an officer might require additional clerical assistance, meaning, as I understand the expression, clerical assistance in addition to that which was required at the date of the passage of the act. If this is the construction placed upon the proviso by the superior court, it must be admitted that it is not very fully borne out by the terms of the statute. The act says nothing about change of conditions through increase of population, or from any other cause. No facts are enumerated upon which the action of the board is made to depend. The only condition is that the officer shall file an affidavit showing that for the proper discharge of his duties he requires the assistance of a deputy or deputies, which it is apparent might be the case in a county in which the conditions were unchanged, or where the change of conditions had resulted in lightening the duties of the office. Nor does the statute require the board of supervisors to find that the duties of the office have become more onerous since the passage of the act. All they have to do is to reach the conclusion in the exercise of their own discretion that the salary as fixed and provided in the act is insufficient to pay a reasonable compensation for the services required to be performed, and, if they are of that opinion, they shall allow such officer not "additional clerical assistance," but "a deputy, or such number of deputies as in their judgment may be required to do the business of such office, in connection with the principal," with salaries payable out of the county treasury. Giving to this language its literal and obvious construction, the working of the law may be fairly illustrated by applying it to counties of the second class, which, by the amendments of 1889, were brought within its operation. Referring to a clause of the statute above quoted, it will be seen that the compensation allowed to the different officers of this class of counties is fixed upon a scale which clearly indicates that it was intended to cover the salaries of a number of deputies in each of the principal offices. The clerk, for instance, has $13,000, the sheriff $15,-000, and so on. Now, let it be supposed that the legislature intended the clerk to have for his proper compensation the sum of $3,000, (which is equal to the maximum allowed by the constitution to the state treasurer, secretary of state, comptroller, and other state officers,) and that the remaining $10,000 was allowed for his necessary deputies, say six in number. This is the condition of things when the law is passed, and when the clerk is elected. On assuming the office, he can truthfully swear, although the conditions are entirely unchanged, that he requires the assistance of six deputies for the proper discharge of the duties of his office, and he files an affidavit to that effect. Thereupon it becomes the duty of the board of supervisors to consider whether his salary, as fixed and provided in the act, is sufficient to pay a reasonable compensation for the services of the clerk and six deputies; and, if they happen to be of the opinion that $3,000 is not a reasonable compensation for the clerk, or that $10,000 is not sufficient for the compensation of the six deputies, they must make an order allowing the clerk to appoint, not additional deputies, but as many deputies as he requires in connection with himself to perform the duties of the office, and order their salaries paid out of the county treasury. This result of a literal construction of the law is so flagrantly absurd, when applied to counties of the second class, that it must be rejected in favor of one more reasonable, though certainly less consonant with the terms of the statute. And it may be conceded that the most reasonable construction that can be given to this proviso is that indicated in the foregoing extract from the opinion of the judge of the superior court. It seems to me, however, that, although the law may have been construed by him according to the actual intention of the legislature, it was applied in this case in its literal sense, for the respondent was Bonneau's sole deputy when the law was passed, and when he was last elected. It was not shown that an additional deputy was required, and in fact none was required. Respondent continued after the order of the board, and his new appointment, to be as he had been before, the sole deputy in the office, and what was in fact done in Marin county by its clerk and supervisors was precisely what I have supposed done in attempting to illustrate the working of the law according to its express terms in a county of the second class. If, therefore, the order under which the respondent claims can be upheld, all the proceedings above supposed to have taken place in a county of the second class would be entirely legitimate and proper.

In making this statement I have not overlooked the fact which appears in the evidence, though not in the findings or decision of the court, that the business of the clerk of Marin county did increase, after the passage of the act of 1887, so much that the respondent, who had before given but a part of his time to his duties as deputy clerk at a small salary, was subsequently compelled to devote his whole time to the duties of the office, and necessarily earned and received a larger salary. If this fact—testified to but not found—is to be considered as bringing the respondent's case within his construction of the law, it will be necessary to bring the law so construed to the test of the constitution. According to this construction, the legislature, after dividing the counties of the state into 48 classes for the express purpose of regulating the compensation of the county officers, and having regulated such compensation by the system of allowing to each officer a certain fixed sum, or certain fees out of which he must pay the salaries of all necessary deputies and assistants, has proceeded to ingraft upon this system a proviso applicable to 20 classes, to the effect that the supervisors may, after the election of any officer, if they think the compensation allowed him by the act in force at the date of his election is insufficient, pay out of the county treasury the expense of employing any deputies he may require in addition to those required at the date of the passage of the act. Assuming this to be the true meaning of the proviso, it either is or is not a mode of regulating the compensation of the officers of the selected classes of counties. If it is a mode of regulation, how does it regulate, and through whose agency? Clearly, it seems to me, through the agency and subject to the discretion of the board of supervisors. If, under the law in force at the date of his election, an officer is to receive for his proper compensation one sum, (viz., what is left of his fixed salary after paying his necessary deputies,) and under the order of the board made after his election a larger sum, (viz., what is left of his fixed salary after paying at most only a part of his necessary deputies,) it is the discretion of the board, and not that of the legislature, which fixes the amount, and such amount, instead of being fixed in advance of his election, can only be fixed after his election, for by the terms of the proviso the affidavit of the officer is a necessary preliminary to the order of the board. Passing over this last objection, which, in view of the evident purpose of sections 5 and 9 of article 11, is serious enough, let us consider only the first. For myself, I am far from believing that the plan of regulating the salaries of local officers by local boards is a bad one. On the contrary, I think the best plan would be to leave such matters to the control of those who are most directly interested and most capable of deciding for the best. But it is very certain that the framers of our constitution distinctly intended to give this power to the legislature, to the exclusion of the boards of supervisors. This is not only evident from the language of section 5 of article 11, but is shown by the debates of the convention. When this article was reported to the convention, Mr. Webster, of Alameda, offered an amendment to section 5, providing in effect that the respective boards of supervisors should regulate the compensation of other county officers. After a short debate, in which the only argument against the amendment consisted of a statement of the supposed mischiefs involved in conferring such a power upon local boards, the amendment was voted down, and the section adopted substantially as reported. Deb. Const. pp. 1048, 1049. The framers of the constitution having thus deliberately rejected the proposition to invest the board of supervisors with discretionary authority in this particular, and having committed the whole matter to the discretion of the legislature, under a mandatory injunction to exercise the power by regulating in advance the compensation of all officers according to their duties, it is clear that the legislature cannot delegate such power to the supervisors, to be exercised according to their discretion. But counsel for respondent seek to avoid the force of this argument, by insisting that the proviso in question, according to their construction of it, does not in any way regulate or affect the compensation of the county officers. They make a distinction between the compensation of the officer and the expenses of his office, and contend that the county government act itself fixes the compensation of the officers beyond the power of the board of supervisors to change or alter it, and that the proviso merely gives the board power to allow and pay the expenses of the office occasioned by changed conditions and unforeseen contingencies. I understand this to be the position to which the respondent commits himself, and upon which he feels most confident of sustaining the judgment in his favor.

In view of the foregoing discussion it would seem rather difficult to maintain that the proviso in question does not affect, and was not intended to regulate, the compensation of county officers; but, conceding for the moment that the respondent is right in his construction of it, what is the result? The result is that we have an act in direct conflict with various provisions of the constitution prohibitory of local and special legislation. If there is any one feature of the constitution more marked, any characteristic more pervasive, than all others, it is this oft-reiterated, this general and specific, inhibition of local and special laws. I cite the following clauses as bearing more directly upon the matter under discussion: Article 1, § 11: "All laws of a general nature shall have a uniform operation." Article 4, § 25: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * *Ninth.* Regulating county and township business, or the election of county and township officers. * * * *Thirty-Third.* In all other cases where a general law can be made applicable." Now this law, which for the present we assume has nothing to do with the compensation of county officers, but merely empowers the boards of supervisors to allow and pay the expenses caused by changed conditions and unforeseen contingencies, is certainly a law of a general nature, relating, as it does, to a matter of equal interest to every part of the state. It ought, therefore, to have a uniform operation throughout the state, instead of being confined to less than half of the counties. But, passing over this objection to the law as one founded upon a disputed, and perhaps doubtful, construction of section 11, art. 1, it seems clear that this proviso is in direct conflict with the ninth and thirty-third subdivisions of section 25, art. 4, for certainly it is a regulation of county business, and the case not only admits, it demands, the application of a general law. But this law is local and special. It selects certain classes of counties, apparently at random, some large, some small, some of intermediate size, omitting others of every grade of population, above, below, and intermediate, and confers upon the classes so arbitrarily selected a power and a privilege in the transaction of the county business which is denied to others standing in precisely the same relation to the subject of the enactment. The fact that it is made applicable to classes of counties created in pursuance of authority expressly conferred by the constitution itself, viz., the authority to classify counties by population for the purpose of regulating the compensation of county officers, does not make it a general law; for, on the construction which is here assumed, it is not a regulation of the compensation of officers, but a provision for contingent expenses; and a classification permitted for one kind of legislation cannot be made the basis of a different kind of legislation to which it is manifestly inappropriate. It is this consideration which distinguishes this case from Cody v. Murphey, 89 Cal. 522, 26 Pac. Rep. 1081, and People v. Henshaw, 76 Cal. 444, 18 Pac. Rep. 413. In the first-mentioned case an act was upheld, although it applied to but one class of counties; but it was an act to regulate the compensation of the county officers. In the Henshaw Case the act upheld affected only one class of cities; but it was an act relating to municipal organization, for which purpose the constitution expressly authorizes the classification of cities and towns in proportion to population. Article 11, § 6.

The case of Miller v. Kister, 68 Cal. 142, 8 Pac. Rep. 813, on the other hand, holds that the classification of counties established by the act of 1883, for a legitimate purpose, cannot be made the basis of discriminating legislation, even when it relates to the compensation of county officers. The case of Ex parte Westerfield, 55 Cal. 550, is also directly in point on the proposition that a law is not general merely because it applies equally to all of a class arbitrarily defined. As Mr. Justice McKinstry says in that case: "A general law must be as broad as its object." Therefore a law, the object of which is to provide for the payment of county expenses arising from unforeseen contingencies, must be as broad as the state, for it is absurd to say that unforeseen contingencies will happen in some counties, but not in others. In the case of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604, a law applying to two classes of municipal corporations was held unconstitutional, because it related to a subject foreign to the purpose for which the classification of such corporations is authorized, and the discussion on this point was summed up in the following words: "The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." Pages 251, 252, 91 Cal., and page 607, 27 Pac. Rep. In view of these decisions, the conclusion cannot be avoided that the proviso, construed as something distinct from a regulation of the compensation of county officers, is local and special legislation, and therefore void. And this vice of the statute in question distinguishes it broadly from the law which was sustained in Kirkwood v. Soto, 87 Cal. 394, 25 Pac. Rep. 488, upon which the respondent so confidently relies. That was a general law, allowing superintendents of schools in every county in the state certain necessary official expenses, and was in this respect similar to many general provisions of the Codes allowing for extraordinary expenses of county offices; such, for instance, as the preparation of a new great register, (Pol. Code, § 1113,) to which I see no constitutional objection. If I am correct in the views above expressed, the proviso in question is void as special legislation, even if construed according to respondent's contention,—that it does not affect the compensation of county officers. But, although I have for the moment conceded the correctness of his position as to this point, I do not think it can be maintained. The proviso, in my opinion, is an attempt to regulate such compensation by committing to the discretion of the supervisors a duty which the constitution had confided to the legislature exclusively,—a duty which, under the terms of the act, the supervisors cannot perform until after the election of the officers to be affected, whereas the constitution requires it to be performed by the legislature in advance of their election. For these reasons I concur in the judgment of reversal.

McFARLAND, J., (*dissenting*.) I dissent. I have not the time, and there is no necessity, to state my views at large on the questions here involved. I will state some of them, however, briefly.

1. The undisputed general rule is that all presumptions are in favor of the constitutionality of statutes; that before an act of a co-ordinate branch of the government can be declared invalid by the judiciary for the reason that it is in conflict with the constitution, such conflict must be clear, positive, abrupt, and unquestionable; and that, in case of fair, reasonable doubt of its constitutionality, the statute should be upheld. I state this old rule here because I think it particularly applicable to the case at bar; for, at best, the unconstitutionality of the statute here in question is certainly not so clear as to be seen without a good deal of microscopic aid.

2. The amendment of 1887 was not, in my opinion, in violation of section 9 of article 11 of the constitution, which provides against increase of compensation "after election." Bonneau, the county clerk, whose deputy Dougherty, the plaintiff, is, was elected after the passage of said amendment; and he did not "contract," as contended by appellant, that he would do all the work of his office, or pay a deputy, if necessary to employ one. The law which gave the contingent right to have a deputy paid by the county was in force at the time of his election. Moreover, the employment of a deputy paid by the county did not "increase the compensation" of the county clerk. His compensation was the same after the employment of the deputy as before. It is contended that his compensation was increased because his work was lessened. Now, in the first place, there is no such presumption; the presumption is that the board allowed the deputy because there was additional work for him to do. But, in the second place, suppose his work was lessened, shall a solemn act of the legislature be declared void by the circuitous reasoning which brings us to the conclusion that a decrease of duties is an "actual increase of compensation" within the meaning of the constitution? Suppose that the legislature had created a new county office, and transferred to the incumbent of such new office a part of the business formerly required to be done by the county clerk, would that have been an "increase of compensation" of the county clerk?

3. Neither do I think that the amendment is "special legislation" inhibited by section 25 of article 4, or that it has not a "uniform operation" within the meaning of section 11 of article 1. The legislature has the power to "establish a system of county governments," (section 4, art. 11,) and to "regulate" the compensation of county officers, "and for this purpose may classify the counties by population," (section 5, art. 11.) Under these provisions the legislature may create as many classes as its judgment dictates, and such classification is not special legislation. Longan v. Solano Co., 65 Cal. 122, 3 Pac. Rep. 463. And, of course, if such legislation is not "special," it has a "uniform operation," because it operates alike on each of the classes upon which it operates at all.

4. And I see nothing in the point that the board of supervisors could not be given the power to allow the deputy and provide for his salary. The constitution merely declares that the legislature shall by general laws provide for the election "or appointment" of certain named county officers, and regulate their compensation. Section 5, art. 11. The deputy involved in the case at bar can hardly be considered as one of the county officers mentioned in the section just referred to; but, if he were, it is difficult to see why the legislature could not "provide" for his appointment in the way mentioned in the statute under consideration. And the legislature is only to regulate the compensation. I confess that I can find no authority in either common or law literature for giving to the word "regulate" the meaning of "fix,"—that is, to name definitely, exactly, and mathematically the very sum in dollars and cents of the compensation. I find no general or law dictionary which uses the word "fix" at all in defining the word "regulate," or gives one as the synonym of the other. Indeed, the words seem to have quite different significations. Some of the definitions of "fix" are to make "firm, staple, or fast;" "to set or place permanently;" "to fasten immovably." Webst. The common definitions of "regulate" are "to adjust by rule, method, or established mode;" "to direct by rule or restriction;" "to subject to governing principles of law." Id. These same definitions of "regulate" are to be found in law dictionaries. The latter word, therefore, has much greater latitude of meaning than "fix," which includes the notion of inflexibility and rigidity. To fix is to fasten a thing immovably,—as with nail and hammer; while to regulate includes the idea of marking the boundaries and prescribing the methods within and by which the

thing may be done by others. I know that words are uncertain things, and must be construed with reference to the context and relations in which they are found; but certainly a word should not be strained from its usual to a restricted sense when the result of such construction is to upset a statute. Therefore, giving to "regulate" what, it seems to me, is clearly its usual meaning, I see no question in the case about unwarranted "delegation of authority" by the legislature. The constitution expressly provided that "the legislature shall provide a system of county governments," which shall have, to a large extent, legislative powers; and I cannot see how the power to employ and pay deputies in county offices, within restricted limits, is different from the numerous other powers which boards of supervisors are exercising every day without question. The Code formerly provided that the board of supervisors shall have the power "to fix the compensation of all county officers not otherwise in this Code, or by general or special law, fixed, and provide for the payment of the same." Section 4046, Pol. Code, (Newmark, 1889.) And this court held in Kinsey v. Kellogg, 65 Cal. 115, 3 Pac. Rep. 405, that such power was properly granted. This was practically holding that the county governments might be given the power to fix the salaries of all county officers. I do not think that the position of appellant is made any stronger by putting it in the form of the proposition that the amendment of 1887 undertook to give the board of supervisors the power "to change or suspend the law." The amendment is in the very section 211 which contains all the law on the subject; and the change was made by the legislature itself. In my opinion, the judgment should be affirmed.

PATERSON, J. I concur in the views expressed by McFARLAND, J.

BURR v. JOHNSON, County Treasurer, *et al.* (No. 14,574.)

(*Supreme Court of California.* May 30, 1892.)

Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Application of one Burr for a writ of mandate, to one Johnson, treasurer of the county of San Francisco, and others, to compel the payment of a certain warrant. Writ refused, and petitioner appeals. Reversed.

Clinton L. White, for appellant. *A. J. & Elwood Bruner*, for respondents.

DE HAVEN, J. This case presents the same general questions which were involved in Dougherty v. Austin, (No. 13,323,) 29 Pac. Rep. 1092, the decision in which has just been rendered, and upon the authority of that case the judgment appealed from must be reversed, and the cause remanded. Judgment reversed, with directions to the court below to overrule the demurrer to the complaint.

We concur: BEATTY, C. J.; SHARPSTEIN, J.

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94 Cal. 544

CULVERHOUSE v. CROSON *et al.* (No. 14,435.)

(*Supreme Court of California.* May 21, 1892.)

AMENDMENT OF PLEADINGS—TERMS—PAYMENT OF EXPENSES.

Under Code Civil Proc. § 473, authorizing the court to allow amendments to pleadings on such terms as may be proper, there is no abuse of discretion in requiring, as terms of an amendment to an amended answer at time of trial, that defendant should at once pay plaintiff $65 actual expenses of coming to the trial, which would be of no avail if the amendment was allowed necessitating a continuance.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Action by Jerry Culverhouse against E. T. Croson and Emma A. Croson for foreclosure. From a judgment for plaintiff, and an order imposing terms as a condition to amendment of the answer, defendants appeal. Affirmed.

Spencer & Raker and *Clarence A. Raker*, for appellants. *Clay W. Taylor*, (*Chauncey H. Dunn*, of counsel,) for respondent.

FOOTE, C. This appeal is from a judgment of foreclosure and sale of certain mortgaged premises, and from an order denying a new trial. The main question in the case is whether or not the trial court abused its discretion in refusing the defendants leave to file an amendment to their amended answer. It appears that when the case was called for trial the defendants, evidently supposing that it was necessary to their defense that it should be pleaded and proved that they had within a reasonable time offered to rescind the contract, which they claimed to be without consideration, and tainted with fraudulent representations of the original holder of the note secured by the mortgage sought to be foreclosed, asked leave to file an amendment to the amended answer. This the court refused to allow, under the circumstances surrounding the matter, unless the defendants would pay $65, "as terms," to the plaintiff. It appears that this was to cover certain expenditures of the plaintiff in coming to the place of trial with counsel, which would be of no avail if the amendment was allowed, because a continuance of the cause would become necessary. In this connection it appears further that the cause had been upon the calendar for two years; that the plaintiff and his attorney had come from Redding, in Shasta county,—a considerable distance from Alturas, Modoc county, (the place of trial,) and that what was asked was to reimburse plaintiff for actual expenditures, not including the use of a private team of horses. The defendants did not seem to be decidedly averse to paying this money as a consideration to file the amendment, but wanted it included in the general bill of costs. But this the plaintiff objected to, as not likely to result in his ever getting the money, as the mortgaged property he claimed not to be sufficient to pay the debt then due. The court seemed to think that, as the defendants had so long delayed their proposed amendment, and had compelled the plaintiff to come with counsel from a distant place, putting him to this expense, and that an amendment would necessitate a continuance, justice required that the defendants should reimburse plaintiff then and there for the money thus expended, which otherwise he would not perhaps obtain from defendants. We cannot say that this action of the court was in violation of the terms of section 473 of the Code of Civil Procedure. There are various other points raised by the appellants for a reversal of the judgment and order, but a careful examination of the record leads us to the belief that no prejudicial error has resulted from the action of the trial court, and we therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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94 Cal. 406

CARPENTER *et al.* v. BAILEY *et al.* (No. 14,744.)

(*Supreme Court of California.* April 30, 1892.)

WILLS—FRAUD—UNDUE INFLUENCE—DELUSIONS—NONEXPERT WITNESS—COMPETENCY—INSTRUCTIONS.

1. In an action to set aside a will by which testator left his estate to his partner's children, evidence that the partner circulated a report that testator had visited his relatives, had been badly treated by them, and would not leave them any portion of his property, and thus suggested it to testator's disordered fancy, was insufficient to sustain a finding that the will had been procured by the fraud of the partner, where there was no evidence that testator ever heard of his partner's statement, and it appeared that testator had previously made a similar statement.

2. The fact that the partner had a family, which was supported by the partnership, could have no tendency to induce the testator to make his will in favor of his partner's children.

3. Evidence that testator wrote to his relatives several times; that his relatives wrote him, sometimes addressing to his partner; and that the letters were neither received nor returned from the dead-letter office,—was insufficient to show that the partner suppressed the correspondence, in the absence of evidence that the partner received the letters, or that he alone was in the habit of going to the post office for letters.

4. Evidence that the partner had great influence over testator during the latter years of his life; that he frequently visited him during his last illness; that, as he was going over accounts with testator one time, both ceased talking when the landlady entered the room; that the attending physician importuned testator to make a will; and that he delayed for some time before doing so,—is insufficient to show undue influence exercised by the partner, or some one at his request.

5. A person who appreciates the varying moods of another, and who is able to judge of his acts with full knowledge of his peculiarities, would be an "intimate acquaintance," within the meaning of Code Civil Proc. § 1870, subd. 10, making competent "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason of the opinion being given."

6. The objection to allowing witnesses who were not intimate acquaintances of testator to state their opinion of his sanity cannot be avoided by varying the form of the question, and asking how he appeared mentally.

7. The trial court erred in permitting an hypothetical question to be put to a medical expert, in which it was assumed that when the testator said he had a sister, and if he knew where she lived he would visit her, he referred to a sister whom he knew to have been dead for 30 years, rather than to his living sister, where no mention of the dead sister was made in the evidence on which the question was based.

8. An instruction that if testator firmly believed that his relatives had mistreated him, and such belief was not based on fact, evidence, or probability, and was such as a rational man under like circumstances would not have had, he was in the eyes of the law suffering from an insane delusion, is an instruction as to the weight and value of evidence.

9. It was error to charge, in effect, that as a matter of law testator was of unsound mind, if he was mistaken in his belief that his relatives had mistreated him, and therefore made no provision for them in his will.

10. It was error to charge that, if the jury found that testator's feelings had undergone a radical change, they should inquire whether there was good reason for such change, as the only inquiry should have been whether such chage was caused by an insane delusion.

11. Plaintiff cannot be said to have suppressed evidence which he might have offered, where he objected to it when offered by defendant, and the court excluded it as inadmissible; and in such case plaintiff would be injured by instructions that "it is a presumption of law that evidence willfully supressed would be adverse if produced," and that "it is a presumption of law that higher evidence would be adverse, from lower evidence being produced."

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; ANSEL SMITH, Judge.

Proceeding by Abel F. Carpenter and others against C. K. Bailey and others to revoke the probate of the will of Charles W. Carpenter, deceased. Judgment for contestants. Proponents appeal. Reversed.

For decision on former appeal, see 79 Cal. 382, 21 Pac. Rep. 835.

Carter & Smith and *S. D. Woods*, for appellants. *L. W. Elliott*, *A. H. Carpenter*, and *Sawyer & Burnett*, for respondents.

TEMPLE, C. This is a contest in regard to a will, inaugurated after the will had been probated, and is the second appeal taken by proponents. 79 Cal. 382, 21 Pac. Rep. 835. It is from an order revoking the probate of the will and from an order refusing a new trial. There have been two trials, each before a jury, and twice the verdict has been to the effect that the decedent was of unsound mind, and that the will was the product of an insane delusion. On the last trial special issues were submitted, and the jury not only found that the decedent was of unsound mind and under an insane delusion which caused him to make the will in question, but also that the will was procured by the fraud and undue influence of C. K. Bailey.

The contestants are three brothers of the deceased, a sister, and the minor children of a deceased brother, all residents of the state of Vermont. The beneficiaries in the will, who by its terms receive the bulk of the estate, are the children of C. K. Bailey. No relative is given anything by the terms of the will. Carpenter was a native of Vermont, born about 1829. He left home when about 20 years of age, and is shown by the evidence to have been in California as early as 1853, where he had since continuously resided. He had never been back to visit his relatives, and none of them had ever visited him in this state. Some correspondence was kept up, however, as late as 1877. The record discloses that in 1856 Carpenter was mining at Mokelumne Hill, and that C. K. Bailey was his partner; also that in 1863 he was ranching with Bailey as his partner. This partnership continued until Carpenter's death, January 2, 1884. Carpenter never married, but Bailey was a married man, with a family of children, some of whom are the beneficiaries of the proposed will. I do not find their ages stated in the evidence, but it does appear that they grew up during the copartnership, and that the relation between them and Carpenter was intimate and friendly. There is abundant evidence of his attachment for them, and some expressions were those of his intention, long before his last sickness, to make some of them the objects of his testamentary bounty. Correspondence was put in evidence between Carpenter and some of his relatives, mostly, however, of very old date, and with his father and mother, both of whom died before him, which seem to show a relation quite intimate and friendly.

Omitting formal parts, and condensing, the charges of fraud in the complaint are: (1) Bailey falsely represented to Carpenter that his relatives were all dead; (2) that upon the death of either the property would be greatly depreciated unless kept together; (3) Bailey promised to make his will in favor of Carpenter, if Carpenter would make the will in question; and (4) Carpenter's sickness was not fatal, and Carpenter would probably survive Bailey, and his estate get the benefit of the proposed wills.

There is no evidence to support any of these specific charges, nor, so far as I can find, is there in the record any evidence tending to show fraud of any kind on the part of Bailey or any one else. In response to a challenge from appellants, respondents state several matters which they claim constitute fraud.

1. Bailey circulated a report that Carpenter had been back east, and had been badly treated by his relatives. It is, to say the least, doubtful if there is any evidence tending to show that Bailey circulated such a report. The proof is that a certain witness asked if Carpenter had got back. Bailey said, "Yes;" and also stated, according to the witness, that he complained of the treatment he had received, and that he would not give his relatives any portion of his property. Some of the contestants' witnesses also state that they heard Carpenter make similar assertions. The claim is that Bailey started the report, thus suggesting it to Carpenter's disordered fancy. There is no evidence that the alleged statement of Bailey was communicated to Carpenter, and the alleged assertions of Carpenter antedate this supposed interview with Bailey.

2. Bailey had a family which were supported by the partnership. There is no evidence of this, but, if true, it would not constitute fraud; for Carpenter must have known it, and consented to the arrangement; and if by it Carpenter were defrauded, that would have no tendency to induce him to make a will in favor of Bailey's children.

3. Bailey suppressed Carpenter's correspondence. The only evidence of this is that one of Carpenter's brothers said he had written to him, and that some letters had been addressed to Bailey, but since 1877 had received no reply, nor had any of his letters been returned to him from the dead-letter office. No letters since 1877 were found among Carpenter's effects, and Carpenter is reported to have said on sundry occasions that he had written and had got no replies. There is no proof that Bailey received any of the letters, or that he was in the habit of going to the post-office for letters exclusively. Sometimes Bailey went to town to transact their business, and sometimes Carpenter did. Whether either or who was in the habit of going for their mail does not appear. Such evidence, at the most, could do no more than raise a suspicion. Certainly it cannot be called proof. This is not one of the charges specifically averred.

The jury found that the will was procured to be made through fraud exercised by C. K. Bailey, or some one at his instance and request. This finding is wholly unsupported by the evidence. The allegations of undue influence may be regarded as sufficient. The special issue submitted to the jury was in two forms, in which, however, I see very little difference. Was the will procured to be made through undue influence exercised by C. K. Bailey, or any one at his instance and request, and was it procured to be made in the form in which it was made by such influence? The jury found both issues in the affirmative. Was there any evidence tending to support either of these findings? I think not, or, at least, not more than "slight evidence." Section 1835, Code Civil Proc. This court held in Goodwin v. Goodwin, 59 Cal. 560, following Jarman on Wills, that the influence must amount to force and coercion, destroying free agency, as to the very act, and that the exertion of undue influence upon the very act must be proved. There is no evidence tending to show that Bailey, or any member of his family, ever spoke to Carpenter about making a will, or about the disposition of his property, or in regard to his relatives, or that any one else, authorized or not, ever tried to influence Carpenter in regard to the disposition of his property, much less in favor of Bailey or his children. Carpenter died from consumption. His last illness was not at Bailey's house, and neither Bailey nor any member of his family attended him during his illness. On the contrary, Mrs. White, at whose house he was and by whom he was nursed, shows herself a warm partisan of the contestants. She was one of the witnesses to the will, and says she thought at the time that it ought to be "bursted" because he gave nothing to his relatives. Challenged to find some evidence to support these special issues, respondents specify: (1) Bailey's great influence over Carpenter during the latter years of his life; (2) his frequent visits to Carpenter during his last illness; (3) the importunities of Dr. Stockton, the attending physician, to make a will; (4) the reluctance of Carpenter to make a will, shown by the fact that he did not make it at once when it was suggested; and (5) when Bailey was there at one time going over the accounts with Carpenter they ceased talking when Mrs. White entered the room. It is evident at once that there is nothing here that comes up to the rule laid down in Goodwin v. Goodwin. Conceding that it was proven that Bailey had more influence in the management of the partnership business, that would not tend to prove that he influenced the testamentary disposition. It is not shown that Dr. Stockton made any effort to influence Carpenter as to the character of his will, or ever mentioned Bailey or his children, or Carpenter's relations; in fact, all that is shown is that Dr. Stockton made the very proper suggestion that he ought to make a will, and through him Carpenter sent for the attorney who drew it up. It does not appear that Bailey was acquainted with the attorney. The attorney testified that no one spoke to him about the contents of the will except Carpenter, who told him that he (Carpenter) had sent for him to prepare it. The other specifications do not require refutation. There was really no proof to sustain the verdict in this respect.

The special verdict in regard to mental unsoundness, though stated in different ways, is really only that the deceased at the time of making the will was of unsound mind, and therefore incompetent to make a will, and, if it may be classed under this head, that he failed to make provision for the contestants by reason of an insane delusion. It was admitted that there was some evidence tending to support each of these findings, and the verdict upon these issues is sufficient to sustain the order vacating the probate of the will. The question, therefore, is, does the record show such errors of law in the trial of these issues as will necessitate a new trial? The allegation of mental incompetency was supported, in a large degree, by the opinions of witnesses claimed to be intimate, as to his mental condition. Objection was made in the case of each witness on the ground that the witness was not shown to be an intimate acquaintance, within the meaning of subdivision 10, § 1870, Code Civil Proc., which makes competent "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." What is an "intimate acquaintance" has not been very clearly settled. The requirement that such an acquaintance shall be an intimate acquaintance does not seem to exist elsewhere. In State v. Pike, 49 N. H. 399, Mr. Justice Doe, in a dissenting opinion, which has since been followed in that state, considers the question as to whether persons not experts can be allowed to testify in regard to mental sanity. He seems to assert that in England the rule has always been to receive such testimony, and he shows by numerous citations that such, too, has been the rule in most of the states. The witnesses are only required to have had sufficient opportunity to observe the person whose sanity is in question. Different rulings have been made as to what shall be considered a sufficient showing of opportunity of observation to enable a witness to form an opinion which can be received as evidence; or, expressed in the language of our Code, what degree of intimacy there must be. In general, the idea seems to be that no rule can be prescribed on this subject, and therefore, as in regard to handwriting, if it appear that there has been some opportunity, and the witness has an opinion, he may state it. The value of it will depend upon circumstances. In some states such evidence is not received at all from nonexperts. Our Code provides that intimate acquaintances may give their opinions, and, of course, the converse will follow that no others can. The phrase "intimate acquaintance" cannot include all aquaintances. Worcester, under the word "acquaintance," has the following: "Acquaintance expresses less than familiarity, familiarity less than intimacy. Acquaintance springs from occasional intercourse; familiarity from daily intercourse; intimacy from unreserved intercourse. Acquaintance, having some knowledge; familiarity, from long habit; intimacy, by close connection." In People v. Levy, 71 Cal. 618, 12 Pac. Rep. 791, it is said: "It is often a difficult question to determine whether the witness is sufficiently acquainted with the party to entitle him to speak. That the witness should be familiar with the temperament and habits of mind of the person whose soundness is in question there is no doubt." Sir John Nicholl, in Kinleside v. Harrison, 2 Phillim. Ecc. 449, says: "Persons who see a testator only occasionally will form different opinions from those who have better opportunities of judging. We know that little appearances occurring in this way are extremely fallacious, yet we often find occasional observers depose with great confidence. It often happens that the most ignorant are the most confident. * * * This kind of opinion is still more various where the testator's capacity is fluctuating, where he is sometimes better and sometimes worse, and this is generally the case with old age or other infirmities." An intimate acquaintance would appreciate these varying moods and temperaments, and be able to judge the acts of a testator with full knowledge of his peculiarities. A mere acquaintance who only casually meets one who has some infirmities, and perhaps also some striking idiosyncrasies, although quite often, and yet without special interest in him, might think strangely of conduct which to one better acquainted would seem rational and natural. No two persons are exactly alike, and many, in fact nearly every one, has some weakness, which, perhaps like physical infirmities, they endeavor to favor or hide. Our thoughts run in different channels; our mental processes follow different methods. An intimate acquaintance, who is familiar with all these, can better judge of mental conditions.

Now, when we take into consideration the rule, as it exists in most jurisdictions where the common law prevails, we must conclude that our Code has attempted what has been said to be impracticable, to establish a rule as to what opportunities of observation shall entitle a witness to speak. A nonexpert may testify, but only if he has had these advantages which I have attempted briefly to specify, notwithstanding the statutory attempt. Since it requires the drawing of a definite line between things which are separated only by degrees of difference, the rule is and must remain more or less indefinite. A very large discretion must be conceded to the trial court. If the conclusion reached is one which can be reasonably entertained, consistently with the above idea of intimacy, this court cannot review the ruling.

Some of the witnesses who were allowed to give their opinions as to the sanity of the deceased evidently were not intimate acquaintances, within this rule, and the objection is not avoided by varying the form of the question,—asking the witness how he appeared mentally. If anything, this adds to the objection, for it fails to require the witness to give the reason for his belief. There are, of course, some things whch are not so much matter of opinion as descriptive of appearances. If one is a raving maniac, or dead drunk, or utterly unconscious, these are sometimes, at least, hardly matters which require judgment, but only ordinary powers of observation. As to such obvious appearances, I presume it was not intended that the rule should apply. Evidence of this character is received even in those jurisdictions which do not permit one not an expert to give an opinion as to mental sanity. This was not the character of the evidence received in this case. As I think the case must be retried for other reasons, it will not be necessary to review exceptions of this character in detail.

The objection to the hypothetical question put to the medical expert, in which it is assumed that when deceased said he had a sister, and if he knew where she lived he would visit her, he referred to a sister whom he knew to have been dead for nearly 30 years, rather than to his living sister, should have been sustained. It is based upon the testimony of Drais, who simply testified: "He said if he knew where his sister was he would go and see her and visit her." There had been no mention of the dead sister, and nothing said by the witness indicates that she was thought of. The other rulings as to the admission of evidence do not seem very material, and may not be repeated at the trial.

The instructions are quite voluminous, and many of them have reference to supposed proof in regard to fraud and undue influence, upon which subject there was no evidence. They are also many of them as to the weight and value of evidence. An instruction which, commencing with an obvious fact, prefaced with the remark, "If you find," says, "you must then inquire whether so or so, and why, and, if you find thus, you must or are at liberty to conclude thus," is an instruction as to the value of evidence. Take, for instance, the fourth instruction here given at the request of the respondents. In effect, it tells the jury that if Carpenter firmly and persistently believed that his relatives had mistreated him, and such belief was firm and immovable, and not based on fact, evidence, or probability, and was such as a rational man under like circumstances would not have had, he was, in the eyes of the law, suffering from an insane delusion. Now, it is quite common for people to be offended at imaginary injuries, to take offense when none was meant, to have a firm belief that they have been mistreated, not based on fact, and when the offending party would believe—for generally the baselessness of the belief could only be proven by him—that there was not even rational ground for such belief. But the chief objection to this is that, even if the logic be sound, it is not a conclusion of law, but of the judging mind, from the evidence. The court has no right to dictate or suggest the process of reasoning by which the evidence shall be judged. Perhaps instructions of this character, though vicious and violative of the constitutional inhibition, have been often passed without condemnation; but, if a party will ask the court to argue his case upon the evidence, he should be held responsible for the soundness of the logic. In this case the appellants are as guilty in this regard as the respondents.

The second instruction given at the instance of contestants, and to which objection is made, is as follows: "If Chas. W. Carpenter, deceased, at the time of the execution of the alleged will,—if he did execute it,—was under a delusion that his relatives in the east had maltreated or abused him, and that under the influence of such delusion he made no provision in his alleged will for them, then, in the eyes of the law, he was of unsound mind, no matter how well he might transact his other business, or converse, nor how sane he was on matters in general, and you must so find." Among other definitions of "delusion" given by Webster is: "(2) The state of being deluded or misled. (3) That whch is falsely or delusively believed or propagated; false belief; error." The jury then are told that if Carpenter was mistaken in his belief, and therefore made no provision for his relatives, as matter of law he was of unsound mind. This cannot be so. There is evidence tending to show that Carpenter had for years, before any one thought him insane, said that he had been ill used. Whether he was mistaken or not, the mere fact here recited did not, as matter of law, amount to an insane delusion. There was evidence tending to show that Carpenter thought he had been east from California, and had then been ill used, while admittedly he had not left California. This instruction does not necessarily allude to that alleged delusion. That is covered by other instructions.

The ninth instruction given at the instance of contestants was, I think, erroneous, not for the alleged blunder which respondents think could do no harm, but, among other reasons, because it tells the jury that, if they find that Carpenter's feelings had undergone a radical change, they should inquire whether there was good reason for the change. The only inquiry, as there was no evidence found, should have been whether it was caused by an insane delusion. Otherwise it did not concern this inquiry. People may hate their relatives for bad reasons, and yet not be deprived of testamentary power.

The court also instructed the jury, at the instance of the plaintiffs, that "it is a presumption of law that evidence willfully suppressed would be adverse if produced." I have examined the voluminous record in vain to find any evidence that there has been any suppression of evidence. Respondents in their brief here on this point say that Dr. Stockton's testimony would naturally be considered the best evidence upon Carpenter's condition of mind, and that there was evidence that proponents would not use it, that they suppressed it by objecting to it when offered by contestants. Of course, this, if it occurred, was not a suppression of evidence, and it would be strange that the court, having decided that the evidence was not admissible, should nevertheless instruct the jury that the party offering it should have the benefit of a presumption that it was favorable, and that the other party, because he made a legal and proper objection, should thereby lay his case under the suspicion that he had been guilty of suppressing testimony. The instruction would naturally have an injurious effect. The same thing is true of the instruction: "It is a presumption of law that higher evidence would be adverse, from inferior evidence being produced." This was also evidently aimed at the objections to the testimony of Dr. Stockton, although the record does not show that any such evidence was offered. I think the order should be reversed, and a new trial had.

We concur: BELCHER, C.; FITZGERALD, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders appealed from are reversed, and a new trial ordered.

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94 Cal. 546

SALFIELD *et al.* v. SUTTER COUNTY LAND IMPROVEMENT & RECLAMATION CO. (No. 13,813.)

(*Supreme Court of California.* May 23, 1892.)

CANCELLATION OF CONTRACT—WANT OF AUTHORITY IN AGENT—RATIFICATION—PLEADING.

In an action against a corporation for the cancellation of a contract to purchase land from it on the ground that the same was made through one who represented himself to be its agent, but who in fact had no such authority, the complaint is good on demurrer, although it alleges that a portion of the price has been paid, and that the corporation refuses to return it, and has instituted an action to recover the balance, as the contract was not thereby ratified, since Civil Code, § 2309, provides that the authority of an agent to sell land shall be in writing, and section 2310 that, where the adoption of a particular mode is necessary to confer authority, ratification can only be made in the same manner; and, even if the contract could be ratified by part performance, it is immaterial that the contract, set out *in hæc verba*, authorizes plaintiffs to take immediate possession, and that it is not alleged that they have not done so, since it is a matter of defense that they have taken possession.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by David Salfield and Herman Kohlberg against the Sutter County Land Improvement & Reclamation Company.

Otto Tum Suden, for appellants. *Gordon & Young*, for respondent.

TEMPLE, C. Plaintiffs appeal from judgment entered on demurrer to their complaint. The action is to have declared void a certain writing purporting to be an agreement for the sale of land. The complaint avers that Gaman & Lyon pretended that they had authority from the corporation defendant to contract for the sale of its lands. That, relying upon such representations, the plaintiffs did on the 3d day of April, 1888, agree with said Gaman & Lyon, as agents, to purchase certain lots owned by defendant, and entered into a contract in writing to that effect, which purported to be executed by the defendant, through the said pretended agents, and which was signed as follows: "In witness whereof the said party of the first part hath by a resolution of its board of directors, duly passed, authorized its agents, Gaman and Lyon, of 330 Kearny street, San Francisco, and Sutter City, California, to affix its name hereto, and they and the said parties of the second part have hereunto set their hands and seals the day and year first above written. SUTTER CO. LAND IMPROVEMENT AND RECLAMATION COMPANY. By GAMAN & LYON, Agents. (G. & L.) DAVID SALFIELD. (D. S.) HERMAN KOHLBERG. (H. K.)" Nevertheless the corporation never authorized Gaman & Lyon, either personally or as copartners, to execute the agreement or any agreement for the sale of said lands; but plaintiffs did not discover such want of authority until June 7, 1889, and had in the mean time paid to the defendant $470 on account of principal and interest due on the contract. June 7, 1889, after discovering that Gaman & Lyon had no authority in the premises, plaintiffs demanded from the corporation the return of the said $470, which the defendant refused to do, but, on the contrary, claims that the contract is valid and binding on the plaintiffs, and has commenced suit against the plaintiffs in the justice court to recover $112.13 for interest which has accrued on the contract. The contract, which is set out in the complaint *in hæc verba*, authorized the plaintiffs to take immediate possession, and provided, in case one or more lots were sold by the vendees, and the *pro rata* portion of the purchase price were paid to the corporation, it would execute deeds for such lots to the purchasers. There is no averment as to whether possession was taken, or lots were sold, and, of course, no offer to redeliver or place the alleged vendor *in statu quo*. The demurrer was simply that the complaint does not state facts sufficient to constitute a cause of action.

The contract does not purport to have attached to it the corporate seal, and it does not appear that Gaman & Lyon, or either of them, held such official position in the corporation as would raise a presumption that they were authorized to contract for the corporation in regard to anything. The complaint plainly avers that they had no authority to sell the land or to execute the contract. Under such circumstances, the laboring oar must be with the respondent. Its real claim is that the contract has been ratified by the corporation, according to the allegations of the complaint: *First*, by the receipt on the part of the corporation of $470, paid under the terms of the agreement, which plaintiffs seek to have declared void; and, *second*, by commencing suit to recover money due by the terms of the agreement. This being a contract for the sale of land, it was necessary that the authority of the agent should be in writing. Section 2309, Civil Code. The defendant, being a corporation, could only act in this matter through its board of directors, when duly assembled, by resolution duly passed and recorded. Sections 305, 308, 377, Civil Code; Gashwiler v. Willis, 33 Cal. 10; Harding v. Vandewater, 40 Cal. 78; Association v. Bustamente, 52 Cal. 192; Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. Rep. 373. Section 2310 of the Civil Code provides that, when the adoption of a particular form or mode is necessary to confer authority, ratification can only be made in the same manner, "or, where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof." The supposed acts of ratification do not conform to the requirements of the Code. It is said, however, that the plaintiffs show that they have partly performed the contract, by making payment of a part of the purchase money, and, therefore, since they may insist upon it, the respondent can. But in Forrester v. Flores, 64 Cal. 24,[1] this court approved the following statement: "By an unbroken current of authorities running through many years it is settled too firmly for question that payment, even to the whole amount of the purchase money, is not to be deemed part performance so as to justify a court of equity in enforcing the contract." It is also contended that the contract authorizes the plaintiffs to take immediate possession, and it is not shown that they have not done so; therefore there may be other acts in part performance. As the assumed contract was no contract, plaintiffs were not authorized to take possession; but, if the contract could be validated by part performance, it is incumbent upon the party claiming the benefit of such acts to aver them. Plaintiffs were not required to negative a possible defense. The question is not, however, as to whether an oral contract for the sale of land can be enforced, but whether what purports to be a written contract of a corporation is so in fact. No doubt the corporation might have ratified it before the plaintiffs signified their intention not to be bound thereby, but, so far as the averments of the complaint show, they did not do so. As the corporation could have elected not to be bound, the same privilege must be accorded the plaintiffs. The judgment should be reversed, and the court below directed to overrule the demurrer.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to overrule the demurrer.

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94 Cal. 550

PEOPLE v. MITCHELL. (No. 20,900.)

(*Supreme Court of California.* May 23, 1892.)

HOMICIDE—EVIDENCE—HEARSAY—EXPERT—IMPEACHMENT OF WITNESS.

1. A train register is not competent, on a criminal prosecution, to prove the time of the arrival and departure of a train at a certain station on the night of the crime, where the conductor who made the register is not called as a witness, and the agents of the railroad, who are called, have no actual knowledge of the time, but are only able to testify that the rules of the company required the conductor to register.

2. On a murder trial, where a witness for the defense has testified that a certain person, who had been tried for the same offense and acquitted, had admitted the shooting of the deceased, and that he got the pistol from a third person, it is not competent for the latter to testify in rebuttal that the pistol was not procured from him, as this does not tend to show whether the one party or the other did the killing, or to contradict the witness in testifying merely as to what was told him. DE HAVEN, J., dissenting.

3. Expert testimony is not admissible, on a murder trial, as to whether a certain cartridge had marks upon it which would indicate that it had once been in the chamber of a pistol, or whether a ball taken from a certain pistol was similar to one which had been fired at the deceased, as such matters are matters of common knowledge.

4. Statements made by a defendant, while testifying as a witness on the trial of one charged with the same offense as that for which he is being tried, are admissible against him, where it does not appear that he objected to being sworn or to testifying on that occasion.

5. A witness, who fails merely to testify as expected, cannot be impeached by the party calling him by proving that he had elsewhere made the desired statements, but this can only be done when he has given damaging testimony.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; J. F. ELLISON, Judge.

Conviction of Rube Mitchell for murder. Defendant appeals. Reversed.

W. P. Johnson and *G. H. Chase*, for appellant. *Atty. Gen. Hart* and *A. M. McCoy*, Dist. Atty., for the People.

TEMPLE, C. The defendant, having been convicted of murder in the second degree, appeals from the judgment and a refusal of a new trial. It appears that Oscar Crandall was fatally shot, about midnight, April 23, 1891, near Rathja's saloon, in the town of Red Bluff. Crandall, who had been in the saloon, went out upon the back porch, where he was engaged for a time imitating Chinese talk. Two or three minutes after he went out, Rathja heard the report of a pistol, and went upon the back porch, but saw no one. The back yard was surrounded by a high fence. The saloon was at the corner of Main and Hickory streets, facing on Main. It was bright moonlight, and, except as obstructed by the fence, Rathja could see both streets. Two witnesses claim to have been eyewitnesses of the affray. Peterson, who testified for the prosecution, was 224 feet away westerly on Hickory street. He was positive that he recognized defendant's voice, but he could distinguish no one by sight. He saw the flash of the pistol, and the person who fired ran off south along the alley back of the yard which incloses Rathja's back porch. This is all the direct testimony against defendant, but there was considerable circumstantial evidence. Defendant claimed and testified, as did several other witnesses in his behalf, that he was at home, about a half block from Rathja's saloon, administering what he calls a "shot" of morphine to one Boyden, when he heard the report, and was told that some one was shot, and then ran across the street with Boyden, found the wounded man, and he and Boyden took up the body, and carried it to the front of the saloon. While they were so carrying the wounded man the people gathered. Hughes and Boyden both corroborate defendant's story. Hughes says he was across the street from Rathja's back yard at the corner of Hickory and High streets. He heard the altercation, saw the flash of the pistol, and the assassin run off, he thought down Main street, and, being but a few steps from defendant's house, informed a woman there that some one was shot; that Mitchell and Boyden ran past him to the saloon, and the body was carried as defendant stated. To make out the case for the prosecution by the circumstantial evidence, it became important to fix the precise time of the homicide. It was contended on the part of the people that defendant did not go to his house, as he claims he did, to administer the hypodermic injection of morpnine to Boyden; that he came up from the depot on the Tremont hotel bus after the arrival of the train, which was due at 11:50 P. M.; that the homicide was committed before the departure of the train, the schedule time of which was 12:05. They had experiments made as to the time it would require to walk where he said he walked after he left the bus, and claimed that he did not have time to go home and do what he said he did before the report of the pistol. There was much evidence directed to this point on both sides. Among other things, the defense introduced evidence showing that the train did not leave on that night until after 12:10. The prosecution, against the objections of the defendant, were permitted to show by the local agent of the railroad and the night operator that by the rules and regulations of the company the trains must not arrive before their schedule time, and that the conductor must register the exact time of arrival and departure. That such register was in fact kept at this station. The register was then introduced, defendant objecting, from which it appears that the train arrived and left on the night in question on schedule time. Neither of the witnesses had any actual knowledge of the times, nor was the conductor who made the record called as a witness. The evidence was clearly incompetent, and was material in the highest degree. If we can presume, as suggested, that the conductor was absent or dead, that fact would make no difference. It was hearsay evidence, and should have been excluded.

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[1] 28 Pac. Rep. 107.

It seems that one H. K. Long had been tried for this same offense, and had been acquitted. Nevertheless the defense attempted to prove that Long committed the homicide. C. A. Boyden, a witness for the defense, testified, without objection, that Long told him that he had killed Crandall, and that he got the gun from Morin. In rebuttal, the prosecution asked Morin if he loaned Long a pistol, and he was allowed, against the objection of the defendant, to answer that he did not. This was not competent. It did not tend to show that Long did not kill Crandall, or that Mitchell did, and it did not tend to contradict the witness Boyden, who did not say that Long procured a pistol from Morin. He only testified as to what Long had said, and this evidence did not tend to disprove that fact. See People v. Hurtado, 63 Cal. 289.

Vance, a carpenter and gunsmith, was called as an expert, and allowed, against objection, to state his opinion that a certain cartridge had never been in a pistol, because he saw no mark on it. He was then allowed to compare a ball shown him, and assumed to have been from a pistol claimed by the defense to have been used by Long, with the ball taken from the head of deceased, and to state that they were not similar. The balls were there in court and shown to the jury. This was not a proper subject for expert testimony. It did not require special skill to determine whether a cartridge had marks upon it which would indicate that it had been once in the chamber of a pistol, nor that it was covered with verdigris, nor that the end of one bullet was feather-edged, and another not so, or was flat or concave at the end. These are all matters of common knowledge, and the jury was as competent to pass upon them as the witness.

The prosecution, in rebuttal, put in evidence statements made by the defendant while testifying as a witness in the case of People v. Long. Though charged with the same offense for which Long was tried, it is not by the same information. It does not appear that defendant objected to being sworn on that trial, and it seems to be conceded that he did not object to answering the particular questions, the answers to which were given in evidence against him. It is contended simply that the statements are not voluntary, because the defendant was duly sworn to answer questions, and was compelled to answer or to admit that his answers might criminate himself. Bish. Crim. Proc. §§ 1255–1257, cites numerous authorities, and concludes that the testimony voluntarily given as a witness are admissions or confessions competent against him in a criminal cause to which they are pertinent. Unless he objected to answering the particular matter complained of, and was forced nevertheless to testify, it is considered voluntary. Some few cases there are which seem to sustain the appellant, but nearly all the authorities are the other way. See, also, Whart. Crim. Law, §§ 664, 669, 1120. We cannot see that our Code, which allows the defendant to testify or not as he may choose, and to limit his testimony to such matters as he pleases, can make any difference.

The prosecution called a witness, Hopper, to impeach and contradict defendant's witness C. D. Boyden, whose brother was accused jointly with defendant. Boyden had said that he did not attempt to get money from Hopper for Long to get away with, in order to save his brother. Hopper testified that Boyden tried to get money for Long to get away with, but did not say that it was to save his brother. The district attorney was then allowed, defendant objecting, to impeach him by asking if he had not testified differently on the Long trial, and proceeded to read for that purpose what purported to be his evidence given at the Long trial. This was error. A witness, whichever party calls him, cannot be impeached unless he has given testimony against the impeaching party. This witness had not testified against the prosecution. He simply failed to testify to a fact which the district attorney thought he could prove by him. The defense had not proven or attempted to prove any statements made by Boyden to Hopper. Boyden's testimony on the subject was brought out on cross-examination. The impeaching statements were evidently desired as evidence. If such testimony were admissible, it would be easy to manufacture evidence of that kind. If a witness merely fails to testify as expected, that does not authorize the party calling him to prove that the witness had elsewhere made the desired statements. It is only when he has given damaging testimony that he can be impeached. People v. Jacobs, 49 Cal. 384. Many other points are made by appellant, some of which are at least debatable. They are mostly in regard to attempts at impeachment, or comparatively unimportant matters, decision of which would not be of importance on a retrial of the cause. We think the judgment and order should be reversed, and a retrial had.

We concur: Foote, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

De Haven, J. I concur in the judgment, and in the foregoing opinion of Commissioner Temple, except that part which holds that the court erred in overruling defendant's objection to certain evidence given by the witness Morin. The defendant was permitted to introduce in evidence, without objection, the confession of Long to the effect that he (Long) was the person who committed the murder for which defendant was being tried, and that he obtained from Morin the pistol with which the killing was done. This admission or confession of Long was not competent evidence in favor of defendant. It was only hearsay. Smith v. State, 9 Ala. 994; Sharp v. State, 6 Tex. App. 650; Rhea v. State, 10 Yerg. 258; Daniel v. State, 65 Ga. 199; Kelly v. State, 82 Ga. 444, 9 S. E. Rep. 171. But the confession being in evidence, and the defendant insisting upon its truth, there was no error of which defendant can complain in admitting the testimony of Morin to the effect that he did not loan or give Long a pistol, as it tended in some slight degree to disprove the truth of the alleged confession.

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94 Cal. 566

In re Wood's Estate. (No. 18,051.)

(*Supreme Court of California.* May 24, 1892.)

Order Appointing Administrator—Stay on Appeal—Exigencies of Estate.

On appeal from an order appointing an administrator the undertaking provided for by Code Civil Proc. § 941, stays all further proceedings upon the "order appealed from or the matters embraced therein," such appeal not being within the exceptions mentioned in sections 942–945, 949, where appellants are required to perform the directions of the order appealed from; and hence the administrator will be restrained from performing any acts as such, loss to the estate in consequence thereof being avoidable by the appointment of a special administrator under section 1411. Pennie v. Superior Court, 26 Pac. Rep. 617, 89 Cal. 31, followed.

Department 2. Appeal from superior court, Sacramento county; W. C. Van Fleet, Judge.

In the matter of the appointment of administrator of the estate of James A. Wood, deceased. From an order issuing letters of administration to George Bronner, C. M. West appeals, and moves for a stay of proceedings pending appeal. Motion granted.

Holl & Dunn, for appellant. *Johnson, Johnson & Johnson*, for respondent.

McFarland, J. There was a contest in the court below between C. M. West and George Bronner, as public administrator, for letters of administration of this estate, which was decided in favor of the latter. West appealed from the order appointing Bronner administrator, giving an undertaking on appeal in the sum of $300, as provided for in section 941 of the Code of Civil Procedure; but Bronner is proceeding to administer the estate, and the matter now before us is an application by West for an order staying all proceedings until the determination of the appeal. The undertaking provided for by section 941 "stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein," except in those cases specified in sections 942–945, and a few special matters mentioned in section 949, not material here. See sections 946–949. But appellant here is not within the said sections from 942 to 945, which "apply to appellants who are required to perform the directions of the judgment or order appealed from." Estate of Schedel, 69 Cal.

241, 10 Pac. Rep. 334. The case at bar cannot be distinguished in principle from Pennie v. Superior Court, 89 Cal. 31, 26 Pac. Rep. 617, in which we held that on an appeal by one claiming to be the heir from an order directing the administrator to pay family allowance to another person, a $300 undertaking stayed all proceedings on the order. And it is quite clear that every act which the respondent might undertake to do as administrator of this estate would be "upon the order appealed from and upon the matters embraced therein." If, as suggested by respondent, there be any danger of loss to the estate from a stay of proceedings, such danger can be avoided by the appointment of a special administrator under section 1411. The motion for a stay of proceedings is granted, and the respondent, Bronner, is restrained from doing any act as administrator of said estate during the pendency of the appeal.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

94 Cal. 562

In re BARRY. (No. 14,865.)

(*Supreme Court of California.* May 24, 1892.)

CONTEMPT—JUDGMENT—ENTRY OF SECOND JUDGMENT—ISSUE OF EXECUTION.

A judgment that defendant be imprisoned for contempt five days, and pay a fine of $500, with the alternative of imprisonment at $2 per day, is final; and the court cannot, at the expiration of the five days, enter another judgment for the fine, and issue execution thereon.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

James H. Barry was convicted of contempt, and sentenced to imprisonment and fine, with alternative of further imprisonment. From an order refusing to quash an execution issued on a second judgment, defendant appeals. Reversed.

Reddy, Campbell & Metson, for appellant. *William S. Barnes*, Dist. Atty., for respondent.

PATERSON, J. The appellant was found guilty of contempt, and sentenced to serve a term of five days in the county jail, and at the end of said term to pay a fine of $500, with the usual alternative of imprisonment at the rate of $2 per day. Thereafter, it appearing to the court that the term of imprisonment had expired, and that no part of the fine had been paid, a judgment was entered against Barry for $500 and costs, and directing that execution issue therefor. A motion was made in the court below to quash the writ; the motion was denied, and this is an appeal from the order. The second judgment referred to was annulled here in an original proceeding by *certiorari*. Barry v. Superior Court, 91 Cal. 486, 27 Pac. Rep. 763. In the opinion therein filed we said: "The first judgment was final, and the only authority of the court thereafter, in the matter concluded thereby, was the power to enforce the judgment according to its terms, so far as it was capable of enforcement." The only portion of the judgment capable of enforcement, according to its terms, was the term of imprisonment. Whether an execution could be issued on the first judgment we are not called upon to determine. It is clear that the execution issued upon the second judgment fell with the judgment itself. Order reversed.

We concur: HARRISON, J.; GAROUTTE, J.

94 Cal. 564

NORTON v. WALSH *et al.* (No. 12,824.)

(*Supreme Court of California.* May 24, 1892.)

APPEAL—DISMISSAL—PARTIES IN INTEREST.

In an action to quiet title by J., in her own right, against herself as administratrix of F., and against his heirs, J. having died, N., as her successor in interest, was substituted as plaintiff, and then, having purchased the interest of the heirs, he was substituted as defendant in their place, and a judgment was rendered against a substituted administratrix. *Held*, that one claiming a transfer from one of the heirs of some rents and profits accruing from the land could not be a proper party to the action, and therefore his appeal, and that of the heirs who had no interest, should be dismissed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; OLIVER P. EVANS, Judge.

Action by John Norton against Alice Walsh and others. Judgment for plaintiff, and certain of defendants appeal. Appeal dismissed.

R. Percy Wright and *Theodore Bradley*, for appellants. *E. F. Preston*, for respondent.

FOOTE, C. This action was instituted originally by Jane Fitzpatrick, in her own right, against herself as administratrix of the estate of her husband, John Fitzpatrick, deceased, and his heirs at law, two daughters by a former marriage, and their husbands. To say the least, this effort to contend on one side for individual rights, and upon the other for those of a trustee, by the same person, inconsistent and opposed to each other as they are, is irregular, and not to be upheld. The action is to quiet the title of the plaintiff to a certain piece of land, which she claimed as her own separate property, and which, on the other side, was claimed to be community property. The court below made findings which sustained the contention of the plaintiff. Before the judgment was entered, Jane Fitzpatrick died, and the present plaintiff, as her successor in interest, was substituted as plaintiff. The next thing done, upon motion, was an order substituting this same Norton as defendant, in the place of the two daughters of John Fitzpatrick and their husbands; he, Norton, as it appears from a bill of exceptions filed herein, having bought out the heirs of John Fitzpatrick in this land, and taken their conveyances. Thus it would seem that their interest became his, and he had no cause of action against them upon which he could demand judgment. Properly they were dropped from the case, and had no further concern with it, so far as affected Norton. But it also appears in this bill of exceptions that one R. Percy Wright, the attorney for one of the heirs at law, claimed to have a transfer of some rents and profits accruing from the land in controversy from Kate Kelly, one of the defendants. It also appears that whatever claim Wright had was entirely unknown to Norton, when he took a conveyance to the land from the heirs at law, and he was therefore an innocent purchaser for value. The evidence is very meager as to whether Wright had any claim at all, but, even if he had as to the rents and profits, it is not perceived how he could become a proper party to this action. The judgment which was afterwards rendered in the case is not against any of the appellants here; it is against Kate Kelly Hiland, substituted administratrix for Jane Fitzpatrick, the former administratrix of John Fitzpatrick, and the estate of John Fitzpatrick, and those claiming under Kate Kelly Hiland in her representative capacity and "through the said estate." The appeal from the judgment is taken by R. Percy Wright, (who, as we have seen, is not a proper party to the cause,) and by the heirs at law and their husbands, none of whom are aggrieved or affected by the judgment. The other appeal is from an order denying a new trial, and is taken by the heirs at law and their husbands above mentioned. They have no interest in the controversy, and R. Percy Wright has no right to appeal through them. The only party against whom the judgment is given and made—the administratrix of the estate of John Fitzpatrick—prosecutes no appeal. It follows that these appeals have no place here, and should be dismissed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeals are dismissed.

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94 Cal. 568

McCOY *v.* SOUTHERN PAC. CO. (No. 14,091.)

(*Supreme Court of California.* May 24, 1892.)

RAILROAD COMPANIES — STOCK KILLING CASES — MAINTAINING FENCES.

1. One who has a license from the lessee of land to pasture his sheep thereon cannot recover of a railroad company for sheep which pass onto the track, through an opening made by the lessee for his accommodation in the fence, which had been erected by the company under the provision of Civil Code, § 485, requiring railroad companies to fence their track.

2. If the lessee made the opening in the fence with the consent of the company, and on its agreement to put in a gate, it would be liable for loss occurring after it had failed to do so within a reasonable time.

In bank. Appeal from superior court, Tehama county; C. P. BRAYNARD, Judge.

Action by one McCoy against the Southern Pacific Company for sheep killed on defendant's track. Judgment for plaintiff. Defendant appeals. Reversed.

Chipman & Garter, (*S. C. Denson*, of counsel,) for appellant. *John F. Ellison* and *A. M. McCoy*, for respondent.

DE HAVEN, J. The complaint alleges that plaintiff's sheep were lawfully grazing in a certain field through which the road of defendant runs, and that, by reason of the failure of defendant to construct and maintain a good and sufficient fence along the line of its road at that point, the sheep strayed upon defendant's road, and were killed by the passing cars. This action is to recover damages for the loss of such sheep. The plaintiff recovered judgment in the superior court, and the defendant appeals. The evidence upon the trial tended to show that the land from which the sheep strayed was at the time in the possession of Boyd Bros., as lessees for a term of years, and that plaintiff's sheep were being pastured there, under an agreement with the Boyd Bros. by which the plaintiff bought the stubble and feed standing in the field, with the privilege of herding or keeping his sheep on the stubble until it should be "fed off" by the sheep. In substance, the contract was for pasturage, the plaintiff undertaking to herd and look out for his sheep while they were on the land. The defendant constructed a sufficient fence along that portion of its road passing through the field in question, but prior to the time plaintiff obtained the right to thus pasture his sheep in the field, the Boyd Bros., for their own convenience in driving in and out of the field, made and left an opening in the fence by removing a panel therefrom, and the fence was in this condition when plaintiff's sheep were put in the field, and the Boyd Bros. continued thereafter to drive through this open gap with their teams as they had done before, and it was through the breach thus made in the fence by the Boyds that plaintiff's sheep strayed upon the track of defendant. Upon the trial it was claimed by plaintiff that the Boyd Bros. took the panel out with the consent of defendant, and that defendant agreed to replace the same with a gate, while, upon the other hand, the defendant insists that it gave no such consent, and made no such agreement.

1. Section 485 of the Civil Code provides: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owners of the animal so killed or maimed." The defendant complied with this statutory duty, so far as concerns the Boyd Bros., when it constructed the fence along the line of the road passing through the land occupied by them, and if, thereafter, they removed a panel from such fence for their own convenience, they would not be heard to complain if their own stock had strayed through the opening thus made onto the track of defendant and been injured. In such a case the loss would be attributed to their own fault, and the defendant would be exonerated from liability therefor by the very terms of the statute just quoted. We do not think that plaintiff occupies any more favorable position. The right which he

had to pasture his sheep in the field from which they strayed was nothing more than a license, and its license did not confer upon him any rights as against the defendant which his licensors themselves did not possess. The question whether a subsequent grantee or lessee of this land could recover from defendant, if by reason of its failure to repair this fence the stock of such grantee or lessee should be injured by the cars of defendant, does not arise in this case. The Boyd Bros. were at all times in the possession, occupation, and rightful control of the field from which plaintiff's sheep escaped, as lessees, and as such continued to use the opening which they had made in this fence, and they could not, by giving plaintiff permission to turn his sheep into such field, impose upon defendant any new duty with respect to this fence, or expose it to liability for damages, such as here claimed, by one who is in privity with them. As the plaintiff here was there with his sheep only by their license, he must be deemed to stand in the place of the Boyds, and possessed only of such rights as they could have enforced against defendant if they, instead of plaintiff, had owned the sheep killed on defendant's track.

2. The court did not err in refusing the instructions requested by defendant. The sixth instruction, as requested, was indefinite, and, if given, would have laid down no rule for the jury to observe, and the third does not correctly state the law which would be applicable to the case if it were shown that the Boyd Bros. removed the panel with the consent of the defendant, and upon its agreement to replace it with a gate. In such a case it would be the duty of the defendant to put up the gate within a reasonable time, and if it failed do do so it would be liable for any loss of stock occasioned by such neglect, precisely as if it had left the opening without the consent of the adjoining owner when it constructed the fence. As the case is to be remanded for a new trial, it is proper to say that, in order to prove that defendant agreed to put in a gate, it must be shown that the person assuming to act for it had authority, either actual or ostensible, to act for it in the matter, or that his agreement was subsequently ratified by defendant. The third instruction given by the court, at the request of plaintiff, when read, as it must be, with reference to the evidence in the case, is in conflict with the law as declared in this opinion, and in giving it the court committed error. The other points made do not require special mention.

Judgment and order reversed.

We concur: PATERSON, J.; SHARPSTEIN, J.

MCFARLAND, J. I concur in the judgment of reversal and in the opinion of DE HAVEN, J., with this exception: I think that the sixth instruction asked by defendant should have been given. It told the jury, substantially, that plaintiff had no greater rights than the Boyds would have had if their sheep had escaped through the opening in the fence and been killed. Of course, the jury should have been further instructed what, in the event supposed, the Boyds' rights would have been; but the instruction, as far as it went, was, in my opinion, correct. Whether or not the statute was intended for the protection of the public generally is a question which does not arise in this case. If a passenger were suing for damages from an accident caused by animals on the track, then such question would be presented. "Through or along the property of the owner thereof" certainly does not include a person who has a mere temporary license to have his stock eat stubble when his licensor maintains the opening. If so, then it would include the horses of a guest turned out for a day or two to graze. The Boyds were the owners of the property within the meaning of the statute. If the doctrine of the judgment of the lower court were to prevail, then a railroad company could never with safety give to any adjoining landowner the accommodation that was given to the Boyds.

BEATTY, C. J. I concur in the judgment and in the opinion of DE HAVEN, J. The superior court did not err in refusing to give the instructions asked by the defendant in the form in which they were put, for they did not state clearly or accurately the proposition of law upon which the defense rests, but certainly it was error to give the third instruction requested by plaintiff unqualified by any statement of the proposition that the plaintiff, if a mere licensee of Boyd Bros., could not recover for his loss if they made and maintained the opening in the fence for their own convenience. The evidence in the case very clearly shows that the defendant had fully performed its duty by the erection of a sufficient fence, and that Boyd Bros. subsequently removed a panel for their own convenience. To counteract the effect of this proof, an attempt was made to show that defendant had agreed to close the gap by putting in a gate. But, in my opinion, there was no evidence to justify a finding that the defendant ever made any such agreement. There was evidence that Daly, a section boss, promised to put in a gate, but no evidence that he had any authority to make such agreement in behalf of the defendant. No actual authority was shown, nor any circumstance from which an actual authority can be inferred, and his ostensible authority to bind the defendant did not extend to a matter as to which the obligation rested exclusively upon Boyd Bros., and in no degree upon the defendant.

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94 Cal. 558

YANCY v. MORTON. (No. 14,604.)

(*Supreme Court of California.* May 24, 1892.)

MECHANICS' LIENS — FORECLOSURE — PLEADING — BUILDING CONTRACTS — VALIDITY — PAYMENTS — DESCRIPTION OF LOT — RECORDING — ESTOPPEL.

1. Under Code Civil Proc. §§ 1183, 1184, providing that, when a contract for the construction of a building is void for any of the reasons therein enumerated, materials shall be deemed to have been furnished at the special request of the owner, and the building shall be subject to a lien for the

same, a material man suing to foreclose a lien need not plead the construction contract and its invalidity, but may plead that the goods were sold at the special request of the owner of the building, the contract and its invalidity being matters of evidence.

2. Where a partnership furnishes the material, the owner of the building is estopped from defending on the ground that the partnership is illegal.

3. Under section 1184, requiring *inter alia* that at least 25 per cent. of the contract price for the construction of a building shall be made payable at least 35 days after completion of contract, and declaring that the contract shall be void if it does not conform substantially with the provisions of the section, it does not affect the validity of the contract that, after providing for such retention, payment before the expiration of the 35 days is allowed if the contractor shows receipts and give bonds that all bills be paid, and that no claims exist against the premises.

4. There being no requirement that the contract contain a description of the land, omission to do so does not invalidate it.

5. Under the provision of section 1183, that the contract be filed in the recorder's office, omission to file the drawings and specifications, which the contract recites are thereunto annexed, and which it provides are intended to cooperate with and supplement the contract, will render the contract void.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by T. G. Yancy against Peter Morton to foreclose a mechanic's lien. Judgment for plaintiff. Defendant appeals. Affirmed.

R. B. Terry and *G. B. Graham*, for appellant. *Church & Cory*, for respondent.

Garoutte, J. Action by material men to foreclose a lien for material furnished in the erection of a building. This appeal is by defendant from the judgment and order denying his motion for a new trial. Poore and Anton, as original contractors, agreed to erect a building for defendant for the sum of $2,700. Prior to the completion of the contract they abandoned the work, and plaintiff now brings this action against the owner of the building for the value of the material furnished, claiming that the contract was absolutely void, because (1) 25 per cent. of the contract price was not to be retained 35 days after the completion of the building; (2) because the contract contained no description of the property; (3) because the drawings were made a part of the contract, and were not attached to and filed with it in the recorder's office. Appellant also complains that the contractors were not joined as codefendants. While they were proper parties to the action, it does not appear that they were necessary parties, and, if the defendant desired to have them joined as codefendants, he should have made application to the court for such an order. In Lumber Co. v. Garrettson, 87 Cal. 596, 25 Pac. Rep. 747, this court declared: "Lastly, it is said that there is no judgment against the parties personally liable, and that such judgment is necessary to support the lien. We know of no law or decision supporting this position." See, also, Green v. Clifford, (Cal.) 29 Pac. Rep. 331. The complaint in this case is upon a contract for the value of goods sold at the special instance and request of defendant. Sections 1183, 1184, of the Code of Civil Procedure provide that, when the contract between the parties for any of the reasons therein enumerated is void, materials shall be deemed to have been furnished at the special instance and request of the owner, and the building is subject to a lien for the same. In support of his complaint plaintiff introduced the contract in evidence, for the purpose of showing that it was void. The court found such to be the fact, and the evidence and findings were justified under the complaint. No substantial reason is suggested to us why the necessity existed for plaintiff to set out the contract and then allege its invalidity. Such matters were matters of evidence, and the completeness of the pleading did not demand it.

It is alleged that the San Joaquin Lumber Company, the assignor of the plaintiff, is a copartnership formed from the Hanford Lumber Company and the Puget Sound Lumber Company, (corporations.) The legality of the formation of the partnership is attacked by defendant, but under the principles of Irrigation Co. v. Warner, 72 Cal. 383, 14 Pac. Rep. 37, and cases there cited, the defendant is estopped from making such defense. It is there decided that "when one has contracted with an alleged corporation, and is sued for failure to perform his contract, he cannot be heard to say that the corporation had no existence, and for that reason no contract was made." Was the contract in this case between the owner and the contractors void? It provided that 35 days after the completion of the building the balance (25 per cent.) of the contract price should be paid, "provided that payment may be made at any time between the date of completion and the said thirty five days in case said contractors show receipts and give special bonds that all bills will be paid, and that no liens or other claims exist against said premises; such payment to be optional with the owner." It would seem that the foregoing provision of the contract is in substantial conformity with the requirement of section 1184 of the Code of Civil Procedure, and the section in terms only requires a substantial compliance in this regard. The proviso found in this contract was undoubtedly inserted for the benefit of the contractor; yet, at the same time, it was in no way detrimental to the interests of any prospective lien claimant, for the section expressly so provides. See Lumber Co. v. Wooldredge, 90 Cal. 579, 27 Pac. Rep. 431. Neither was the contract void by reason of its not containing a description of the property upon which the building was to be erected. The statute does not require it. Lumber Co. v. Wooldredge, supra.

We think the remaining objection to the validity of the contract well taken. It is mandatory that the contract should be filed in the recorder's office. This contract provides for the erection of a building "conformable to the drawings and specifications made by James Seadler, architect, and signed by the parties, and hereunto annexed, within the time aforesaid." And again it is provided therein "the specfications and drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if they were mentioned in the specifications set forth in the drawing to be the true meaning and intention of said drawing and specifications." It is thus apparent that the drawings were made a part of the contract, and an essential part of it. It is recited in the contract that they are signed and attached thereto, but such seems not to be the fact. It follows that the contract in its entirety was never recorded, and it is therefore void. Holland v. Wilson, 76 Cal. 434, 18 Pac. Rep. 412, directly supports these views. See, also, Worden v. Hammond, 37 Cal. 61. Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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94 Cal. 581

BEAN v. TRAVELERS' INS. CO. (No. 14,682.)

(*Supreme Court of California.* May 25, 1892.)

ACTION ON ACCIDENT POLICY—PLEADING—DAMAGES.

1. Where plaintiff, in an action on an accident insurance policy, alleged that he gave affirmative proof of injury and disablement, as required by the policy, an answer admitting the giving of "what purported to be his affirmative proof," but denying that it was "affirmative proof," without specifying the defect, is an objection to form merely, and operates as a waiver of the defect.

2. Insurance, "under classification preferred, (being a capitalist by occupation,)" from "bodily injuries" causing total "disablement from transacting every kind of business pertaining to his occupation above stated," covers total disablement from transacting any business.

3. Where the insurance under an accident policy is a sum certain, provided the assured "recover no more than the money value of his time," the indemnity covers all loss by injury insured against, including the value of his time outside of his regular employment.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Action by C. F. Bean against the Travelers' Insurance Company, to recover on an accident insurance policy. To a judgment for plaintiff, and an order refusing defendant's motion for new trial, defendant excepts, and appeals. Affirmed.

F. H. Howard, for appellant. *Johnston & Borden* and *Shelden & Borden*, for respondent.

TEMPLE, C. Appeal from judgment, and order refusing a new trial. This is an action upon an accident insurance policy. In his complaint, the plaintiff, after setting out the contract of insurance and his injury, avers that, "within three months of the time of such accident, plaintiff furnished unto the defendant affirmative proof of his said injury, and of the duration of his disability." The answer "admits that the plaintiff furnished defendant with what purported to be his affirmative proof at the time alleged in the complaint, but defendant denies that the same amounted to affirmative proof of the duration of his alleged disability." The policy required written notice to be given of any injury, and provided: "Unless affirmative proof of death, or loss of limb or sight, or of duration of disability, is so furnished within seven months from the time of such accident, all claims based thereon shall be forfeited to the company." At the trial plaintiff showed that his proof was made out on blanks furnished by the defendant, and with the advice of Dr. Ross, local examining surgeon of the defendant, and by him declared sufficient, but did not offer the papers themselves in evidence. Motion for nonsuit was made for alleged insufficiency of the evidence in this respect, and the same objection was urged on motion for a new trial, and is repeated here.

I think there are several reasons why this contention on the part of the appellant cannot be sustained: *First*, there is no sufficient denial. To admit that proof was made, and then to assert that it did not amount to affirmative proof, is but to state a legal conclusion,—the mere opinion of the pleader. If the defect were sufficiently material, it could have denied the allegation that the preliminary proof was made, or could have stated, with its denial, just what was done. But if the objection was merely as to the form of the proof,—that it was negative rather than affirmative,—meaning that the injury or disability was stated inferentially, and not directly, it is obvious that in this particular case such a defect might have been remedied, and, not having been specified by the defendant, was waived. The defendant, by its policy issued to plaintiff, insured him, "under classification preferred, (being a capitalist by occupation,) * * * in the sum of fifty dollars per week, against loss of time, not exceeding 26 consecutive weeks, resulting from bodily injuries * * * which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated." The policy also provides that, if the insured is injured in any other occupation or exposure classed by the company as more hazardous than that stated, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard. In the conditions it was stated that no claim for indemnity in excess of the money value of the insured's time should be valid. In the statement on motion for a new trial there is no attempt to set out the evidence which shows the disability, but its effect is thus summarized: "The plaintiff proved that he had sustained the accidents and injuries in mode and manner substantially as set forth in his complaint, (except that the second accident therein alleged was shown to have taken place on August 30, 1889, instead of August 16, 1889,) and plaintiff also proved that he had, in consequence of said accidents and injuries, been totally disabled from transacting any business for the period of twenty-six weeks next ensuing said accidents." It does not appear, in any way, that there was evidence conflicting with plaintiff's, the effect of which is thus stated. While it cannot be taken that this statement was agreed to, we have no alternative but to conclude that appellant concedes that plaintiff's testimony on that subject was satisfactory, and that it did not put in evidence which raised a substantial conflict, or its counsel would have had the evidence set out in the record. The record discloses, however, that appellant did object to testimony of plaintiff in regard to his occupation and services in the superintendence and cultivation of his orange orchard at his home place, on the ground that it was immaterial. The objection was overruled, but it does not appear that any evidence in regard to the matter was received after the objection. Whether the rulings were right or wrong, therefore, it does not appear that there was injury.

The appellant objects to certain instructions given at the instance of plaintiff. By the first the jury was told that if plaintiff's occupation was such a business as a person classed as a capitalist might reasonably follow, and if plaintiff was immediately and wholly disabled from transacting any and every kind of business pertaining to his said occupation, the verdict should be for him; and, by the second, that the fact that he is described as a capitalist was to be regarded as the class in which he was insured, but not as necessarily determining his occupation, for the purpose of deciding whether or not he was totally disabled. Capitalists may follow various occupations, and if plaintiff was injured while pursuing any occupation not more hazardous than is usual among men classed as capitalists, and so injured as to deprive him of the ability to transact any business which a capitalist might reasonably be expected to follow, they should find for plaintiff. That these instructions are erroneous is, I think, quite patent. The policy does not, as the instruction assumes, class the plaintiff as a capitalist; it simply insures him in a preferred class, because he is a capitalist by occupation, which is a very different matter. One engaged, personally, in the manufacture of dynamite, may own the plant with which he is working. Therefore, since he owns property employed in productive industry, he is a capitalist. But he is not a capitalist by occupation. Especially where the classification is by an insurance company for the purpose of discriminating employments more or less hazardous, and fixing insurance rates in proportion to hazard. And, when the court told the jury that the occupation was not to be used to determine whether plaintiff was totally disabled from transacting any kind of business in which he was engaged, it was against the express provision of the policy, which, to entitle him to recover, requires that he be totally disabled from transacting any business pertaining to the occupation of capitalist. The court went even further, and told the jury that the plaintiff might recover if totally disabled from transacting any business which a person classed as a capitalist might reasonably be expected to follow. I know of no business which a capitalist might not as reasonably be expected to follow as any one else. This, at one stroke, swept away the classification, in accordance with which the insurance was graded. It was impossible to get further from the stipulations of the contract. But is it at all material? These instructions all go simply to the question whether the plaintiff was so injured that he could recover upon the policy. The evidence upon this subject was all for the plaintiff, and proved, without conflict, that plaintiff was totally disabled from transacting any business. The whole must include the parts; therefore plaintiff was disabled from transacting any business as a capitalist. And upon this proposition it does not appear that at the trial there was any controversy. However instructed, therefore, the jury could not conclude otherwise than they did, and appellant is not injured.

One of the grounds upon which the defendant moved for a new trial was that there was no evidence as to the value of plaintiff's time as a capitalist; and the statement shows that there was none, except upon the theory adopted by the court, that the business of taking care of his orchard, buying and selling land, locating and surveying land, and superintending the development of water, being such occupations as a capitalist might reasonably be expected to follow, were occupations as a capitalist. There were other instructions, which are duly excepted to by appellant, in which this idea is explained and insisted upon. The only objection to the testimony upon this subject was that it did not tend to find the value of plaintiff's services in the occupation of a capitalist. To the same effect is the specification of the insufficiency of the evidence. Was it essential, in respect to this question, for the plaintiff to prove the value of his time in the occupation named? I do not find it so nominated in the bond. On the other hand, I find that he may recover $50 per week, provided he shall recover no more than the money value of his time; not what his time was worth in the occupation named; nor do I think any such qualification was intended. It was merely that he could not make money by being hurt. Such a condition affords some security to the company against fraudulent claims, as much under the construction I have given it as the other. To simulate injury, and refrain from work, cannot be made profitable. It could not have been supposed that the insured might not transact any business not included in his general occupation. That he might be injured while transacting other business is provided for in the policy; and he is not precluded from recovery thereby, but his insurance is calculated at a different rate. Any one rendered unable to transact business may suffer loss, and his time may be of value outside of his regular employment. As the insurance was meant to indemnify the insured for the loss of his time in consequence of his injury, there is no reason why it should not include this. Such construction seems to effectuate the presumed intent of both parties, and is in consonance with the language of the policy.

The other exceptions seem utterly immaterial. There was no evidence which tended to show that plaintiff was injured in an occupation more hazardous than that named. I think the judgment and order should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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94 Cal. 576

BYRNE *et al.* v. BYRNE, (MCGRATH, Intervener. No. 14,567.)

(Supreme Court of California. May 25, 1892.)

CLAIMS AGAINST DECEDENT'S ESTATE—ACTION BY ADMINISTRATRIX PERSONALLY.

Where plaintiff, who was also administratrix of her deceased father's estate, joined with the other children in an action against herself in that capacity, and as such suffered judgment to be entered against her by default, an objection by an intervening creditor, whose claim against the estate has been allowed, that decedent's estate was not competently represented, is valid. Brown v. Mann, 12 Pac. Rep. 51, 71 Cal. 192, applied.

Commissioners' decision. Department 1. Appeal from superior court of Nevada county; J. CALDWELL, Judge.

Action by Mary F. Byrne and others against Mary F. Byrne, administratrix of Michael Byrne, deceased, defendant; B. McGrath, intervener as to the property in certain money recovered under a judgment by default against defendant. From a judgment on the minutes in favor of plaintiffs, and from an order denying his motion for a new trial, defendant appeals. Reversed.

A. J. Ridge, for appellant. *A. D. Mason*, *A. B. Dibble*, and *C. W. Kitts*, for respondents.

VANCLIEF, C. A striking peculiarity of the action is that the same person—Mary F. Byrne—is both plaintiff and defendant. In her simple, nonofficial character she sues herself as administratrix of the estate of her deceased father. As plaintiff, she actively prosecuted the action, giving material and important testimony for plaintiffs. As defendant, she failed to answer or demur, and her default was duly entered. Judgment was rendered in her favor as plaintiff, and against her as defendant. The effect of the judgment is to give her and her coplaintiffs $1,700, which, in her character of administratrix, she had received as the property of the estate of her father, and represented to be such in all her proceedings as administratrix from January, 1888, until May, 1890. Whether the money recovered by the judgment was the property of the estate of Michael Byrne or the property of the plaintiffs was the main issue tried; and this issue was raised by the pleading of the intervener, McGrath, a creditor of the estate, whose claim had been allowed, and who alone appeals from the judgment and from an order denying his motion for a new trial.

The plaintiffs—five in number—are the children of Michael Byrne and his wife, Mary F. Byrne, both deceased. The complaint alleges that on January 12, 1878, Mary F. Byrne, plaintiff's mother, executed her last will, whereby she devised and bequeathed to her husband, Michael Byrne, all her separate real and personal property, in trust, for the use, benefit, support, maintenance, and education of her children (the plaintiffs) or the survivor or survivors of them, and appointed Michael Byrne executor thereof; and that thereafter, on January 20, 1878, she died. It was found by the court that Michael Byrne was appointed executor, accepted the trust, and took possession of all the estate of the testatrix. No copy of the will appears in the transcript, nor does it appear what property the testatrix owned at the time of her death, nor what of her property came to the possession of her husband after her death, except that the court found he received $2,500 from her estate, which he invested in a drug store on January 1, 1884, in his own name, and thereafter conducted the store as his own property until December 7, 1887, when he died. On January 15, 1888, the plaintiff, Mary F. Byrne, was appointed administratrix of his estate. In her verified petition for letters of administration she stated that the drug store was a part of the estate of the decedent, and as such entered it in her inventory of the estate, and had it appraised. In her petition for a family allowance, and for an order allowing her to replenish the stock and to continue the business of the drug store, she represented the drug store to be a part of the estate. A family allowance of $1,800 was made, and taken principally from the drug store. By order of the court she was allowed to replenish the stock of the drug store on the credit of the estate, and to carry on business until May 23, 1890, when, on her petition, the whole stock was sold by order of court, as the property of the estate, for the sum of $1,700, which sum is the subject of contest in this action. The estate is still in debt for stock of drug store purchased by decedent in his lifetime, and also in the sum of $2,000 for stock purchased by the administratrix, and is insolvent. There was no demurrer to the complaint; but at the commencement of the trial the intervener, who claimed that the drug store was the property of the estate, and subject to the debts thereof, objected to any and all evidence offered by plaintiffs, on the ground that the complaint stated no cause of action upon which the plaintiffs were entitled to any relief whatever, because Mary F. Byrne was both plaintiff and defendant. This objection was overruled by the court, and the trial proceeded.

On his motion for a new trial, the intervener contended (1) that the evidence was insufficient to prove that the $2,500 invested in the drug store, or any part thereof, came from the estate of Mary F. Byrne, deceased, or was held by Michael Byrne in trust for the use of plaintiffs; (2) that, if said money was originally received from the estate of Mary F. Byrne in trust for plaintiffs, the evidence was insufficient to trace and identify any part thereof in the stock of the drug store at the time of Michael Byrne's death or thereafter. While I am inclined to the opinion that the evidence was not sufficient to distinguish any part of the trust fund from other property of the estate of Michael Byrne at or after the time of the commencement of this action, it is not necessary, in my view of the case, to decide this question, since I think the complaint is insufficient to entitle plaintiffs to any relief whatever. "No one can be both plaintiff and defendant in the same action. A party cannot have a right of action against himself as debtor or tort feasor." Barb. Parties, p. 18; Trustees v. Stewart, 27 Barb. 553; Blaisdell v. Ladd, 14 N. H. 129. "It is a first principle that, in whatever different capacities a person may act, he never can contract with himself, nor maintain an action against himself." Eastman v. Wright, 6 Pick. 316. In Brown v. Mann, 71 Cal. 192, 12 Pac. Rep. 51, it appears that Charles Brown, while administrator of Abel Mann, held a mortgage on the land of his intestate, and, for the mere purpose of having it foreclosed, he assigned it to his brother Adolphus, who commenced an action for that purpose, making Charles Brown, as administrator of Mann, a party defendant. A decree of foreclosure was rendered, under which the property was sold. After the sale, and after Charles Brown ceased to be administrator of Mann's estate, Adolphus Brown reassigned the mortgage debt and judgment to Charles Brown, who moved the court to substitute himself as plaintiff, and also to vacate the decree theretofore rendered, and allow him to file a supplemental complaint, making other parties defendant. These motions were granted, and subsequently another decree of foreclosure was rendered, on appeal from which this court said: "The proceedings had after the transfer of the note and mortgage by plaintiff (Charles Brown) to Adolphus Brown, with the suit thereon, must be disregarded, because Charles Brown, being the administrator of the estate of Abel Mann, could not, under the name of Adolphus Brown, have an action for his own benefit against himself as administrator, to foreclose the mortgage. He had ample means in other ways to obtain the benefit of his security. Not until he ceased to be administrator, and was substituted as plaintiff, which was after May 4, 1875, had he, Charles Brown, the plaintiff herein, commenced any proper action to foreclose the mortgage. At that time more than four years had elapsed after the note came due, and the action was barred." According to this opinion, the action at bar could not have been maintained even by the coplaintiffs of Mary F. Byrne, while she was interested with them and remained administratrix of the estate of her father. Therefore it is not a matter of misjoinder of parties plaintiff. The valid objection is that the estate of Michael Byrne, deceased, was not represented by a competent administrator. Mary F. Byrne was a proper party plaintiff, but neither she nor her coplaintiffs could maintain the action, except against a competent representative of Michael Byrne, deceased. For all purposes of this action, the office of administator of Michael Byrne, deceased, must be regarded as though it had been vacant. I think the judgment should be reversed, and that the court below should be instructed to dismiss the action.

We concur: Belcher, C.; Fitzgerald, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is instructed to dismiss the action.

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94 Cal. 592

Kneier v. Watrous. (No. 14,575.)

(*Supreme Court of California.* May 26, 1892.)

Trial—Findings—Sufficiency.

Where a complaint charges in the first count that defendant negligently chased plaintiff's mare around a pasture, by reason of which she was injured, and in the second that he chased the said mare about the pasture, until she ran upon a post, and was thereby greatly injured, and the court finds that the defendant did not chase or drive the mare "negligently or at all," and that he did not "damage, hurt, or injure" her, this finding is sufficient to cover the issue as raised by both counts.

Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by George Kneier against Fred Watrous. From an order refusing a new trial, plaintiff appeals. Affirmed.

Louttit, Woods & Levinsky, for appellant. *Baldwin & Campbell*, for respondent.

Per Curiam. Plaintiff appeals from order refusing a new trial. The action is to recover the value of a mare, which it is averred on the 26th day of June, 1889, was being pastured for plaintiff at the Learned and Harris ranch, then in charge of one Lowry. Defendant also had a horse there on pasture, and went to the premises to get his animal. Lowry was not at the house, although on the premises, and defendant with his servant went into the pasture, without obtaining actual permission so to do from any one, and drove his horse into the corral for the purpose of catching it. There were several other horses there on pasture besides these two, and some seven or eight went into the corral with defendant's, and were, of course, locked in while he proceeded to catch his horse. In doing this his animal became frightened, and jumped over the fence, and plaintiff's mare, attempting to follow, was killed. The real question in the case is whether defendant is responsible.

The complainant contains two counts. The first charges the defendant with having "negligently chased and drove about" plaintiff's mare, by reason whereof it was injured. The charging part of the second is as follows: "That on or about the said 26th day of June, 1889, the said defendant, without right and against the will and consent of the plaintiff herein, entered into and upon the inclosure and pasture wherein the said bay mare then was, and without right, and against the will and consent of said plaintiff, chased and drove the said mare about the said inclosure and pasture, and into a corral then and there being, and while in said corral chased and drove the said mare about until she, in attempting to escape from the said corral, jumped upon a post then and there standing, and was thereby greatly hurt, damaged, and injured, so that the said bay mare, in consequence of said hurt, damage, and injury, was killed." By stipulation of the attorneys, the answer filed by the defendant was taken and considered as an answer to the amended complaint herein; but it is said that no finding was made upon the issue raised by the allegations of the second count and the denials thereof. The court did find, however, that the defendant did not chase or drive the mare about the inclosure or corral "negligently or at all," and that "the defendant did not damage, hurt, or injure, or cause to be damaged, hurt, or injured, the said mare." It follows, therefore, that the material allegations of the complaint were denied, and that the findings cover the only material issue. There is no appeal from the judgment, and there is no specification of insufficiency of the evidence to support any of the findings, nor is there any specification of error. The order is therefore affirmed.

CALIFORNIA REPORTER

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94 Cal. 653

DE FRIEZE v. QUINT. (No. 14,667.)

(*Supreme Court of California.* June 11, 1892.)

TAX DEEDS—SUFFICIENCY — ADVERSE POSSESSION —UNINCLOSED LANDS.

1. Where a certificate of tax sale recites that the property was assessed to D., "and to all owners and claimants known and unknown," and the language quoted did not appear in the tax deed, the deed was void, under Pol. Code, § 3786, providing that "the matters recited in the certificate of sale must be recited in the tax deed."

2. Defendants owned uninclosed land, on which various ranchers' cattle grazed at will. Plaintiff held a tax deed for defendant's land, and leased it for five years to M., a rancher, who also grazed his cattle thereon, and under the terms of his lease, to build shelter for "three valuable domestic animals," he built a shed ten feet square, inclosed on three sides, which was intended to be used by plaintiff as evidence of possession. Defendant had no notice of plaintiff's claim or of his lease to M. till about six months before the expiration of the lease, when he undertook to build a house on the land, and was told by the lessee while building the house that he claimed possession. Defendant completed the house, and built a fence on part of the land. After the expiration of M.'s lease, and while defendant and his employe were absent from the house, plaintiff took possession, and forcibly prevented defendant from re-entering. The land was assessed to defendant, who paid the taxes during all the time of the lease. *Held*, that plaintiff did not have adverse possession, under Code Civil Proc. § 323, providing that, to constitute adverse possession of land not inclosed, it must have been used for "purposes of husbandry, or for pasture, or for ordinary use of the occupant."

Commissioners' decision. Department 2. Appeal from superior court, Marin county; E. B. MAHON, Judge.

Action by P. A. De Frieze against Elizabeth Quint, administratrix of Leander Quint, deceased. Judgment for plaintiff. Defendant appeals. Reversed.

W. H. Payson and *Hepburn & Wilkins*, for appellant. *McKoon & Towle* and *Geo. W. Towle, Jr.*, for respondent.

VANCLIEF, C. Action to quiet plaintiff's allged title to a tract of swamp and overflowed land containing 91 acres, situated in Marin county. The action was brought against Leander Quint in his lifetime, for whom the administratrix of his estate was substituted before trial. Judgment passed for plaintiff, and defendant appeals therefrom, and also from an order denying her motion for new trial. The defendant claimed title by a grant, bargain, and sale deed from plaintiff, reciting a paid consideration of $150, and executed January 18, 1879. The plaintiff claims title by a tax deed executed to him by the tax collector of Marin county on March 1, 1880; and also by prescription, alleging adverse possession under the tax deed during five years before the commencement of the action. The recitals in the tax deed show that the taxes for which the land was sold to plaintiff were state and county taxes assessed to John De Frieze for the fiscal year ending June 30, 1879, amounting to $1.55, and that the property was sold to plaintiff for this sum, plus costs and charges, altogether amounting to $2.73. The title was not traced to any higher source than the plaintiff, though the description of the land in the deed of January 18, 1879, from plaintiff to defendant, closes as follows: "For more particular description, see patent recorded in Liber A, page 377, of Records of Marin County." The patent referred to was not put in evidence, but in rebuttal plaintiff's counsel read in evidence the description of the land from the record of that patent, which appeared to be the same as that contained in the deed of plaintiff to the defendant, but did not read enough to show who was the patentee. There is nothing in the record tending to prove that John De Frieze was the patentee, or that he ever owned the land in question, except that the tax for which the land was sold was assessed to him. Finally, it does not appear how, or from whom, plaintiff originally acquired title to the land before the date of his deed to defendant; yet he is estopped by his deed to defendant, purporting to grant the absolute title, from denying that, before and at the date of that deed, he had such absolute title, and, by that deed, conveyed it to the defendant, (Belcher, etc., Min. Co. v. Deferrari, 62 Cal. 160; Dodge v. Walley, 22 Cal. 228; Haffley v. Maier, 13 Cal. 13; Clark v. Baker, 14 Cal. 613;) and it is also clear that, if any title passed by the tax deed, such title would have inured to the benefit of the defendant alone. But it appears that the tax deed was utterly void. The certificate of the tax sale, introduced by plaintiff as a part of his evidence in chief, states that the property was assessed to "John De Frieze, *and to all* *owners and claimants, known and unknown.*" These words in italics do not appear in the tax deed, as required by section 3786 of the Political Code, although it appears that they were recited in the deed as drawn, but were stricken out before the deed was executed; thus showing that section 3786 of the Political Code was deliberately disregarded. Counsel for respondent contend that the deed alone can be received as evidence of the assessment, and that the certificate of sale put in evidence by plaintiff as a foundation for the deed must be disregarded. In this I think counsel are mistaken. The deed is only "primary" (*prima facie*) evidence "that the property was assessed as required by law," and this rests on the disputable presumption that the matters recited in the certificate are recited in the deed as required by section 3786 of the Political Code. Here the plaintiff proved by the certificate that the property was not assessed as required by law, before the deed was offered in evidence. Section 3776 of the Political Code requires the certificate to state (when known) "the name of the person assessed," while the deed is required to recite only the matters recited in the certificate. By first introducing the certificate the plaintiff proved, not only that the property was not lawfully assessed, (Daly v. Ah Goon, 64 Cal. 512, 2 Pac. Rep. 401,) but also that the deed did not contain the recitals required by law.

Plaintiff's main reliance, however, is upon title by prescription, arising from his alleged adverse possession. The evidence relied upon to prove adverse possession tended to prove only the following facts: Three years and five months after the execution of the tax deed, to wit, on August 13, 1883, the plaintiff executed to Bernard T. Miller a lease of the land in question for the term of five years, at a rental of $25 per year, the lessee covenanting to construct upon the premises, within 20 days from the date of the lease, "a building suitable to afford protection in winter to at least three valuable domestic animals." At the time of the execution of this lease the land had no improvements upon it, and never had been inclosed, cultivated, nor occupied by any person. The greater portion of it was low, boggy land, but during portions of the year it afforded feed for cattle which had been accustomed to graze upon it. James Miller, the father of the lessee, had a ranch adjoining the leased premises, on the west side thereof, but which was not fenced on that side. "Cattle could roam at will over this land (land in question) from any contiguous land." James Miller kept a dairy and a number of cows on his ranch. About the time that Bernard T. Miller took the lease from plaintiff he also leased from his father, James Miller, the latter's dairy and cows, and thereafter allowed these cows, with others of his own, to graze upon the leased land, but without a herder, except to drive the cows from the land for the purpose of milking, and to return them after milking. The cows were not confined to the leased land, but could graze upon other adjoining land; and there was nothing to prevent the cattle of other persons from grazing upon the leased land. Being asked if other cattle than his own were pastured upon it during the term of the lease, Bernard Miller answered: "They might have been. I cannot say positively. Cattle get back and forth on the ranches once in a while. I could not say positively whether there were or not. * * * I never remembered seeing any cattle on there excepting my own and those I had rented from my father." About a month after the date of the lease, B. F. Miller constructed a shed on the land, sufficient to shelter three cows, by setting a post in the ground at each of the four corners, and covering it with boards, and also boarding up three sides of it, but leaving one side open. This was the only improvement placed upon the land by him or plaintiff, and it does not appear whether the shed was ever used by him or not. During the first four years of the lease he resided about a half mile from the land, but within sight of it, and during the remainder of the term he resided further from the land. It does not appear that he personally attended to the dairy, but does appear that he was absent from it a considerable portion of the time. In the way above described, he used the land in question during a term of five years before the commencement of this action, but in no other way. It does not appear that his lease was recorded, nor that defendant had actual notice of it, or notice that he used or claimed the land for any purpose during the first four and a half years of the alleged adverse possession. About five months before the alleged five years of adverse possession expired the defendant erected a house upon the land, 20 feet long by 12 feet wide, in which his employe resided several weeks immediately after it was built, and it was while this house was being built that Miller first notified defendant that he (Miller) had a lease of the land and claimed the possession of it. Defendant also built a fence on a portion of the line between the land in question and the land of James Miller immediately after building the house. After the expiration of Miller's lease, and while defendant and his employe were absent from the house, the plaintiff took possession of it, and forcibly prevented them from re-entering. The tax deed to plaintiff was recorded March 1, 1880, and the plaintiff paid the taxes on the land for the years 1881, 1883, 1884, 1885, 1886, 1887, and 1888, said taxes having been assessed to him for those years; but there is no evidence that defendant had actual notice of the deed, or that plaintiff paid the taxes or claimed the land until after defendant built the house on the land. At no time after the execution of the tax deed was plaintiff in the possession of any part of the land, unless he was so by his tenant, Miller, until he took possession of the house built by defendant, as above stated.

On the facts above described counsel for appellant contend: *First.* That the tax deed gave plaintiff no color of title because he obtained it in bad faith, and for the mere purpose of creating a sham color of title. *Second.* That, even conceding that the tax deed gave color of title, the plaintiff never had adverse possession of the land during any period of time. *Third.* That, conceding adverse possession, it was not continuous during a period of five years, having been interrupted by defendant at the time he built the house and fence on the land five months before the five years' adverse possession was complete. As I think, the second of these positions should be sustained; the first and third need not be considered.

It is contended for respondent, and the court found, that the acts of plaintiff and his lessee, Miller, constituted "adverse possession," as defined in section 323 of the Code of Civil Procedure, which is substantially the same as section 11 of the act of 1850, "defining the time for commencing civil actions," (Hitt. Gen. Laws, art. 4353,) and which, so far as applicable here, is as follows: "For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, * * * land is deemed to have been possessed and occupied in the following cases: * * * (3) Where, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purposes of husbandry, or for pasture, or for the ordinary use of the occupant. * * *" It has been uniformly held in this state that, in order to set the statute of limitation in motion against the owner of land, the occupancy thereof must be sufficiently open and notorious to notify an ordinarily prudent owner of its existence, and of its hostile character, unless he is otherwise actually notified of these facts; and, to be available against persons dealing with the owner for the land, the occupancy must be of such a character, at least, as should put them upon inquiry as to the title of the occupant, (Thompson v. Pioche, 44 Cal. 508; Thompson v. Felton, 54 Cal. 547; Fair v. Stevenot, 29 Cal. 488; Smith v. Yule, 31 Cal. 182; Unger v. Mooney, 63 Cal. 586; Thomas v. England, 71 Cal. 457, 12 Pac. Rep. 491;) and the burden of proving all the essential elements of an adverse possession, including its hostile character, is upon the party relying upon it, (American Co. v. Bradford, 27 Cal. 361; Lick v. Diaz, 30 Cal. 75; Garwood v. Hastings, 38 Cal. 223.) The evidence furnishes no ground for a pretense, even, that defendant ever had actual or express notice that the plaintiff or his lessee had or claimed any kind of possession until about the time that defendant built his house upon the land, which was not more than six months before the alleged period of five years' adverse possession expired. Conceding that what is proven to have been done on the land by plaintiff and his lessee, Miller, constituted any kind of possession which may be regarded as doubtful, such possession was not of such a character as to justify the inference that defendant had notice of its existence, even, much less that it was hostile to his title, until four years and six months of the alleged period of adverse possession had elapsed. The land was uninclosed and uncultivated. No person resided upon it. It was bounded on all sides by uninclosed land, upon which, as well as upon it, the cattle of the neighboring ranchers roamed and grazed without restraint. Defendant had no notice of the lease to Miller, nor that Miller had leased his father's dairy or cows, or controlled any cattle that grazed upon the land except his own. The grazing of his neighbor's cattle upon the land, so long as defendant made no effort to restrain them by inclosure or otherwise, did not indicate to him that his neighbors had or claimed adverse possession of his land. The little shed sufficient to afford shelter to "three valuable domestic animals," say ten feet square and seven feet high, is the only thing relied upon to indicate to defendant that plaintiff or Miller was in possession of the land; and no doubt it was intended to be used as evidence of such possession, and for no other purpose. So important was it considered by the plaintiff that the only visit he made to the land during the term of the lease was for the purpose of ascertaining whether Miller had built it according to the covenant in the lease. Why was this shed required to be sufficient to shelter only three valuable animals? Why is there no evidence that it was ever used for any purpose? It was obviously a mere sham, which should be allowed no effect whatever as evidence of possession. I think the finding of adverse possession of the land in question is not justified by the evidence, and that the judgment and order should be reversed, and a new trial granted.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

94 Cal. 651

PINSON v. SCHMALZ. (No. 13,751.)

(*Supreme Court of California.* June 11, 1892.)

ASSUMPSIT—MONEY HAD AND RECEIVED.

Plaintiff, acting as agent for K. & D., shipped in his own name coffee by steamer to defendant, to whom by a previous understanding K. & D. were to ship all their coffee. On the same steamer plaintiff sent a letter directing defendants to hold the coffee to the order of K. & D., and to send plaintiff certain merchandise, "charging me [plaintiff] with the amount to the above-named gentlemen, [K. & D.]" Defendant accounted to K. & D. for the coffee, whereupon plaintiff demanded of him the proceeds of sale. Plaintiff had no interest in or lien on the coffee, and K. & D. were not indebted to him for commissions or any amount except for the cash proceeds of the coffee. *Held*, that plaintiff could not recover.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge

Action by H. F. Pinson against William Schmalz. Judgment for defendant. Plaintiff appeals. Affirmed.

H. B. M. Miller, for appellant. *Nathan Vidaver*, for respondent.

VANCLIEF, C. Action for money had and received for the use of the plaintiff. Judgment for defendant, from which and from an order denying his motion for a new trial the plaintiff appeals. The facts upon which plaintiff's demand is founded are substantially as follows: On July 15, 1888, the plaintiff, then residing at Ocos, Guatemala, shipped to defendant in San Francisco, by steamer, 61 sacks of coffee in his own name as shipper, but for account of Messrs. Kunze & Duran of Guatemala, with whom defendant had dealings and a previous understanding that they were to ship their coffee to him. By the same steamer defendant received from plaintiff, who was then unknown to defendant, the following letter: "Ocos, July 15, 1888. Mr. Wm. Schmalz, San Francisco—My Dear Sir: By steamer of the 14th I sent to you sixty-one sacks of coffee, in gold, in accordance with letter of advice and bill of lading, by the agency of this port. The said lot you will please hold to the order of Messrs. Kunze & Duran, of the Rodeo Co. At the same time I request you to send me by the next steamer the inclosed bill of goods, charging me with the amount to the above-named gentlemen. Please to send me directly this consular invoice and bill of lading. Believe me, yours, truly, H. F. PINSON." After defendant had accounted to Kunze & Duran for the coffee as requested by them, the plaintiff demanded of defendant the proceeds of the sale thereof; and upon the defendant's refusal to accede to this demand, plaintiff commenced this action to recover such proceeds. It is admitted that in shipping the coffee plaintiff acted as the agent of Kunze & Duran, and it is not pretended that he had any interest in or lien upon the coffee, or that Kunze & Duran were indebted to him for commissions, or upon any amount whatever, except for the cash proceeds of the coffee. It appears that defendant did not send plaintiff the goods as requested in the above letter, but it is not pretended that defendant was under any obligation to do so. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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94 Cal. 642

DOLLIVER v. DOLLIVER *et al.* (No. 13,140.)

(Supreme Court of California. June 4, 1892.)

RECORD ON APPEAL—RESCISSION OF CONTRACTS—HUSBAND AND WIFE.

1. On an appeal from a judgment, taken on the judgment roll alone, if the judgment is supported by the findings made, the failure to find on other issues presented by the pleadings is not ground for reversal unless the record shows that evidence on such issues was offered in the court below, and that a finding thereon from such evidence would countervail the findings actually made, so as to invalidate the judgment; nor does the fact that the court has made findings of fact not within the issues presented by the pleadings invalidate its judgment, if supported by the findings within the issues.

2. A transfer of property, sought to be rescinded, and for which a valuable consideration was falsely recited, was executed by plaintiff to defendant, her husband, to induce him to withdraw a divorce suit instituted by him for the purpose of forcing plaintiff, who was suffering from nervous prostration, to surrender part of her property. The transfer was executed in the presence of defendant and his attorney, and plaintiff had no independent advice as to the effect thereof. *Held*, that the transfer was executed under undue influence, within Civil Code, § 1575, and should be rescinded.

3. The pendency of a divorce suit does not affect the confidential relation existing between husband and wife, so as to relieve the husband from the good faith in dealings with his wife required by Civil Code, § 2228, from persons occupying confidential relations.

In bank. Appeal from superior court, city and county of San Francisco; WM. T. WALLACE, Judge.

Action for the rescission of a transfer and a contract by Mary W. Dolliver against John S. Dolliver and others. Judgment for plaintiff, and defendant Dolliver appeals. Affirmed.

T. M. Osmont, (*H. L. Gear*, of counsel,) for appellant. *M. C. Blake* and *Wm. M. Pierson*, for respondent.

HARRISON, J. Action for the rescission of a contract. The court below rendered judgment in favor of the plaintiff, and the defendant has appealed from the judgment, bringing the case here upon the judgment roll alone. The court finds that the parties are husband and wife, having been married in 1873, and that the plaintiff at the time of their marriage was the owner of certain real estate as her separate property, at that time of the value of $125,000, and that, after her marriage with the defendant, she acquired certain other property, which was also her separate estate. On the 27th of August, 1885, the defendant abandoned the plaintiff, and thereafter ceased to live with her, and on the evening of that day, after leaving her, he caused her to be served at her residence with a summons and copy of a complaint in a suit for divorce brought by him against her. The court finds that at that time, and for some time previous, the plaintiff was a sufferer from general nervous prostration, and that the abandonment by the defendant and the nature of the charges in the complaint for divorce caused her great agitation and distress of mind, and greatly aggravated her bodily infirmity, and that, while so distressed in mind and sick in body, she almost immediately sought out the defendant, and urged him to dismiss the suit and return to her, and that on the 31st of August they met by appointment at the office of Mr. A. N. Drown, who was his attorney, and to whom he introduced the plaintiff, with the statement that they had come to make a settlement. At that interview, certain memoranda of the settlement were prepared by Mr. Drown in the presence of both parties, and signed by them, and on the next day formal instruments of settlement, which in the mean time had been prepared by his attorney, were executed by them. By these instruments the plaintiff made to the defendant her promissory notes amounting to $30,000, and secured their payment by a mortgage upon certain of her real estate, and a memorandum of agreement was signed by both parties, reciting that "all of the property belonging to both of said parties has hitherto been and is now held by Mary W. Dolliver," and that "differences have arisen between said parties relating to such property, and the respective rights of each concerning the same;" and that, "in mutual consideration of the premises," it was agreed by them that the property that day conveyed by him to her should be her separate property, and that the property transferred by her to him, together with the aforesaid promissory notes and mortgage, should be his separate property. It is for the rescission of these agreements, and the restitution of the plaintiff to the property so conveyed, and the surrender of the notes and mortgage, that this action was brought. The court finds that the above recitals in the memorandum of agreement had no foundation in fact; that no property of the defendant had been held by the plaintiff, and that he had no property; that there had been, in point of fact, no differences, in the sense assumed in the memorandum; that the claim set up by the defendant, and which the settlement purported to adjust, was not a *bona fide* claim on his part; and that the memorandum purported to give to the plaintiff nothing which was not in point of law and fact already hers, and effected nothing for her pecuniary advantage. The court also finds that the abandonment of the plaintiff "was without just cause, was made in bad faith, and the suit instituted by him, ostensibly to obtain a divorce, was brought by him merely to harass and vex the plaintiff, and as a means of coercing her into a surrender to him of a portion of her separate estate, and for no other purpose;" that the matters set forth in his complaint as substantive grounds for divorce were untrue in point of fact, and known by the defendant at the time to be untrue, and that the allegations inserted therein as to the amounts of money which had been turned over by him to his wife were not true in point of fact, and that those amounts were grossly and purposely exaggerated for the purpose of alarming her, and influencing her to make a settlement; that the plaintiff executed the instruments in manner and form as they had been prepared by the attorney for the defendant; that she had no independent advice concerning them, or their legal effect and operation, and did not in fact comprehend their effect, in point of law, upon her property rights; that she was constrained to their execution by considerations of the immunity she hoped to obtain from the personal disgrace apprehended by her from the trial of the suit for divorce upon the charges made against her in the complaint; and that it was under the moral pressure exerted upon her by these various considerations that she acted in executing the said instruments.

1. Upon the record before us, we cannot consider the proposition made on behalf of the appellant that the court has failed to make findings upon certain material issues presented by the pleadings. Upon an appeal from a judgment taken upon the judgment roll alone, if the judgment is supported by the findings which are made, the failure of the court to make findings upon other issues presented by the pleadings is not a ground for reversal, unless it shall appear from the record that evidence was offered upon such issues in the court below, and that a finding thereon from such evidence would countervail the findings actually made to such an extent as to invalidate the judgment. Winslow v. Gohransen, 88 Cal. 450, 26 Pac. Rep. 504. Nor does the fact that the court has made findings of fact which are not within the issues presented by the pleadings invalidate its judgment, if that judgment finds support in the findings which are within the issues, independent of such extraneous findings.

2. An action for the rescission of a contract may be maintained whenever the consent of the party seeking to rescind was obtained through any fraud or undue influence of the other party. Civil Code, § 1689. "Undue influence" is defined in the Civil Code, § 1575, to consist "(1) in the use by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress." The plaintiff and defendant were husband and wife, and by virtue of that relation a personal trust and confidence had been created between them, which imposed upon the defendant the obligation of exercising the highest good faith towards the plaintiff in any dealings between them, and precluded him from obtaining any advantage over her by means of any misrepresentation, concealment, or adverse pressure. Civil Code, § 2228. This relation, and the obligation arising from it, were not destroyed by the mere fact that an action for divorce was pending between them. They were still husband and wife, and so long as that relation existed between them the law would not permit any inquiry into the extent of the trust and confidence which is presumed to be placed by one in the other; nor can the husband, by bringing an action for divorce against his wife, divest himself of the obligations which are imposed upon him by virtue of such relation. The suit for divorce was brought by the husband on the 27th of August, under such circumstances as naturally to surprise and distress the wife. They had been living together for many years as husband and wife, and in the exercise and enjoyment of the confidential relations incident thereto. On that day he dined at home with her and the family, together with an invited guest, and immediately after dinner announced to her his intention of abandoning her, and on the same evening caused her to be served with the summons and complaint in the suit for divorce. Instead of resisting the suit, or assenting to its prosecution, she almost immediately sought him out, and urged him to dismiss the action and return to her. Although he at that time refused to do this, the parties within four days after the commencement of the ac-

tion met by appointment at the office of his attorney to make a "settlement." Instead of insisting that the plaintiff should have the benefit of some independent and disinterested advice, he refrained from calling in any adviser for her, but took upon himself the duty of formulating the instruments by which the "settlement" was to be effected, and had himself the benefit of the presence and advice of his own attorney. The intervention of Mr. Drown in the preparation of the instruments cannot be considered as any protection to the plaintiff. He was the attorney of the defendant, had instituted the suit in his behalf, and was under his professional obligation to protect the interests of his client, and would feel under no obligation to protect the interest of the plaintiff, or to give to her any advice or counsel in reference thereto. The court finds: "In the progress of the settlement, particularly on August 31st, when its precise terms were being formulated, the defendant here had the benefit of the presence and advice of his attorney, Mr. Drown, who in fact instructed him as to the advisability in his interest of a certain important detail of the settlement. The plaintiff here, the wife, in point of fact, upon her part had no advice or assistance of any character in adjusting the terms, nor in the conduct of the negotiations which culminated in the settlement in question." Under these circumstances the husband must be held to have been bound to the exercise of all those duties towards the wife which spring from the existence of the relation between them, and to be subject to that familiar rule in equity "that he who bargains in matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence," and thus precluded from gaining any advantage from the transaction between them. When, therefore, the court found that the transaction was without any pecuniary advantage to the wife; that the husband had received great pecuniary advantage therefrom; that the consideration recited in the instrument of settlement, and upon which it purported to have been made, was untrue; that the suit for divorce had been brought by him as a means of coercing her into a surrender of a portion of her separate estate, and for no other purpose; that it had the effect to aggravate her bodily infirmity; and that she was constrained to execute the instruments of settlement by reason of the moral pressure exerted upon her by the consideration of the effect upon her that would be produced by the prosecution of the suit; and that she had no independent advice concerning the legal effect and operation of said instruments,—its conclusion of law and judgment that the defendant should surrender to the plaintiff all the fruits of said settlement, and that the settlement should be in all respects rescinded, was the necessary result of such findings, and must be affirmed.

3. The objection by the appellant to that portion of the judgment requiring the transfer of the Hyde street lot is without merit. The court finds that after the execution by the plaintiff to the defendant of her promissory notes, aforesaid, he hypothecated them to the Security Savings Bank for a loan of $9,000, and that he applied $6,500 of the money so received by him to the purchase of the Hyde street lot, giving at the same time a mortgage to the vendor for the sum of $6,000 to secure the unpaid portion of the purchase price thereof. The plaintiff had the right, as against the appellant, to an absolute surrender and cancellation of these notes; but, inasmuch as the Security Savings Bank was a *bona fide* holder of a lien thereon to the extent of $9,000, she had the right, at her option, to follow the proceeds of the notes into the property into which they had been converted. The defendant thereby suffers no injury, as he merely surrenders to the plaintiff the property which he obtained by the unauthorized use of her promissory notes, and the plaintiff can become the owner of the property only by the payment of the unpaid portion of the purchase price for which the property is held in mortgage. For the purpose of sustaining the judgment of the court, we can assume that the defendant was unable or unwilling to redeem the notes from the bank, or that the plaintiff elected to take the property into which the money for whose payment they were held had been converted; and, in the absence of any evidence upon the point, we must also assume that the purchase price of the property was its actual value. The proposition on the part of the appellant that he may be liable to a suit for the unpaid amount of the purchase price is sufficiently answered by the fact that it does not appear from the record that he gave any personal obligation therefor. If the defendant had desired to retain this property as his own, it was at least incumbent on him to offer to return to the plaintiff her promissory notes, freed from the claim of the bank. She was under no obligation to accept in lieu thereof the obligation of the defendant to return them when this lien should be discharged, or to accept the incumbrance on the property as their equivalent.

4. The provision in the judgment in reference to the lots in the "Paul tract" is not prejudicial to the defendant. The terms of the judgment are that he shall execute to her "a good and sufficient deed of all the interest acquired, or claimed to have been acquired, * * * by virtue of any instrument executed by the plaintiff to said defendant on the 31st day of August, 1885, or on the 1st day of September, 1885." The complete terms of the "settlement" between the plaintiff and defendant are not found by the court, and the allegation of the plaintiff that she signed other instruments than those set forth in the complaint is not denied. If the defendant did not acquire any interest in the "Paul tract" lots by virtue of any instrument executed on either of those days, he can suffer no injury by a compliance with the judgment; and, as the injury to the plaintiff is found by the court to have resulted solely and directly from the wrongful acts of the defendant, it is not for him to complain that the court has re-

quired of him as complete restitution as is within his power to make, so long as he sustains no injury or diminution of his estate. The judgment is affirmed.

We concur: McFarland, J.; De Haven, J.; Garoutte, J.; Paterson, J.; Sharpstein, J.

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94 Cal. 595

People v. Hall. (No. 20,895.)

(*Supreme Court of California.* May 28, 1892.)

Burglary—Sufficiency of Information—Dying Declarations — Remarks of Counsel — Instructions.

1. Pen. Code, § 459, provides that "every person who enters any house * * * with intent to commit grand or petit larceny, or any felony, is guilty of burglary." *Held*, that an information which alleged that defendant "did willfully, unlawfully, and feloniously enter a certain dwelling house, * * * with intent then and there to commit grand and petit larceny," etc., was a sufficient charge of burglary, and alleged but one offense.

2. On such information the intent to commit both grand and petit larceny need not be shown.

3. Code Civil Proc. § 1870, subd. 4, which provides that "the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death," may be given in evidence in a criminal action, applies only where the death of deceased is the subject of the trial; and does not make the dying confession of an accomplice in a burglary admissible on a trial for that offense.

4. A prosecuting attorney may challenge counsel for defendant to explain the evidence in the case "upon any other reasonable hypothesis than that of guilt," and then comment on the failure to do so.

5. A court has a right to amend imperfect instructions submitted.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

George Hall was convicted of burglary in the second degree, and appeals. Affirmed.

C. M. Head, for appellant. *Atty. Gen. Hart*, for the People.

Belcher, C. The defendant was convicted of the crime of burglary of the second degree, and sentenced to imprisonment in the state prison for the term of 10 months; and the appeal is from the judgment and an order denying a new trial. The charging part of the information was as follows: "The said George Hall, on or about the 28th day of June, 1891, in the said county of Yolo, state of California, then and there being, did willfully, unlawfully, and feloniously enter a certain dwelling house, which said dwelling house was then and there the property of one Joseph Glide, with intent then and there to commit grand and petit larceny," etc. The defendant demurred to the information on the grounds: *First*, that it did not substantially conform to the requirements of sections 950–952 of the Penal Code, in that it did not contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what was intended; and also in that it could not be ascertained therefrom what offense was charged; and, *second*, that it did not conform to the requirements of section 954 of the Penal Code, in that it charged two offenses, namely, an entry with intent to commit grand and petit larceny. The demurrer was overruled, and appellant contends that the ruling was erroneous, because the information, in effect, charged the commission of two burglaries. Under our statute every person who enters any house with intent to commit grand or petit larceny, or any felony, is guilty of burglary. Pen. Code, § 459. The wrongful entry with intent to commit any of the crimes referred to constitutes the offense, and it is complete when the entry is made, whether the intent be afterwards consummated or not. An entry may be made with intent to commit two or more felonies, but that would constitute only one burglary. People v. Milne, 60 Cal. 71. If another crime were actually committed, then for that another and separate charge should be made. In our opinion, the information conformed with the requirements of the Code, and charged but one offense. The demurrer was therefore properly overruled.

Appellant also contends that, if the information was good, still, in order to justify a conviction, the prosecution should have proved an intent to commit both grand and petit larceny. The evidence is not brought up in the record, and it therefore cannot be ascertained what the proofs in this regard were. The bill of exceptions only states that witnesses were sworn and examined on the part of the prosecution, and "testimony was introduced tending to establish the guilt of said defendant." It will be presumed, therefore, that the evidence was sufficient to justify the verdict. But, in our opinion, the prosecution needed only to prove that defendant entered the building with intent to commit grand or petit larceny. It was proved that defendant and one Kingsberry were arrested for the alleged burglary at the same time and place and by the same persons, and that while under arrest they attempted to escape, and were fired upon and wounded by one of their captors; that a physician was then sent for to treat their wounds; and that Kingsberry died from the effects of his wounds before any complaint was filed against either of the parties. In his own behalf the defendant offered to prove that, after a careful examination, the physician was satisfied that Kingsberry's wounds were necessarily fatal, and that he so informed him at the time; that Kingsberry admitted to the physician that he fully realized "that he was mortally wounded, and was on the point of death, and had given up all hope of ever getting well; that he was conscious of death; and that, thus having a sense of impending death and without hope of reward, he made a full, free, and complete confession to said physician in relation to this alleged crime, stating that he himself had planned the entire scheme, and that said Hall had nothing to do with it, and was not connected with the guilt, and was in all respects innocent of any criminal act or intent in the matter." This evidence was objected to by the prosecution and excluded by the court, and the ruling is assigned as error. It is claimed that the evidence was admissible as a dying declaration, or, if not as such, then as a confession of guilt of one of the parties to the alleged crime. The Code provides that "the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death," may be given in evidence in a criminal action. Section 1870, subd. 4, Code Civil Proc. The rule, however, goes no further than to make the declarations admissible where the death of the deceased is the subject of the trial, and the circumstances of the death are the subject of the declaration. Whart. Crim. Ev. (9th Ed.) § 288. "Dying declarations are restricted to the act of the killing, and to the circumstances immediately attending it, and forming a part of the *res gestæ*." People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. Rep. 233. As the declaration offered in evidence here had no relation to the death of the deceased, it was clearly inadmissible as a dying declaration. And as a confession the evidence was equally inadmissible. The rule is settled beyond controversy that in a prosecution for crime the declaration of another person that he committed the crime is not admissible. Proof of such declarations is mere hearsay evidence, and is always excluded, whether the person making them be dead or not. Whart. Crim. Ev. (9th Ed.) § 225; Greenfield v. People, 85 N. Y. 75; Snow v. State, 58 Ala. 372; Lyon v. State, 22 Ga. 400; Kelly v. State, 82 Ga. 444, 9 S. E. Rep. 171.

The point is made that the district attorney, in his closing argument to the jury, was allowed to go beyond the bounds of propriety, and thereby to prejudice the defendant. He said: "In my opening argument I challenged Mr. Head [counsel for defendant] to explain the facts and circumstances of the case upon any other reasonable hypothesis than that of guilt. He did not attempt any explanation. If there had been any other theory on earth by which the circumstances of this case could be explained, Mr. Head would have advanced that theory, and called your attention to it." And again: "There is no theory on the face of the earth—the possession of all this property, and trying to escape from these officers—that he can advance or has advanced." Counsel for defendant objected to these remarks, on the ground that the defendant was not called upon to explain anything; and he went on to argue that the burden never shifted on the defendant, but that he came before the jury with every presumption of innocence, and neither he nor his counsel was under any obligation to furnish any evidence in his behalf; that the remarks were harmful, because their tendency was to shift the burden on the defendant, which the law did not permit. The court overruled the objection, and the defendant reserved an exception. In making its ruling the court stated, in substance, that the defendant was not bound to offer any testimony in his own behalf, and that the burden of proof was never shifted on the defendant; that the jury could not take into consideration the fact that the defendant had not produced himself as a witness, and had not produced any witnesses, but that they were entitled to consider all the testimony before them; and it said: "If the evidence is criminating, and not explained, I will allow the district attorney to comment on it." We see no error in the ruling. The record shows that "the district attorney did not allude to or comment upon the fact that the defendant has not taken the stand in his own behalf, or failed to produce any witnesses to explain anything." The remarks complained of evidently had reference only to the testimony before the jury and the inferences to be drawn therefrom. The attorney simply challenged the opposing counsel to explain the facts proved, and give his version of the offense; and in this there was nothing improper.

Appellant also contends that the court erred in amending, and giving as amended, three of the instructions asked by him, and in refusing to give one that he asked. It does not appear from the record what the amendments made were. The instructions are simply indorsed, "Given as amended;" and as given they state the law correctly. A court has a right to amend imperfect instructions, and when it does so its action cannot be successfully complained of. Boyce v. Stage Co., 25 Cal. 460; People v. Dodge, 30 Cal. 450. The instruction not given was properly refused. It stated, in substance, that the facts that defendant was found in possession of the property recently stolen, and was arrested, and while under arrest fled, or attempted to flee, were not sufficient to warrant the finding him guilty, nor even to raise in the minds of the jury a strong presumption of guilt, and that defendant could not be found guilty "except upon the most conclusive proof" that he committed the crime alleged. This is not a correct statement of the law. The "most conclusive proof" is not required, but only that which satisfies the minds of the jurors beyond a reasonable doubt. If given, the instruction would have been misleading and erroneous. We find no error in the record, and advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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94 Cal. 636

HEINLEN v. HEILBRON *et al.* (No. 14,489.)

(*Supreme Court of California.* June 4, 1892.)

NOTICES—SERVICE BY MAIL.

Code Civil Proc. §§ 1012, 1013, provide for service by mail in certain cases, and that such service shall be by depositing the notice or other paper in the post office, addressed to the person on whom it is to be served at his office or residence. *Held* that, where a notice attempted to be served by mail was actually received by the person for whom it was intended, the service was sufficient, though it was mailed.

Department 1. Appeal from superior court, Tulare county; M. K. HARRIS, Judge.

Action by Heinlen against Heilbron and others. From an order denying a motion for a new trial, defendants appeal. Motion to dismiss appeal denied.

H. H. Welsh, (*Daggett & Adams*, of counsel,) for appellants. *G. A. Heinlen*, (*R. E. Houghton*, of counsel,) for respondent.

HARRISON, J. In this action, pending in the county of Tulare, the superior court of that county made an order on the 9th day of February, 1891, denying the defendants' motion for a new trial. The attorney for the defendants resided and had his office in Fresno, and on the 28th of March, 1891, filed with the clerk of the above court a notice of an appeal by the defendants from the order denying their motion for a new trial. On the day previous he had deposited in the post office at Fresno a registered letter, containing a copy of the notice of appeal, inclosed in a sealed envelope, with the postage thereon prepaid, addressed to the attorney for the plaintiff, as follows: "G. A. Heinlen, Esq., Attorney at Law, Lemoore, Tulare County, Cal." The letter containing the notice of appeal was not delivered to Mr. Heinlen at Lemoore, but was forwarded to him through the mail from that place to San Jose, on the 31st day of March, and was received by him through the post office at San Jose on the 4th day of April, 1891. The attorney for the respondent now moves to dismiss the appeal upon the ground "that the notice of appeal from the said order was not properly served on the attorney for respondent in the manner required by law, in that said service was made by mail, and it was not addressed to the attorney for said respondent, either at his residence or his place of business;" and in support of the motion presents his own affidavit "that previous to the month of February, 1891, deponent resided and had his office in the city and county of San Francisco, state of California;" and that in February, he removed his office and residence to San Jose, and "did not on the 27th day of March, 1891, and has not at any time since said date, and does not now, reside or have his office in the town of Lemoore; * * * that on the said 27th day of March, 1891, and for one month prior thereto, and ever since said date, his residence, office, place of business, and post office address was at San Jose." At the hearing of the motion several affidavits were submitted on behalf of the respective parties for the purpose of determining whether Mr. Heinlen had an office at Lemoore, but we do not deem it necessary to determine this question, although we think that it sufficiently appears from them that the attorney for the appellants had good reason to believe that that was the proper place at which to address any notice to be sent to him through the mail. Neither do we determine the question of practice suggested at the argument as to whether the affidavits should be filed in the first instance in this court, or be brought up from the superior court, as a part of the record in that court. Section 1011, Code Civil Proc., provides that the service of notices "may be personal, by delivery to the party or attorney on whom the service is required to be made;" and section 1012 provides that "service by mail may be made when the person making the service, and the person on whom it is to be made, reside or have their offices in different places between which there is a regular communication by mail;" and in section 1013 it is declared that "in case of service by mail the notice or other paper must be deposited in the post office, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid." The "delivery" which constitutes a personal service under section 1011 need not be made by the individual who is attempting to make the service, but can be effected through a clerk or messenger, or through any agency by which a "delivery" can be made; and when the notice is so delivered the service becomes a personal service. The fact that the person upon whom the service is to be made resides or has his office in a different place from that of the person making the service, does not require that the service be made by mail, or preclude a personal service, and the person seeking to make the service can avail himself of any agency,—such as Wells, Fargo & Co., or the instrumentality of the post office department,—with as much effect as if he had employed any other messenger. The delivery of the notice through such agency renders the service personal, and the proof of such delivery establishes a personal service.

The service by mail authorized by section 1012 does not contemplate a delivery as a part of the service, as is seen by the provision of section 1013, that "the service is complete at the time of the deposit" in the post office. Such a service is termed a "substituted service," and is intended to take the place of and be equivalent in point of law and effect to a personal service. Inasmuch, however, as it is the general rule that there shall be personal service of all notices in legal proceedings, and that substituted service can be made only in the cases and in the manner designated by the statute, it follows that it is incumbent upon any one who would avail himself of this mode of service to have it clearly appear upon the record that the case is one in which such service is permitted, and that the mode pointed out by the statute for making such service has been strictly followed. If the only proof of service appearing in the record were that a copy of the notice of appeal had been deposited in the post office, addressed to the attorney of the respondents at a place confessedly not his office or place of residence, or which was in some suitable mode shown not to be his office or place of residence, and a motion was made on that ground to dismiss the appeal, we should be compelled to grant the motion, for the reason that the appellant would have failed to show that any notice of appeal had been served, and, therefore, that it did not appear that we had any jurisdiction of the appeal. Jurisdiction, however, as has been frequently held, does not depend upon the proof of service, but upon the fact that service has been made, —In re Newman's Estate, 75 Cal. 220, 16 Pac.

Rep. 887; Sichler v. Look, (Cal.) 29 Pac. Rep. 220; and a motion to dismiss an appeal upon the ground that the record does not show a sufficient service of the notice will be denied if the appellant can show by other proof that the notice was properly served, even though the transcript be defective in that regard,—Perri v. Beaumont, 88 Cal. 108, 25 Pac. Rep. 1109. The affidavit herein of the attorney for the respondent that on the 4th day of April, 1891, he received a copy of the notice of appeal at his office and residence in San Jose, through the agency of the post office, is equivalent to an admission of service, indorsed by him upon the original notice, and establishes that there has been a personal service upon him of such notice, and that the court has thereby obtained jurisdiction of the appeal. The motion is denied.

We concur: Garoutte, J.; Paterson, J.

95 Cal. 57

VANDERHURST *et al.* v. DE WITT *et al.*

(No. 13,685.)

(*Supreme Court of California.* June 17, 1892.)

PARTNERSHIP—EVIDENCE OF.

In an action on a note signed "G. & W.," evidence of statements made by G., in the absence of W., that G. and W. were partners, is inadmissible against W.

In bank. Appeal from superior court, Monterey county; J. K. ALEXANDER, Judge.

Action on a promissory note by Vanderhurst, Sanborn & Co. against George W. De Witt and William De Witt. Plaintiffs had judgment, and William De Witt appeals. Reversed.

Geil & Morehouse, for appellant. *Dorn & Parker,* for respondents.

DE HAVEN, J. Action upon a promissory note. The trial was by a jury, and resulted in a verdict and judgment in favor of plaintiffs, and the defendant William De Witt appeals.

The note sued upon is signed, "Geo. & Wm. De Witt," and was in fact so signed and delivered to plaintiffs by the defendant George W. De Witt. The appellant alleges in his answer that the note was executed without his knowledge and authority. The evidence upon the trial tended to show that the note was made by George W. De Witt in settlement of an account which the plaintiffs had against him for merchandise furnished to and used by him in carrying on a certain farming and threshing business, in which business the respondents claim that the appellant and the said George W. De Witt were in fact partners. The evidence further shows that at the time the goods and merchandise were sold they were charged personally to George W. De Witt, and appellant was not at the time held out to respondents as a partner in the business referred to, nor did they know of the existence of the partnership now alleged.

It will be seen from the foregoing statement that the right of the respondents to maintain this action against the appellant really turns upon the question whether he was in fact a partner of the defendant George W. De Witt in the business referred to, and upon this point the court instructed the jury, in substance, that, in order to constitute such partnership, there must have been an agreement between the appellant and his codefendant to carry on the business together, and to divide the profits between them, and that the fact that appellant was to receive one half of the net profits of the farming and threshing business would not make him a partner therein if the understanding and agreement between the parties was that he was to receive the same only as a compensation for the use of certain personal property let by appellant to George W. De Witt, to be used by said George W. De Witt in the prosecution of that business solely on his own account. The evidence upon the part of the appellant tended to show the facts referred to in this instruction, and the instruction was a correct statement of the law upon the subject to which it relates. Newspaper Co. v. Farrell, 88 Mo. 594; McDonald v. Matney, 82 Mo. 358; Lindl. Partn. (2d Ed.) marg. p. 34. But upon the trial the court, against the objection and exception of the appellant, admitted evidence of the declarations of the defendant George W. De Witt, not made in the presence of the appellant, to the effect that he and the appellant were such partners. There was error in the admission of this evidence. It is well settled that upon such an issue the declaration of an alleged partner, made in the absence of the other, cannot, as against the absent one, be used to establish the fact of partnership. Cowan v. Kinney, 33 Ohio St. 422; Flanigan v. Champion, 2 N. J. Eq. 54; Dutton v. Woodman, 9 Cush. 255; Whitney v. Ferris, 10 Johns. 66; McPherson v. Rathbone, 7 Wend. 216; Hardware Co. v. Wallace, 59 Conn. 336. In Dutton v. Woodman the rule which excludes such declarations and the self-evident reason upon which it is based is thus stated by BIGELOW, J.: "The authority of Thurston and I. F. Woodman to bind E. W. Woodman by their statements and declarations depend entirely upon the existence of the copartnership. Until that was proved, E. W. Woodman was not shown to have had any connection with either of them; and, as that was the point in controversy before the jury to be determined by their verdict, evidence which would be admissible only upon the assumption of the existence of the copartnership was clearly incompetent when offered to prove the fact upon which its competency depended." This evidence being incompetent, and relating, as it did, to a material question in the case, the judgment and the order denying appellant's motion for a new trial must be reversed.

Judgment and order reversed.

We concur: SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.

94 Cal. 665

DE COURCEY V. COX. (No. 14,618.)

(*Supreme Court of California.* June 14, 1892.)

FALSE IMPRISONMENT—LIABILITY OF JUSTICE OF THE PEACE—JUDGMENT ON THE PLEADINGS.

1. A justice of the peace, since he has no jurisdiction of an act which constitutes no offense, is liable for false imprisonment if he issues a warrant for a person's arrest, charging him merely with refusing to return money paid to him by mistake, and, after rendering a judgment that he return the money or be committed, issues a warrant under which he is committed.

2. The granting of a motion for judgment on the pleadings on the ground that the complaint does not state facts sufficient to constitute a cause of action, after having overruled a demurrer based on the same ground, is a mere irregularity.

Department 2. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

Action by one De Courcey against one Cox for false imprisonment. From a judgment for defendant on the pleadings, plaintiff appeals. Reversed and remanded.

Dodson & Ecker, for appellant. *E. W. Hendrick*, for respondent.

SHARPSTEIN, J. The plaintiff brought an action against the defendant for false imprisonment. The complaint was demurred to on two grounds, one of which was that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant filed his answer to the complaint. Afterwards defendant gave plaintiff notice of a motion for judgment in favor of defendant upon the pleadings, which was granted, and a judgment was entered in favor of defendant for his costs and disbursements. From that judgment plaintiff has appealed.

If the complaint stated facts sufficient to constitute a cause of action the court undoubtedly erred in granting defendant's motion for judgment upon the pleadings. The complaint states that upon a complaint made before defendant, a justice of the peace, charging plaintiff with refusing to return the sum of $20, alleged to have been overpaid said plaintiff by mistake by the El Cajon Vineyard Company, defendant issued a warrant of arrest, upon which plaintiff was arrested and brought before defendant, and required to and did plead to said charge, and, after trial, defendant rendered a judgment that plaintiff restore said amount of $20, or be committed to the county jail for 20 days; and that, pursuant to said judgment, defendant issued a committal, and placed it in the hands of an officer, who executed it by imprisoning plaintiff in the county jail for the period of 3 days. Copies of the judgment and the commitment are inserted in the complaint, which recites that defendant proceeded wholly upon a complaint which charged plaintiff with having wrongfully retained money overpaid to her by mistake. Defendant proceeded upon the charge as he might have done had it constituted a crime, which it clearly did not. More than half a century ago, SPENCER, C. J., speaking for the supreme court of the state of New York, said: "I consider it perfectly well settled that to justify an inferior magistrate in committing a person he must have jurisdiction not only of the subject-matter of the complaint, but also of the person of the defendant." Bigelow v. Stearns, 19 Johns. 38. "If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; if he attempts to enforce any process founded on any judgment, sentence, or conviction in such case, he thereby becomes a trespasser." Piper v. Pearson, 2 Gray, 120. "It is true that justices of the peace, while acting within the scope of their authority, as well as the judges of the higher courts, are not answerable in a private action for the erroneous exercise of the judicial functions with which they are invested by law. Such protection is essential to the honest and independent administration of justice. But, on the other hand, it would seem to be well settled that inferior tribunals, invested with special jurisdiction only, and persons clothed with limited authority, such as justices of the peace, must, at their peril, keep within their prescribed jurisdiction; and if they transcend the limits of their authority they are answerable to any one whose rights are thereby invaded. And honesty of purpose in such a case, while it may mitigate damages, cannot justify a clear usurpation of power." Truesdell v. Combs, 33 Ohio St. 186. Numerous cases to the same effect might be cited, but it is unnecessary to cite them, so long as we are unadvised of any case in which the doctrine of the cases cited has ever been questioned. In the case now before us the complaint shows that no warrant could legally be issued upon the complaint made against the appellant; that she was not convicted or adjudged guilty of any crime. She was charged with the commission of an act which did not constitute a crime, and therefore the defendant never acquired any jurisdiction to proceed in the matter, and the judgment and commitment are void on their faces. These facts appearing in the complaint, coupled with the arrest and imprisonment of appellant, certainly constitute a cause of action, and the court erred in granting the motion for and entering judgment for the defendant upon the pleadings.

We have not overlooked the point made by appellant on the action of the court in granting the motion for judgment on the pleadings on the ground that the complaint did not state facts sufficient to constitute a cause of action, after having overruled a demurrer based on that ground. We think it nothing more serious than an irregularity, which it is better to avoid as far as practicable. All we desire to say on this point is that we think the demurrer was properly overruled, and the motion for judgment on the pleadings improperly granted. Judgment reversed, and cause remanded, with directions to the court below to proceed and try the issues raised by the complaint and answer.

We concur: De Haven, J.; McFarland, J.

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95 Cal. 1

Consolidated Nat. Bank v. Pacific Coast S. S. Co. (No. 14,658.)

(*Supreme Court of California.* June 15, 1892.)

Authority of Agent—Evidence—Liabilities of Principal.

1. A bank sued to recover the amount of overdrafts made by defendant's agent, with which, unknown to his principal and its general agents, he had an account in his own name as "agent" only. The overdrafts were caused by drafts payable to the general agents, and remitted by him to them as money of defendant, to cover defalcations in his accounts with them. The agent had at all times sufficient money of defendant in hand to meet all the necessary expenses of the agency. *Held*, that it will not, in the absence of express authority to borrow money, be presumed that the overdrafts were for such purpose, and authorized by the principal.

2. Evidence on behalf of defendant to prove the agent's defalcations, that the overdrafts were made to cover same, and that he had money sufficient to meet all claims, is admissible as tending to disprove the agent's authority, and that the overdrafts were loans to defendant.

3. Evidence that defendant and its general agents were never notified of the agent's bank account or of his overdraft by the agent or by the bank; that this never appeared in his account; that the general agents always received the drafts remitted by him as drafts purchased with defendant's money; that no money borrowed by the agent was ever paid or recognized by them; and that they were not notified by the bank of the overdraft till 15 months after the agent's removal,—disproves ostensible authority of the agent to overdraw.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Consolidated National Bank against Pacific Coast Steamship Company to recover the amount of an overdraft incurred by defendant's agent. From judgment for defendant, and an order denying plaintiff's motion for new trial, plaintiff appeals. Affirmed.

Works, Gibson & Titus, (*Works & Works*, of counsel,) for appellant. *Luce & McDonald*, for respondent.

Vanclief, C. The complaint in this action, showing that plaintiff and defendant are corporations, is in two counts, the first alleging "that defendant is indebted to the plaintiff for moneys had and received by it from the plaintiff in the sum of thirteen thousand five hundred and seventy-four 47-100 dollars, which sum is now due and unpaid." In the second count it is alleged, substantially, that for many successive years the defendant did business with the plaintiff by depositing in plaintiff's bank, at the city of San Diego, and drawing therefrom on its checks, large sums of money, during which time the defendant frequently overdrew its account in large sums, which were repaid at various times, except as hereinafter alleged; "that between April 18, 1889, and November 1st of same year the defendant, by its checks, regularly drawn on the plaintiff, overdrew its account in the plaintiff's said bank in the sum of $10,754.91," which, with interest at 12 per cent. per annum, amounts to $13,574.47. For this amount plaintiff prays judgment. A special demurrer to the first count, on the ground of uncertainty, was sustained by the court. The answer of the defendant specifically denies each allegation of the second count except that each party is a corporation. The case was tried without a jury, and the court found for defendant on all the issues, and rendered its judgment accordingly. Plaintiff's motion for a new trial, made on a bill of exceptions, having been denied, the plaintiff appeals both from the judgment and from the order denying a new trial.

1. Appellant contends that the evidence is insufficient to justify the findings of the court in any material particular. It appears that during the transactions in controversy the defendant was engaged in the business of marine carrier of freight and persons along the Pacific coast from Mexico to Alaska. Goodall, Perkins & Co., at San Francisco, were its general agents, but it had a local agent at each port on the coast where it did business. These local agents were under the control of the general agency, and were required to report directly to Goodall, Perkins & Co., at San Francisco. During the transaction in question J. H. Simpson was the local agent for the defendant at the port of San Diego in this state, and the plaintiff was there engaged in the business of banking. Continually since the organization of the plaintiff's bank, in 1883, until October, 1889, Simpson had an account of his deposits and drafts of money with plaintiff's bank kept in the name of "J. H. Simpson, Agent." To this account he deposited in the bank, from time to time during each month, considerable sums of money collected by him for the defendant. During the same period he was treasurer of a Masonic lodge, and also of a Unitarian Church, and from time to time deposited to the same account considerable sums of money belonging to the lodge and to the church, amounting to over $20,000, besides $23,000 of his own money. All his checks upon this account were signed "J. H. Simpson, Agent," and the greater portion of them made payable to himself, and actually paid to him. Of those paid to himself the greater portion was paid by drafts of the defendant on San Francisco, payable to Goodall, Perkins & Co. There was nothing on the checks, save the name of the payee, to indicate the purpose for which they were drawn. Neither the checks nor the account indicated for whom Simpson was agent. On or about October 1, 1889, Simpson was discovered to be some $9,000 short in his accounts with defendant, which he professed to be unable to pay, and for that reason was removed from his position as agent of defendant. At the same time his account with the plaintiff was overdrawn $11,404.32, which, with interest at 12 per cent. per annum, constitutes the amount sued for in this action. If Simpson had actual or ostensible authority to borrow money for the defendant, the plaintiff is entitled to recover, otherwise not. This is the ultimate and pivotal question of fact presented for decision. Upon this question the trial court found for the defendant, and I think the finding is justified by the evidence. The evidence is positive that no express authority to borrow money on defendant's account, nor even to deposit defendant's money in any bank, was ever given to Simpson; and there is no pretense to the contrary. But counsel for appellant contend, in substance, that such authority was implied from the necessity of borrowing money in order to carry on the business which Simpson was employed and authorized to do. The evidence, however, strongly tends to prove that no such necessity ever existed. It appears that Simpson occupied the position of agent for defendant at the port of San Diego since 1875, and that from some time in 1876 until the organization of the plaintiff bank in 1883 he had an account with the "Commercial Bank" of San Diego similar to that which he afterwards had with the plaintiff; and that upon the organization of the plaintiff bank, as the successor of the Commercial Bank, his account with the latter was transferred to the former. His account in the Commercial Bank was often overdrawn to the extent of $200 to $3,000. Between the 2d day of January, and the 31st day of December, 1888, he overdrew his account in the plaintiff bank 37 times, in sums ranging from $1,000 to $4,600; but these overdrafts were frequently canceled by deposits. On December 31, 1888, the account stood credited with a balance of $1,560.40 in Simpson's favor, and there was a still larger balance in his favor on the 13th day of February, 1889, when he drew a check in favor of himself for $15,026.92, and the next day (February 14th) drew another for $5,000. These two checks were paid to him in drafts on San Francisco, payable to Goodall, Perkins & Co., which were paid accordingly. On February 14, 1889, the overdraft was $8,930; March 13th, $13,782; April 19th, $12,567; May 17th, $13,741; June 19th, $14,099; July 16th, $14,111; August 21st, $13,692; September 12th, $15,717; October 3d, $13,398; and October 11th, when the account was closed, $11,404.32. It was proved that all overdrafts from December 31, 1888, until the account was closed were paid to Simpson in drafts on San Francisco, payable and actually paid to Goodall, Perkins & Co., as the general agents of the defendant. It seems incredible that the agents of plaintiff could have believed that any of these overdrafts were necessary to enable Simpson to carry on any business which he was authorized to do as local agent of the defendant at the port of San Diego, or that Simpson intended to use or could have used them for any such purpose. Nor, indeed, is there any evidence that they ever pretended so to believe. Yet the overdraft sued for must be included in those drawn since February 12, 1889. Mr. Simpson, who appeared as a witness on the part of the plaintiff, testified that there never was any necessity for his borrowing money to carry on any business which he was authorized to do for the defendant; that enough money was always collected by him to pay the running expenses of all the business he was authorized to do; that all his overdrafts which were paid to him by plaintiff in drafts on San Francisco, payable to Goodall, Perkins & Co., were made for the sole purpose of reducing the balance against him in his accounts with the defendant, kept by Goodall, Perkins & Co.; and that he so informed Mr. Bryant Howard, the president of the plaintiff bank, before the 13th of February, 1889. Mr. George C. Perkins, of the firm of Goodall, Perkins & Co., testified on behalf of the defendant that there never was any necessity for Simpson to borrow money for defendant for any purpose

whatever. As to the implied power of an agent to borrow money on account of his principal the court of appeals, in Bickford v. Menier, 107 N. Y. 490, 14 N. E. Rep. 438, said: "If the transaction of the business absolutely required the exercise of the power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment; but it does not afford a sufficient ground for the inference of such a power to say the act proposed was convenient or advantageous or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution of the duties really delegated in order to justify its inference from the original employment." See, also, Hurley v. Watson, 68 Mich. 531, 36 N. W. Rep. 726; Mechem, Ag. § 399; Whart. Ag. § 137; Mor. Corp. § 606. The Civil Code, § 2319, provides that an agent has authority "to do everything necessary, or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." It having been proved, as above shown, that there never was any necessity for borrowing money to effect any purpose of Simpson's agency, it will not be presumed without evidence that it was proper or usual, in the ordinary course of the business in which he was employed, to borrow money without express authority, when there was no necessity for so doing.

2. There is no evidence of ostensible authority. Simpson testified that he never notified the defendant or its general agents that he had overdrawn his account with plaintiff's bank, and that there was nothing in his correspondence with the defendant or its agents, or in the books which he kept for defendant, from which any such overdraft might have been inferred; and, furthermore, that he had never informed defendant that he had an account with plaintiff or any other bank, and did not believe that defendant had notice of any such account before October, 1889. The only circumstance which it is claimed should have operated as notice of such account to Goodall, Perkins & Co. is that seven or eight years before the trial they sent an expert accountant to examine the books kept by Simpson; and on that occasion, in order to balance his account, Simpson exhibited his pass book as a voucher for a small balance in his favor, in either the plaintiff's bank or the Commercial Bank. The pass book then exhibited showed the account to be in the name of "J. H. Simpson, Agent." Mr. Perkins testified that Goodall, Perkins & Co. never had notice that Simpson had any account with any bank; that in 1884 they had furnished him a good safe, supposed to be burglar proof, in which to keep the money of the defendant; and they always supposed that Simpson purchased the drafts remitted to them with defendant's money until after they discovered that he was short in his accounts with them, and after his last overdraft upon plaintiff. There was no evidence that defendant ever paid or recognized any debt for borrowed money contracted by Simpson or by any other local agent. Moreover, the circumstantial evidence had a tendency to prove that the agents of the plaintiff never regarded the account of "J. H. Simpson, Agent," as the account of the defendant, and never understood that defendant was responsible for Simpson's overdrafts. (1) Although often anxious to have the larger overdrafts reduced, and requesting Simpson to reduce them, they never notified the defendant of the existence of the account or of any overdraft until more than 15 months after Simpson was removed. (2) On June 20, 1888, the plaintiff took Simpson's individual note, signed "J. H. Simpson," for $7,000, to cover his overdrafts on the account of "J. H. Simpson, Agent." This note was afterwards, in July, 1888, paid by three memorandum checks drawn by the cashier on the account of "J. H. Simpson, Agent." (3) About the 1st of April, 1889, Mr. Howard, president of the bank, complained to Mr. Simpson of the amount of the overdraft, and requested that it be reduced. Simpson then told Mr. Howard that he (Simpson) was about to go to England, where he expected to get about $21,000, and on his return, in about three months, he would pay the overdraft. Howard asked him if he felt sure of that, and Simpson answered that he did. It was then agreed between them that an overdraft, not exceeding $12,000, would be allowed during Simpson's absence, and that Simpson's son, who was to act for his father during his absence, should be allowed to overdraw the account to that limit. Thereupon Simpson gave the bank written authority to his son to draw checks and transact all banking business for him until further orders, and Simpson left for England on April 8, 1889. I think it does not appear when he returned, but it does appear that he failed to raise any money. On May 17, 1889, the overdraft was $13,741, June 19th, $14,099, and September 12th, $15,717; yet during that time no notice of the overdraft was given to the general agents of the defendant. In October, 1889, Simpson was removed on account of the deficit in his accounts with the defendant. Of this the plaintiff had notice, and soon thereafter Mr. Howard, the president of the bank, went to San Francisco, and called on Goodall, Perkins & Co., and earnestly requested them to retain Mr. Simpson in their employ at San Diego in the same position he had before occupied, and offered to go on his bond for the faithful performance of his duties; yet did not then, nor until about 15 months thereafter, notify Goodall, Perkins & Co. of Simpson's overdraft in plaintiff's bank, nor of any demand against the defendant. Mr. Howard's attempted explanation of these circumstances seems unreasonable and wholly unsatisfactory. Section 2317 of the Civil Code defines ostensible authority to be "such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess." If there was any evidence tending to prove this, I think it safe to say the preponderance of the evidence was against it, and fully justifies the finding of no ostensible authority. Robinson v. Bank, 81 Cal. 107, 22 Pac. Rep. 478.

3. It is contended that the sustaining of

the special demurrer to the first count of the complaint was error prejudicial to defendant. Conceding that it was error, I think it appears that plaintiff was not injured thereby; for, although it may be true, as stated by counsel, that a state of facts may possibly have existed entitling plaintiff to recover under that count without proving the authority of the agent, Simpson, to borrow money for defendant, yet it is quite apparent from the evidence that no such state of facts did exist, and that the first and second counts were intended to represent the same cause of action.

4. The court sustained an objection to each of the following questions propounded by plaintiff's counsel to plaintiff's witness, Simpson: "*First.* When did you first commence to deposit moneys for defendant in the Consolidated National Bank? *Second.* State on whose account and for whom these deposits were made by you as agent." But the witness was afterwards permitted to answer, and did fully answer, these questions.

5. There was no error in allowing defendant to prove the amount of Simpson's defalcations, that his overdrafts were made to pay the amount he was behind in his accounts with defendant, and that at the times of the overdrafts he had money of the defendant on hand sufficient to pay all claims against the defendant. Obviously this testimony tended to prove that the overdrafts were not loans to defendant, and that Simpson had neither express nor implied authority from defendant to make them, but that they were made by Simpson for the purpose of paying his own debt to defendant. For these purposes the evidence was competent, even conceding that it did not touch the question as to the ostensible authority of Simpson.

6. The trial, so far as the evidence was concerned, was closed on July 3d, when, by consent of both parties, the summing up by counsel was postponed until July 7th. On July 7th, the court being otherwise engaged, it was again postponed until July 8th. On July 8th it was again postponed until July 9th, by request of plaintiff's counsel. On July 9th plaintiff's counsel, without previous notice, moved the court to open up the case for the purpose of allowing the plaintiff to make proof that Simpson, in the transaction of defendant's business, had signed receipts, advertised in the papers, and signed other papers and documents "J. H. Simpson, Agent;" and also that since the alleged overdrafts the defendant has taken conveyances of property from Simpson to secure defendant against loss. This motion was opposed on the grounds that the proposed evidence was irrelevant and immaterial, and that there was no showing or suggestion of surprise, oversight, or inability to have procured the proposed evidence upon the trial. The court denied the motion. Counsel for appellant contend that this action of the court was an abuse of its discretionary power; but in this I think they are mistaken. Neither the forms nor substance of the alleged receipts, advertisements, or other documents signed by Simpson as "agent" were shown. It may therefore be presumed that, unlike his account with and checks upon the plaintiff's bank, they contained the name of the principal, the Pacific Coast Steamship Company, and expressly showed the receipted demands to be claims against the principal, the advertisements to be the advertisements of the business of the principal, and that the other documents expressly purported to bind the principal. Such evidence would have added nothing favorable to plaintiff's case. Neither would the fact that defendant took security from Simpson, unless the security was given to indemnify defendant for loss on account of the demand of the plaintiff in suit, which is not pretended. Besides, there was no showing of any excuse for not having produced the evidence at the trial. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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94 Cal. 670

In re LADD'S ESTATE. (No. 14,800.)

(*Supreme Court of California.* June 15, 1892.)

CONSTRUCTION OF WILL—CODICIL.

A testator gave one half of his estate to his wife, and made the following provisions respecting the other half: "*Clause Fourth.* The remainder of my property shall remain as hereinafter provided in the hands of my executors. * * * *Clause Fifth.* Upon the death of either of my parents, one half of said property [mentioned in clause 4] shall be given to my wife * * * absolutely, * * * and the net income of the remainder, * * * not exceeding $1,200, * * * shall be paid to my sole surviving parent until his or her death, and then the entire property shall be given absolutely to my wife. * * * *Clause Sixth.* * * * If my wife * * * shall die after the death of one of my parents, and during the life time of the other, then the remainder of the one half of the property in the hands of my executors under said clause four shall be given to my said surviving parent." Afterwards the testator made a codicil reciting that whereas, since the making of the will, his father had died, and his property holdings had considerably increased, he now changed the fourth clause "in this regard, and to the extent only, that from the income of the property provided by said will to be held in trust" by his executors a monthly payment of $150 should be made to his mother, and other payments amounting to $450 to other beneficiaries. *Held*, that the codicil was intended only to make a different disposition of the income, and not to affect the wife's right to three fourths of the estate upon the death of the testator's father.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

In the matter of the estate of George S. Ladd, deceased.

Myrick & Deering, for appellants. *Pillsbury, Blanding & Hayne*, for respondent.

HARRISON, J. Appeal from a decree of distribution. By his will, which was executed February 24, 1878, the testator gave one half of his estate to his wife, and made the following provisions respecting the other half: "*Clause Fourth.* The remainder of my property shall remain as hereinafter provided in the hands of my executors, and be held or sold, and the proceeds reinvested or loaned by my executors, in their discretion, and the net income thereof, to an amount not exceeding twenty-four hundred dollars in United States gold coin per annum, payable in quarterly installments, shall be divided equally between my beloved parents, Horace Comstock Ladd and Sarah Ann Ladd, and the remainder of the income shall be paid to my wife, Elizabeth. *Clause Fifth.* Upon the death of either of my parents, one half of said property placed and to remain in the hands of my executors under the fourth clause of this will shall be given to my wife, Elizabeth, to be held by her absolutely and free from all trusts, and the net income of the remainder of such property, to an amount not exceeding twelve hundred dollars in United States gold coin per annum, payable in quarterly installments, shall be paid to my sole surviving parent until his or her death, and then the entire property shall be given to my wife, the said Elizabeth, to be held by her absolutely and free from all trusts. *Clause Sixth.* In the event that my beloved wife, Elizabeth, shall die before either of my parents, all of said one half of my estate placed and to remain in the hands of my executors under clause four of this will shall be given to my said parents in equal parts, to be held absolutely and free from all trusts. And if my wife, Elizabeth, shall die after the death of one of my parents, and during the lifetime of the other, then the remainder of the one half of the property placed and to remain in the hands of my executors under said clause four shall be given to my said surviving parent, to be held absolutely and free from all trusts." Before the death of the testator, his father died, and on the 18th of January, 1889, he made a codicil in the following terms: "Whereas, since the making of the foregoing will, my father has died, and my property holdings have considerably increased, I now change the fourth and ninth clauses of my said will in this regard, and to the extent only, that, from the income of the property provided by said will to be held in trust by my said executors, I will and direct that monthly payments be made by my said executors to the following named persons, and each of them, during their lives, that is to say: To Mrs. Anne Sarah Ladd, (my mother,) one hundred and fifty dollars," (and other sums amounting to $450 to different individuals.) The court distributed three fourths of the estate to the wife, and one fourth to the executors upon the trusts set forth in the will and codicil. From this decree the mother and a sister of the testator have appealed, claiming that, by the terms of the will and codicil, one half of the estate should have been distributed to the executors upon the said trusts.

We are of the opinion that the decree of distribution made by the court was in accordance with the terms of the will and codicil. By a proper construction of the terms of the original will, upon the death of the testator subsequent to the death of his father, only one fourth of his estate was to remain in the hands of his executors. The provision in clause 4 that the remainder (one half) of his property should remain in the hands of his executors, "as hereinafter provided," was by its terms limited and qualified by the provision subsequently made in the will, which is found in clause 5, that, upon the death of either of his parents, "one half of said property placed and to remain" in the hands of his executors under the fourth clause of his will "shall be given to my wife, Elizabeth, to be held by her absolutely, and free from all trusts." Clause 5 is a provision of the will, distinct in itself, qualifying and limiting the provision in clause 4; and from the two it clearly appears that it was the intention of the testator merely to provide a fund out of which should be derived an income for the support of his parents, and that if one parent should die before his wife the fund should be reduced to one half of the amount originally provided in clause 4, and the other half "given to his wife absolutely," and upon the death of both there should be no fund whatever, but that the entire property should be "given" to his wife. If the testator had survived both of his parents, and had made no change in his will, his wife would unquestionably have been entitled to the whole of his estate; or if he had died at the date of his codicil, and had not made the codicil, his mother only surviving him, the executors could not claim that more than one fourth of his estate should "remain" in their hands, for the reason that in clause 5 it was "hereinafter provided" that, upon the death of his father, one half of the "remainder" named in clause 4 should be given absolutely to his wife. It must be assumed that the testator, at the time of making his codicil, used the terms therein with reference to the provisions of the will, as they would be construed under the facts then existing, and with a knowledge of what property the will provided that the executors should "hold" in trust, and that he intended that no further change should be made in his will than was expressly declared in the codicil. The execution of the codicil had the effect "to republish the will, as modified by the codicil," (Civil Code, § 1287,) as of the date of the codicil, (Payne v. Payne, 18 Cal. 302.) Its effect was not limited to a republication of clause 4; and, although clause 4 is the only portion of the will which the codicil purports to modify, yet the effect of its execution was to republish the entire will, and not merely the clause so modified, "as if the testator had inserted in the codicil all the words of the will." York v. Walker, 12 Mees. & W. 597. The whole of the original will and the codicil are to be construed as a single instrument executed at the date of the codicil, and of which all the parts are to be construed "so as, if possible, to form one consistent whole." Civil Code, § 1321. A codicil is never construed to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil. 1 Jarm. Wills, p.

*176. "The dispositions made by a will are not to be disturbed by a codicil further than is absolutely necessary in order to give it effect, and a clear disposition made by the will is not revoked by a doubtful expression or inconsistent disposition in a codicil." Kane v. Astor's Ex'rs, 5 Sandf. 533. "The different parts of a will, or of a will and codicil, shall be reconciled, if possible, and, where a bequest has been once made, it shall not be revoked unless no other construction can be fairly put upon the language used by the testator." Colt v. Colt, 32 Conn. 446. See, also, Wetmore v. Parker, 52 N. Y. 462; University v. Pinckney, 55 Md. 365.

In the preamble to the codicil the testator gives as the reason for the change that since the making of the will his father had died, and his property holdings considerably increased; and it is to be presumed that the income had proportionately increased. By the terms of the original will, his wife would have received all the income after paying to his mother $1,200 a year; but, owing to the increase of income, he increased the payment to his mother, and also provided for his brother and sister, for whom in the original will he expressly declined to make any provision, —his wife at the same time receiving from the increased income of the one fourth which fell to her by reason of the death of his father a sufficient equivalent for the other payments directed to be made under the codicil. It was "in this regard"—that is, upon consideration of these facts—that he made the codicil by which he changed the fourth clause of his will "to the extent only" therein expressed; and the change made by the codicil is limited by the "extent" to which he has declared his intention to make the alteration. "A determination expressed to make an alteration in one particular negatives by implication any intention to alter it in any other respect." Quincy v. Rogers, 9 Cush. 296. The only change in his will which the testator purported to make by the codicil was in the fourth clause thereof, and the change which he purported to make in this clause was "only" to the extent of directing "that, from the income of the property provided by said will to be held in trust," his mother should receive $150 instead of $100 per month, and that, instead of paying all the remainder of the income from that property to his wife, $450 thereof should be paid to other beneficiaries. He does not either in terms or by implication change the fund from which that income is to be derived, but designates the will—not merely clause 4, but the whole will—for ascertaining the property from which to obtain the income for such payments, and declares that it is "the property provided by said will to be held in trust by my said executors." But the only property which the will authorizes the executors to hold in trust is that which he directs shall "remain" in their hands; and, as we have seen, this, after the death of the father, was only one half of the one half of the original amount set apart, since he had in clause 5 of his will directed that upon that contingency the other one half should be "given" to his wife, to be held by her absolutely and free from all trusts. It is very clear that the original purpose of the will was that the wife should take one half of his estate at his death, one half of the remainder at the death of one of his parents, and the other one half of such remainder at the death of the other. This purpose is not changed by any express language of the codicil, or by necessary implication from what he has said therein; and it must be held that, in his making a different disposition of the income, he did not intend to deprive the wife of the provision which he had previously made for her receiving a portion of his estate, upon the death of either of his parents. This construction of the effect of the codicil finds support, also, in clause 6 of the original will, in which it is provided that if his wife should die after the death of one of his parents, and during the life-time of the other, "the remainder of the one half" of the property "placed and to remain" in the hands of his executors under clause 4 —that is, one fourth of the estate of which he should die possessed—should be given to the surviving parent. It will be seen that no provision has been made in the will by which the mother can ever receive more than this one half of the "remainder of the one half of the property" which under clause 4 was to be placed in the hands of his executors. The decree of distribution is affirmed.

We concur: McFARLAND, J.; PATERSON, J.

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95 Cal. 17

In re McDEVITT'S ESTATE. (No. 14,550.)

(*Supreme Court of California.* June 16, 1892.)

WILLS—UNDUE INFLUENCE.

1. Testator made a will in favor of a brother, with whom he lived, and to the exclusion of the contestants, the children of two deceased brothers. Testator was 65 years old, of sound mind and strong character, but in bad health, and no pressure had ever been brought to bear upon him as to the disposition of his property, and he alone gave instructions as to his will. The will when executed was taken in charge by the scrivener, and there was no proof that the brother knew the will had been made. The witnesses to the will testified to the evident capacity of the testator, his careful reading of the will, and emphatic approval of a clause expressing an intention to exclude the contestants. None of the contestants were ever denied access to him, but saw him often. One of the contestants testified that the testator seemed afraid of his brother, and that on one occasion after the execution of the will he cautioned the witness when he saw the brother approaching, to say nothing; that the property would all be his by and by. The testator took a strong interest also in another of the contestants, a boy 13 years old. He often expressed an intention to provide for the boy, and the boy finally went to live with him at the house of the brother. This was three years or more before the execution of the will. The boy testified that whenever the brother found that the testator had been to see any of the other contestants he would curse and abuse him, and that, when the witness had been getting a whipping at the hands of the brother the testator would tell him he was unable to interfere, as he would expect a whipping himself if he did. *Held* insufficient to establish undue influence.

2. The use of the past tense in describing acts of undue influence alleged as ground for set-

ting aside a will does not render the statement insufficient in failing to connect the undue influence with the making of the will, where it is alleged in the concluding sentence that the decedent at a certain time, and while in the condition described, and unable to resist the importunities of a certain person, executed the pretended will.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; E. R. GARBER, Judge.

Proceeding to contest the will of Charles McDevitt, deceased. From a judgment in favor of the contestants, the beneficiaries appeal. Reversed.

Jones & O'Donnell and *E. W. McKinstry*, (*E. F. Preston*, of counsel,) for appellants. *P. F. Dunne* and *Thos. F. Barry*, for respondent.

TEMPLE, C. This proceeding is to contest the will of decedent, and the appeal is taken by the beneficiaries under the will from a judgment in favor of the contestants, from an order refusing a new trial, and from an order refusing to dismiss the proceeding on the ground that the judgment was not entered within six months after its rendition. Charles McDevitt died on the 28th of February, 1890, at the age of 65 years. The will in question was executed September 27, 1889. The testator, at the time this will was executed, was an invalid, suffering from internal cancer, from which he finally died. He seems, however, not to have been so ill as to prevent his going out. One of the contestants, James McDevitt, testified that he and his family saw him nearly every day until three or four months before he died; and further: "I saw uncle Charley in our yard about a month or so before he died. He looked sickly then, and was as white as the wall. He died by inches." Deceased was at the time living with his brother Andrew, some distance from the residence of the witness; so that he must have been going about for several months after the will was executed. Deceased was a bachelor. He was a native of Ireland, and it appears that he had at one time three brothers and a sister living in San Francisco. The brothers were all married. Two, Michael and James, died before the testator, each leaving several children, the contestants herein. James McDevitt, the father of some of the contestants, and the deceased were at one time partners in the draying business in San Francisco. The business prospered, and they purchased a ranch in Sonoma county, which was managed by the deceased, while James managed the draying business. After 10 years before the testator's death there were business differences between himself and James, which resulted in litigation and the dissolution of the copartnership. Prior to that time, when visiting the city, which he did two or three times a year, the testator lived with his brother James. At the time of the litigation he went to live with his brother Andrew, and continued to reside there until his death, about 10 years later. After the dissolution James became the owner of the ranch, and Charles of the real estate, which now constitutes his estate. The deceased left, as heirs, a sister, residing in Massachusetts, a brother Andrew, at whose residence he died, seven nephews and nieces, children of his deceased brother James, and five nephews and nieces, children of a deceased brother Michael. All except the sister resided at San Francisco. In the will, executed, as we have seen, five months before his death, the deceased gave $1,000 to his sister, and all the residue of his estate to his brother Andrew and members of his family. The will contained the following: "I make no provision for the children of my deceased brother James McDevitt, nor those of my deceased brother Michael McDevitt, and my omission to provide for them is therefore intentional."

The contest is upon the ground that the will was procured through the undue influence of Andrew McDevitt, in this: that decedent had, prior to the execution of the will, for several years been living at the house of Andrew, and had become subject to the wishes and much in fear of, and dominated by, him; that at the time decedent had been sick and suffering, and became enfeebled in mind and body, and while in that condition was not permitted by said Andrew to see and converse with any of his relations except the immediate family of said Andrew, and was falsely told by said Andrew that his relations, except said Andrew and his family, cared nothing for him, and he ought not to do anything for them, and was urged and importuned by said Andrew, while in said condition, to make a will, giving all his estate to Andrew and his family; that, unable to resist the importunities, decedent made his mark to said will. The contest was tried with a jury, and by stipulation the only issue was, "Did the said Charles McDevitt, at the time of signing the instrument offered for probate, sign or execute the same under undue influence of Andrew McDevitt?" to which the jury answered, "Yes," and the findings of the court were in accordance with the verdict. The appellant contends that the statement of the contest is insufficient, because in the specifications of the acts of undue influence the past tense is used; but I think the concluding sentence, "that at said date, and while in said condition, and unable to resist the importunities of said Andrew, deceased made his mark to said pretended will," sufficiently connects the alleged undue influence with the testamentary act.

The appellant makes several points, either of which, he contends, requires a reversal. After a careful examination, I am convinced that the evidence is insufficient, as matter of law, to justify the verdict and decision. This is one of the grounds of the motion for a new trial. If this position be correct, the other points become matter of little consequence. I shall therefore proceed to consider this question. It may be premised, in the first place, that 65 is not such an advanced age as, of itself, to suggest senility; and that the evidence shows, without conflict, that the testator was a man of sound mind and memory and of strong will. There is no evidence which tends to show impairment of intellect, unless bad health necessarily has that effect. In the next place, there is no proof whatever that he was urged or importuned by Andrew or any one else to make a will, or that it was ever suggested by any one that he ought to give his property to Andrew or any one else. It does not appear that the subject of the testamentary disposition of his property was ever mentioned except to contestants, and Andrew testified that he did not know that a will had been made until after the death of the testator, who had sent him, as he says, to get a lawyer to look after his rents. Neither Andrew nor any member of his family was present when the will was executed, although it was at Andrew's house. The will when executed was taken away by the attorney, and there was no proof that any member of Andrew's family knew of it. The witnesses to the will testify to the evident capacity of the testator, the careful reading of the will, and the emphatic approval by the testator of the clause which expressed his intention to exclude the contestants. Upon the question whether decedent was not permitted to converse privately with contestants, the testimony on behalf of contestants shows, I think, beyond all controversy, not only that the charge is not sustained, but that the contrary is true. No relative was ever denied access to deceased, but, on the contrary, whenever any called to see him they were politely received and kindly treated. Nor do I think the effort to show that Mrs. Andrew McDevitt always remained present during such interviews a success. Very few of the contestants ever called at all, and these but seldom. This lack of attention is excused on the ground that they had business differences with their uncle Andrew, and did not think they were welcome at his house; but this does not tend to prove that they were prevented from seeing their uncle Charles. And, besides, the deceased was out and around, more or less, even during his last illness. Some of the contestants occupied the property which constitutes the estate, and many of them testify that they saw the decedent frequently out at the wharfs, and at his property, where some of them lived. It does not appear that he was attended by any one during these times, and it is absurd to say that they could not have seen him and conversed with him privately had they desired. There is no evidence tending to show that there was any period during which they did not so meet the decedent, and it appears affirmatively from their own testimony that some of them did so see him during his last illness, and for three months or more after the will was executed. James McDevitt, son of James McDevitt, deceased, brother of the testator, testified: "Afterwards [after his father's death] we saw him nearly every day until three or four months before he died." And again: "I saw uncle Charley in our yard about a month or so before he died." There is no evidence tending to prove that Andrew McDevitt or any one else ever told decedent that none of his relatives except Andrew and his family cared for him. There is, however, testimony to which that construction may be given so far as the children of James McDevitt are concerned, which is hereafter set out. Giving this the full effect that can be claimed for it, it still utterly fails to prove the allegation in the statement of the grounds of contest.

To prove the friendly relations existing between the decedent and the contestants, they were allowed to put in evidence several expressions of the deceased as to his testamentary intentions. That these expressions, as a general thing, do tend in some measure to prove a friendly feeling towards the persons in regard to whom they were used, cannot be denied. They were therefore properly received. But, unless made so near the time the will was executed as to constitute a part of the *res gestæ*, they did not tend to prove that the will was procured through undue influence, merely because it does not conform to these expressions. Although, therefore, such statements, when made under such circumstances as to show friendliness, are admissible for that purpose, the effect should be carefully limited by the court to the one for which they are admissible. Only so far as the friendly relations of the parties may have such effect can they throw any light upon the testamentary intentions of the decedent at the time of the execution of the will. In fact, in a case like this, where the testator was beyond question of sound mind, they were entitled to no weight at all, in the absence of proof of influence as to the very testamentary act. None of these expressions as to testamentary intent were sufficiently near the testamentary act to constitute them part of the *res gestæ*. One instance is shown, however, of such declarations which must have been after the execution of the will, and within two or three months of the time. I think there are no others brought within a year of that act. Charles McDevitt, son of James McDevitt, testified that he went to see decedent at Andrew McDevitt's house, in regard to the rents; that after some conversation uncle Charley said, when he saw uncle Andrew coming, "Sh! say nothing; it will all be yours by and by. * * * Question. Well, did he drop the conversation with you or did he drop it after Andrew came up? Answer. He dropped it. The deceased acted as though he were afraid of Andrew; never seemed to talk freely, except when he was away." On cross-examination he said the remark was: "Go ahead, you folks will have it when I am gone." The witness also stated that this happened two or three months before his uncle died. This witness also testified that he called three times during his uncle's illness. The second time Mrs. McDevitt ushered him into the room where his uncle was, and left him alone with him. He was treated kindly and politely by Andrew McDevitt's family. Whether by this statement the decedent intended to deceive the witness, or at the time intended to execute a new will, is alike immaterial. In neither case would it tend to prove that the will which had been executed was procured by undue influence. For that purpose the evidence would have been incompetent, except in connection with evidence tending to show fraud in procuring the will, or mental unsoundness. In the last case it might tend to prove that the alleged testator did not know the nature of the will he had executed. There is no chance for such supposition here. Although there is a charge of mental weakness in the contest, there was no proof tending to establish it, unless proof of physical infirmity constitutes such proof. That it did not go to this extent here we have seen. On the other hand, it is shown that he was a man of sound mind and strong will. The attending physician and the attorney who drew the will, and another subscribing witness, show beyond doubt his sound mental condition at the time, and thorough understanding of the will. Under such circumstances, this evidence and all other of like character is entitled to no weight. Waterman v. Whitney, 11 N. Y. 157.

Another witness, whose testimony has already been alluded to as showing an effort to prejudice the alleged testator against some of his nephews and nieces, and who also stated facts tending to show that decedent greatly feared his brother Andrew, is Charles McDevitt, son of Michael McDevitt. He was a boy about 13 years of age when his mother died. His uncle Charles on various occasions took great interest in him as a bright lad, and one who was not strong, and therefore unable to do hard work. Several times it is shown his uncle Charles had expressed his intention to assist in educating him, and had declared that he would provide for him. So far as I can find, these declarations were made at least two years before the will was executed, though some do not seem to be located as to time. After his mother's death his uncle Charley took him to live with himself at his uncle Andrew's, who, however, boarded both his uncle Charley and him without pay. He went there about February 7, 1886, and remained from four to six months. During this time the conversations testified to occurred. All must have been, therefore, more than three years before the execution of the will. He says his uncle Charley looked after his schooling, bought books and clothes, and furnished him spending money, etc. Further: "I heard Andrew, after he would find out that Charley had been down to see James' folks on Sansome street, abuse him about it. This would only happen after the tenants in the house, who used to play cards with them evenings, had retired. * * * He would say, 'I heard you have been down to your brother Jim's today;' and uncle Charley would not make any reply, and uncle Andrew would say, 'You damn dirty old fool, don't you know you ought to have better sense than to go there and see those people? You will allow those girls [having reference to uncle Jim's daughters] to kiss and love you and sponge all they can out of you; but it is not for love of you, but for love of your money, and, you damn old fool, you have not got sense enough to see through that.' * * * Uncle Andrew repeatedly told uncle Charles, 'Why, damn you, only for the way I went to court and lied like I did, and went around at the time of the law suit, you would not own one half of that property that you now own, that is your possession.' Charles would never make any answer. Uncle Andrew used to call uncle Charles an old crawler. * * * Generally in the morning we had a habit of getting up at half past seven or a little later, and if my uncle Andrew would get up before me my uncle Charley would say, 'How are you?' and I would say, 'All right;' 'Sleep good?' 'All right;' and my uncle Andrew would be in the dining room, and he would pull out a cat o' nine tails, and give me a good thrashing. I was not a bad boy, but was in bed. * * * When I would talk to uncle Charley about Andrew's licking me, he would say, 'Don't let your uncle Andy know that you are coming to me complaining; don't expect me to stick up for you, because you know how he abuses me; and if I should attempt to stick up for you in any manner I would get the same as you get.' Uncle Andy would pull me out of bed and lick me. He did this about half a dozen times during the six months that I was there. * * * I only heard Andrew call him a crawler from my bed. On no another occasion did I hear it. Uncle Charley appeared to me to be afraid of uncle Andrew. Uncle Charley told me that he was afraid uncle Andy would lick him if he would stick up for me. He says, 'Never ask me to stick up for you, because if I would make the least attempt to stick up for you when uncle Andrew is beating or abusing you, I would get the same from him.'" He also testified that his uncle Andrew used to beat his children, too, and that, when his uncle Charley said he had applied for letters of guardianship for him, (the witness,) uncle Andrew abused them both, saying that his brothers and sisters were grown up and working, and able to support him, (the witness,) and he ought to go to them, and not to uncle Charley. That he did not tell his father, or his brothers or sisters, about the beatings he received,—only complained to uncle Charley.

I think I have now made a full and fair statement of the contestants' case, and that the extracts given include all that can be claimed to bear upon the question whether Andrew McDevitt exercised, or attempted to exercise, any influence over the deceased as to the testamentary act. Does this testimony, admitting its entire truthfulness, taken in connection with the other uncontradicted evidence, make out a case for the contestants? I think it does not. The other facts have been already suggested. They are the undoubted mental soundness of the testator, the clear proof of his intelligent execution of the will; the fact that he alone instructed his attorney how to draw his will; and the entire absence of evidence that any pressure was brought to bear upon him at any time, by any one, in regard to the testamentary disposition of his estate. The scrivener did not know that any one else was aware that a will was contemplated. At all events, the decedent, unaided, gave him all his instructions. In fact, the only parties spoken to in regard to his testamentary intentions, so far as disclosed by the evidence, were the contestants themselves, except, perhaps, the witness Murray.

If efforts were made to prejudice the testator against the contestants, it is shown only by the testimony above set out, given by the younger Charles McDevitt. It had reference only to the children of James, with whom deceased had had trouble and litigation, and does not seem to have reference to testamentary favors which these children might expect, but to Andrew's fear that they were getting money from his brother Charles. It was three years at least before the execution of the will, but had they been made at the very time they would not have been sufficient, even then, of themselves, to throw the burden of proof upon the proponents, the mental competency of the testator being as clearly proven as in this case. As to the statement that the testator lived in fear of personal violence from his brother Andrew, it is simply incredible. Nor is it necessary to discredit the witness to come to this conclusion. Allowing that he said all that the witness affirms, it shows that he very properly refused to interfere with the order maintained by Andrew in his own house, and his statement of fear was to be rid of complaints. I understand the matter differently from the boy. To me it seems probable, from the statements, that his uncle approved of the punishment. What brutes it makes of both to suppose that Charles, when nothing had been said to him by Andrew about it, gratuitously believed that he, a man over 60 years of age, would have been whipped with a cat o' nine tails by his brother for merely suggesting that the boy ought not to be punished. Why did Charles remain with Andrew if he was so constantly abused and lived in such fear? He was able to provide for himself. He had then another brother living in San Francisco, and many affectionate nephews and nieces. Some were living in his own house, and he is represented as saying that he considered it his home, and would go there to live but for his brother Andrew. If constantly called such opprobrious names, and in fear, why did he not do so? Some people who are friendly still talk roughly, and we can only comprehend the condition here by supposing that these brothers were of that character. The evidence, however, refutes all suspicion that Andrew attempted, by flattery or simulated kindness, to get the good will of his brother and steal his inclinations in that way.

The will is not an undutiful will. Not to divide property equally among nephews and nieces does not make it an inequitable will. An uncle is under no obligations, ordinarily, to provide for his nephews, either when living or by his will. Failure to name them in the will does not under the statute raise a presumption that they were forgotten. Circumstances may be such that failure to provide for one who is a stranger in blood may seem inequitable. No such circumstances exist here with reference to any of the contestants. It has been held, however, that the mere fact that children are unprovided for and the estate given to strangers does not throw upon the beneficiaries the burden of proving fairness. Redf. Wills, 526, and cases. The will is not at variance with natural instincts. Charles McDevitt, the alleged testator, had no descendants, no one for whom a natural duty rested upon him to provide. He had quarreled with his brother James, and had had a lawsuit with him which must have been somewhat bitter. From the testimony of young Charles McDevitt, we must infer that Andrew in that quarrel had been a warm partisan of Charles. Soon after the trouble began he went to live with Andrew, who apparently had just married. He remained with Andrew 10 years, until his death, during which time he was generally more or less of an invalid, and several times was ill. At all these times, as during his last illness, he was cared for by Mrs. Andrew McDevitt. None of the contestants assisted or ever offered to assist in caring for him. Perhaps they had a valid reason for not doing so in their disagreements with Andrew about property. But nevertheless there is the fact. They were not present at these times of trial. The family of Andrew was present. Good feeling thus won does not invalidate the will, although the services may be rendered to induce testamentary favor. Five children were born in the house while the testator was an inmate. Contestants themselves concede that he was much attached to these children. He would have been less than human and they most unattractive if they did not get close to the old man's heart. For his board at the house of Andrew he never paid or offered to pay one cent. He required more money than he was getting for rents to improve his property. He borrowed some $3,700 from Andrew for this purpose. No part of this was ever paid, nor was any obligation given for it. Andrew was his only surviving brother, and the evidence only shows one sister, living in Massachusetts, whom he had not seen for years.

Is this will executed under such circumstances unnatural or inequitable? I think not. This being so, then I say that the testimony of the contestants, in connection with the clear and uncontradicted testimony that the will was dictated and executed by an understanding mind, in the absence of apparent restraint or influence, does not raise a presumption that Andrew McDevitt procured its execution by the use of undue influence. We are not called upon to approve the will, and may regret that the boy Charles was not provided for; but there was no duty resting upon the testator with reference to him, such as he would impute to a parent. Although I do not think it of special interest here, it is well to remember that one has a right to make an unjust will, an unreasonable will, or even a cruel will. Generally such questions turn our thoughts, as they are often intended to, from the only question at issue, which always is, only, is the will the spontaneous act of a competent testator? Of course, juries lean against wills which to them seem unequal or unjust. But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper. General influence, not brought to bear upon the testamentary act, however strong or controlling, is not undue influence. There must be proof that the influence was used directly to procure the will, except in those cases where the beneficiaries or parties instrumental in having the will executed sustained a confidential relation to the testator. This case is not within the exception. In the long list of cases I have examined, the only further exception I find is that it has sometimes been held that when a testator is weak, physically and mentally, and those having exclusive access to him have procured what may be called an unnatural will,—one which we would conclude would be against the natural instincts of the testator,—a presumption is raised against the will. Evidence must be produced that pressure was brought to bear directly upon the testamentary act, but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. I think there is nothing beyond suspicion shown here. There is no proof. Circumstances have been proven which accord with the theory of undue influence, none of which are inconsistent with the hypothesis that the will was the free act of an intelligent mind. This does not amount to proof. And many circumstances are shown which are wholly inconsistent with the hypothesis of undue influence. And the presumption of law, in the absence of all proof in a contest, is in favor of the will. As to the order made after judgment, it is enough to say that I do not think this court should interfere with the action of the trial court. I think the judgment and order denying a new trial should be reversed, and a new trial ordered, and that the order refusing to dismiss should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed. Motion to dismiss denied.

94 Cal. 515

PENNIE v. ROACH. (No. 14,838.)

(*Supreme Court of California.* June 13, 1892.)

In bank.

On rehearing. For former report, see 29 Pac. Rep. 956.

PER CURIAM. Rehearing denied. In response to one point made in the petition for rehearing, we will say, in addition to the opinion heretofore filed, that that part of the decree in this case relating to the compensation and commissions of Philip A. Roach, deceased, properly construed, does not reserve any power to the superior court, sitting as a court of equity, to adjust, in this proceeding, the amount of commissions or compensation to be allowed to the administrators of the Blythe estate, or to apportion said amount among the respective administrators, but merely reserves the power to require payment to the defendant by the plaintiff or his successor of such sum as the probate court may award on final settlement of the Blythe estate to the representatives of Philip A. Roach, for his services as administrator.

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95 Cal. 34

In re MOORE'S ESTATE. (No. 14,275.)

(*Supreme Court of California.* June 17, 1892.)

EXECUTORS AND ADMINISTRATORS — WHEN APPOINTMENT CANNOT BE QUESTIONED — LIABILITY OF.

1. Where an executor qualified and acted for more than 20 years under his appointment, on appeal from his final settlement he will not be allowed to dispute the recitation in his appointment that citation to the heirs was issued and served.

2. Erecting a building on a lot belonging to the estate, and paying the rents thereof to the widow for the support of an infant legatee, is not a compliance with a bequest which directs the executor to keep a certain sum invested, and "allow the increase thereof to accumulate" for such infant; and the executor is liable for interest on the amount.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

On application of Ferris Jewett Moore, Jr., as legatee, the executor of the estate of Ferris Jewett Moore, deceased, was cited to render his final account. From the order settling his account the executor appeals. Reversed, and decree directed.

Johnson, Johnson & Johnson, for appellant. *Catlin & Blanchard*, for respondent.

TEMPLE, C. Appeal from an order denying a motion for a new trial upon a contest over the final account of an executor. The testator died in 1868, leaving a widow and one child,—a son about 16 months old. The will was admitted to probate May 11, 1868, and the appellant was appointed executor, and at once qualified and entered upon his duties as such. He returned an inventory of the estate July 7, 1868, which showed personal property of the value of $15,176, and two lots in Sacramento, appraised at $1,461. The personal property consisted of solvent debts and a stock of goods. The latter were sold for nearly $1,000 above the appraised value after paying the expenses of sale, and the sale was approved April 27, 1870. Notice to creditors was duly published May 11, 1868. No claims against the estate were presented. The executor rendered no account of his administration until December, 1879, and then rendered no formal account as required by the statute, but only a statement of certain moneys received from his agent in charge of the property, or some of it, and disbursements made by him. In August, 1884, he filed a second account, which purports only to be a statement of receipts of rents and the disbursements of the same. A similar account, equally defective, was filed March 8, 1889. Having been cited to render a final account by the legatee, who had arrived at the age of majority, he filed what purports to be a final account June 21, 1889. This is little more than a recapitulation of the former reports, and also wholly fails to show what had become of the moneys received by the executor, except as to the rents of the real property received since the testator's death, which, it seems, amounted to $12,704. The court, however, proceeded to ascertain a balance from the evidence, and entered a final decree accordingly, adjudging the executor indebted to said estate in the sum of $12,577.50. No brief has been filed on behalf of the respondent.

The executor, on this appeal, objects that the order appointing him as such executor is void, because proper citations to the heirs were not issued and served. He took charge of the property of the estate as executor, having duly qualified under the order. For twenty odd years he has remained in possession, claiming no right save as executor, and now presents his final account as such, asking for a settlement and discharge, and in the very proceeding objects to the jurisdiction of the court. The order appointing him, and under which he qualified, recites that citations had been duly issued and served, and notices duly given according to law. If the notices were not in fact given, it was the fault of the appellant, and his taking possession of the estate was wrongful. He cannot make this objection. Moore v. Earl, 91 Cal. 632, 27 Pac. Rep. 1087. It seems that the executor, without authority, used some $5,000 of the money of the estate to erect a building upon one of the lots belonging to the estate in Sacramento. The rents of this building have since been paid to the surviving widow of the testator, who has supported Ferris Jewett Moore, Jr., son of the testator.

The ninth subdivision of the will is as follows: "I give and bequeath to my said executor the sum of three thousand, in trust of [for] my son, Ferris Jewett Moore, Jr., and I direct my said executor to invest and keep invested the said sum of three thousand dollars, and allow the increase thereof to accumulate; and when my said son shall arrive at his majority I direct my said executor to pay over to him the said sum and the increase thereof, and, in the event of the death of my said son during his minority, then the same shall go [to] my heirs forever." By the tenth subdivision the testator gave to his executor the residue of his estate after paying the debts, expenses, and other legacies, in trust to pay the interest thereon, and so much of the principal as might be necessary, to his widow for her support while she remained his widow, and for the support and education of his son until he should arrive at the age of majority. By a previous provision in the will the executor was authorized to sell at public or private sale all the property of the estate, real or personal, and convert the same into money or securities, and directed to pay all bequests, legacies, and appropriations in the will in United States legal tender currency, which the probate court construed to mean legal tender notes. The executor, as the court decided, did not make the investment directed by the ninth subdivision of the will, and therefore the court charged him with the $3,000, and credited him with $2,200, the cost in gold in 1870 of $3,000 legal tender notes. Legal interest was then computed upon this sum until the accounting. Appellant claims that he did invest this $3,000 in the building placed upon the lot belonging to the estate. This claim the probate court decided against him, and, we think, correctly. There are many cogent and obvious reasons for holding that the money expended in the erection of this building was not an investment under the ninth subdivision of the will; and, notwithstanding his positive testimony to that effect, it is also obvious that the executor himself did not so consider it. Under that subdivision he was required to allow the increase to accumulate. In fact he paid the rents to the mother of the legatee for his support, as he was required to do with the profits of the property held by him in trust under the tenth subdivision. We cannot see, however, what authority the court had to charge the executor with the difference between the value of the money held by him, as executor, in gold, and $3,000 in legal tender notes, which is virtually what it did by the method pursued. By the ninth subdivision Hathaway was vested with this money as trustee. Had the trustee named been a third person, the payment by the executor to such trustee would have entitled him to a credit for that amount. As he was himself the trustee, he should have procured an order distributing the amount to himself as trustee, and should have made the investment. Perhaps, had he in fact made the investment, the same result would have followed, and he would, as executor, have been entitled to a credit of that sum. But he procured no such partial distribution, and made no investment of the money. It would seem to follow, then, that he still held the money as executor, and his default consists in not promptly settling the estate. It was also found that he used the money in his own business. This would make him liable for interest. If these views are correct, the other points made do not seem to be of consequence. The result would be that the decree should be modified by simply deducting from the balance found the amount by which it was increased by charging the profit which would have been made if $3,000 in legal tender notes had been purchased, which can easily be done.

We concur: Belcher, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is reversed, and the court below is directed to modify its decree settling the account of the appellant by charging him therein with the sum of $2,200 as the amount of the legacy given by Ferris Jewett Moore, Jr., by the last will and testament of Ferris Jewett Moore, deceased, instead of the sum of $3,000 in legal tender notes, and calculating interest on said sum of $2,200 in the same manner and for the same periods as it is calculated in the report of the referee on $3,000.

95 Cal. 78

BLOOD v. WOODS. (No. 14,623.)

(*Supreme Court of California.* June 18, 1892.)

TOLL ROADS—DEDICATION—GRANT OF FRANCHISE BY SUPERVISORS.

1. The legislature in 1863 granted a 20-year franchise for a toll road between certain points. Plaintiff collected tolls on a road between those points for over 20 years after the grant of the franchise, but whether under authority thereof did not appear. *Held*, that as he was in possession, claiming the right to collect tolls, and made no claim under any other authority, it would be concluded that he claimed under the legislative franchise, which had expired by limitation.

2. One who without authority lays out a road, and permits the public to use it on payment of tolls, thereby dedicates it as a public road; and the portion used by those who, not going so far as the tollhouse, do not pay tolls, becomes a free public road, the use of which is not subject to the payment of tolls.

3. The board of supervisors of a county has no authority to grant a franchise to collect tolls on a free public road, and the attempt of the board so to do does not conclude inquiry as to the character of the road.

Commissioners' decision. Department 1. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Action by Harvey S. Blood against George Woods to recover tolls. Judgment for defendant, and plaintiff appeals. Affirmed.

Reddick & Solinsky, for appellant. *W. C. Green*, for respondent.

TEMPLE, C. Appeal from a judgment taken within 60 days after its rendition. The action is to recover tolls claimed to be due from defendant for passing over plaintiff's alleged toll road. The validity of the franchise is questioned. An act of the legislature of this state, passed April 8, 1863, granted to certain persons named, to be incorporated as "Silver Mountain Turnpike Company," a franchise to construct and maintain a toll road from a point in Calaveras county to a point then in Mono county, now Alpine, the franchise to continue for 20 years, tolls to be fixed by the supervisors of Calaveras county. The record contains no direct evidence that the persons named, or their assigns, or the corporation ever constructed the road under this act. The plaintiff, however, testified: "I have been on this road twenty-seven years. It has been a toll road for the use of the public ever since that time. It has been a toll road ever since 1862. This is the same road referred to in the act of the legislature of this state of April 8, 1883. People have traveled over this road both in Calaveras county and in Alpine county ever since then by paying tolls." The road was known as the "Big Tree & Carson Toll Road," and the court finds from the above evidence that it is the road referred to in the act of the legislature. On the 7th day of April, 1887, the board of supervisors of the county of Calaveras passed the following ordinance: "Ordinance No. 20. The board of supervisors of the county of Calaveras do ordain as follows: (1) H. S. Blood is hereby granted the right, privilege, and franchise to collect tolls at a rate to be fixed by this board on that portion of the Big Tree & Carson Valley Toll Road situated and being in this county, to wit, beginning at the Big Trees, and extending easterly to the boundary line on said road between Calaveras and Alpine counties, for the period of ten years after the 23d day of April, 1887." Rates of toll were fixed, and plaintiff proceeded to collect tolls at Bear Valley station, which was in Alpine county. No tollgate had been authorized by the board of Calaveras county. May 7, 1890, the board of supervisors passed the following order: "Petition of H. S. Blood, owner of the franchise to collect tolls on the so-called 'Big Tree & Carson Valley Toll Road,' received and filed, petitioning this board to establish and fix a tollgate and place to collect tolls at Gardner's or Cold Spring ranch, about 2½ miles from the Big Trees, in Calaveras county; also petitioning this board to fix the rate of toll to be collected on this road for the ensuing year. On motion it was unanimously ordered that a tollgate and place to collect tolls on said road be, and the same is hereby, established at Gardner's house, on the said 'Cold Spring Ranch,' about 2½ miles from Big Trees, in Calaveras county, and the said H. S. Blood is hereby authorized and empowered to collect tolls on said road at said Gardner's house." The court found that the road in question was a free public road, and that the ordinance granting the franchise to plaintiff and the order authorizing a tollgate at Gardner's were void.

The appellant claims (1) that the evidence does not show that the road was a free public road, but, on the contrary, that it was a private toll road, belonging to him; (2) if it were a free public road, still the ordinance and order are valid; and (3) the ordinance is conclusive, and the court cannot go behind it to inquire whether the requisite facts to authorize the board to grant the franchise existed or not.

If the appellant can be regarded, under the evidence, as the successor of the beneficiaries of the act of the legislature, the answer to the first proposition is easy. By limitation, the franchise expired in 20 years, and the road became a free public highway. Section 2619, Pol. Code. This provision of the Code and the *status* of the road after the expiration of the franchise were fully considered in People v. Davidson, 79 Cal. 166, 21 Pac. Rep. 538. But the appellant contends that it was not shown that the persons or the company named in the act, or their assigns, ever constructed the road authorized by that act, or that he was the assignee of such persons, or ever collected toll under that franchise. He testifies that the road is the road authorized by that act; that ever since the passage of that act the public has been using the road, paying tolls for so doing; and that he has been there collecting tolls for 27 years. In other words, he has been in possession, claiming to own this franchise, and has enjoyed the benefit of it. Although the record is silent on that point, we must conclude that he has had the rates of toll fixed by the board and tollgates authorized. We cannot presume that he has demanded and received, for all these years, tolls as a wrongdoer. In fact, in his evidence and in his specifications he claims that the road was a toll road. It could only be made so by a grant of a franchise from some source. Such a grant is shown, and, as there is no claim that there was any other, we must conclude that the appellant claimed the right to collect tolls under that franchise. He certainly enjoyed the benefit of it, and cannot now escape the conditions of the franchise under the claim that his title was bad, and all his acts illegal and wrongful.

But the same consequence would follow if he could escape the conditions of the grant of the franchise by showing that his title was bad. In People v. Davidson, supra, it was held that the fact that tolls are demanded, and that the public uses the road only upon condition of paying tolls, does not affect the question of dedication. There is the offer of the land to the public, and an acceptance of the offer. That portion of the road which was in Calaveras county, up to 1890, had not only been used as a public road, but as a free public road, by all who did not travel as far as Bear Valley, in Alpine county. The defendant and his neighbors had had the free use of it. If plaintiff had no franchise, there was nothing to connect it with his road in Alpine county. It was a road thrown open to the public, and accepted and used by it. These acts would constitute a dedication.

This brings us to the question, conceding that it had become a free public road, could the board grant to plaintiff a franchise to collect tolls thereon? To establish his position appellant points out that, prior to the passage of the county government act, subdivision 4, § 4046, Pol. Code, authorized boards of supervisors to lay out and control public roads, turnpikes, etc.; and in subdivision 17, § 4046, to grant licenses and franchises, as provided by law, for constructing, keeping, and taking tolls on roads, etc. These provisions were re-enacted in the county government act in 1883. This act was amended in 1889, (St. 1889, p. 233.) Subdivision 4, § 25, of this act reads: "The boards of supervisors in their respective counties have jurisdiction and power, under such limitations and restrictions as are prescribed by law, * * * (4) to lay out, maintain, control, erect, and manage public roads, turnpikes, ferries, bridges within the county, and to grant franchises and licenses to collect tolls thereon." These general statements, grouping and to some extent defining the power of the board, cannot be held to place the board above the procedure elsewhere prescribed, which often very materially limits the jurisdiction and power apparently conferred by this general language, and in the amendment to the county government act, above quoted, the power is expressly limited and restricted.

Turning now to the provisions as to toll roads, we find, commencing with section 2779 of the Political Code, a chapter with reference to toll roads. Article 1 is entitled, "Construction of Toll Roads;" and the first section in the chapter prescribes a procedure where the company requires the use of the power of eminent domain. It will be seen that the board must appoint commissioners to lay out the road, and that they control the location. Section 2789, in this chapter, prescribes what shall be done where the company has no occasion to condemn lands. Then follow many provisions in regard to construction and management, erection of bridges, tollgates, etc. To a large extent these roads are placed under the control of the board of supervisors. In the Civil Code, commencing with section 512, are provisions defining, even more minutely, what shall be done to establish toll roads. Toll roads are public roads, as much so as free public highways, and the statutes relied upon by appellant confer the power to manage and control them upon boards of supervisors, as public roads. The public roads, therefore, upon which the board may regulate the collection of tolls, are the roads so constructed, and the mode in which the board must exercise the power to grant such franchises is prescribed by the statutes and procedure alluded to. Appellant relies for authority upon People v. Davidson, supra. There was no such question before the court in that case. It was not claimed that the road, before the granting of the franchise, was a public highway. The only questions discussed, as stated by the court itself, were whether the use by the public of the road, upon condition of paying tolls, amounted to a dedication, and whether, when the franchise defendant claimed to have had, expired, the road became a free public road. So far as these two questions are concerned, I have based this decision largely upon that case. Nothing further was there decided.

That the board of supervisors has no authority to grant a franchise to collect tolls upon a free public highway was expressly held in El Dorado County v. Davison, 30 Cal. 521. Does the fact that the board has attempted to grant a franchise to collect tolls imply that the board has decided that the road is not a free public highway, but is a toll road, within the meaning of this opinion, and, if so, is that conclusion one that can be questioned collaterally? The granting of a franchise is a legislative act. It is the use of delegated power, and the board cannot exceed its authority. No case has been cited, and I know of none, in which the right to inquire whether the power has been used upon a subject-matter not within the grant of power has been questioned, in whatever form it becomes material. In cases where the right to exercise the power depends upon the existence of some fact which the board may or may not be authorized to determine, the board, as to such preliminary matter, acts in a capacity somewhat different. Whether courts can go behind such a conclusion has been, and perhaps is, a vexed question. But it is not involved here. No such authority is given the board, and the point is that the act is not within the authority delegated to the board, and could not be done under any circumstances. The act of accepting a road as one constructed under the authority of the Code, and of fixing tolls, is to some extent a judicial act. But I see nothing in this which can preclude inquiry. To give these acts that effect would enable the board to do an act wholly outside of its authority, and then, by a subsequent assertion, place it beyond question. Certainly this cannot be done. The cases cited by appellant have no bearing upon the question. It is not necessary that the board of supervisors should cause a road to be recorded as such, to render a strip of land dedicated to the public as a public road a legal public highway. I think the judgment should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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95 Cal. 75

PEOPLE v. LA RUE *et al.* (No. 13,288.)

(*Supreme Court of California.* June 18, 1892.)

WHARFINGERS—LIABILITIES ON BONDS.

Under Pol. Code, § 2523, giving the board of state harbor commissioners authority to "institute and prosecute to final judgment actions * * * for the collection of money due or that may become due," recovery on the official bond of a wharfinger for money collected and not paid over by him is not affected by a change in the law after the delinquency complained of, transferring the duty of collecting money from wharfingers to other officers.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. H. Rearden, Judge.

Action by the people of the state of California against H. M. La Rue and A. S. Greenlaw as sureties on the bond of William M. Haynie, wharfinger. Judgment for plaintiff, and order denying a new trial. Affirmed.

J. F. Wendell and *W. H. Burrows*, for appellants. *T. C. Coogan* and *F. S. Stratton*, for respondent.

Foote, C. This action is brought against the defendants, as the sureties on the bond of one William M. Haynie, as wharfinger, appointed by the board of state harbor commissioners, to recover certain moneys lost to the said board by the delinquency of said Haynie. The cause was tried before a jury, who returned a verdict for the plaintiff in the sum of $800.30. Judgment was rendered accordingly. Upon motion made for a new trial the court granted the same, unless the plaintiff should remit a certain portion of the judgment. This the plaintiff did, and a new trial was then, by an order, duly denied. From the judgment given and made in the premises, and from the order denying a new trial, this appeal is taken.

Two contentions are made for a reversal of the judgment and order: (1) That the board of harbor commissioners have prosecuted the action without authority of law, because not done on the relation of the attorney general. (2) That Haynie, the principal on the bond sued on, was appointed in March, 1880, removed from office on the 6th of March, 1883, after the delinquency complained of had taken place, and the action was commenced after a change was made in the statute, whereby the duties of the wharfinger as existing while Haynie was in office were conferred upon another officer, called a "collector." It is contended that after the passage of the amendment to section 2522 of the Political Code,[1] on March 7, 1883, (the day following the removal of Haynie from office,) the board of state harbor commissioners could not sue for moneys which had been collected and not paid by a wharfinger, as said amendment had taken the collection of moneys from wharfingers, and imposed it upon collectors. We do not perceive how this change in the law, made after the duty was violated, could take away the right to make this wrongdoer responsible for his act, which right existed when he did the act complained of; for while, under the provisions of section 2522 as amended in 1883, the duties of a wharfinger, in a matter such as this in hand, were taken from him, as such officer, and put upon a collector, section 2523 of the same Code, which was enacted in 1876, was in full force when the delinquency of Haynie took place, and was not changed when this action was brought. Said section provides, among other things, that the board of state harbor commissioners "may institute and prosecute to final judgment actions in the name of the people of the state of California * * * for the collection of any money due, or that may become due, by authority of this article." Article 9, pt. 3, tit. 6, Pol. Code. This money had become due under this article before the change in the law. Hence we think the authority existed to bring this action, and to prosecute it to final judgment, as was done. We therefore advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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95 Cal. 48

Redd v. Murry *et ux.* (No. 13,555.)

(*Supreme Court of California.* June 17, 1892.)

Deed—Sufficiency of Description—Quieting Title—Evidence.

1. Where a deed conveyed land as a numbered block, as marked on the plat of the grantor's addition to a town, this evidences the existence as against him of such a plat; and evidence tending to show a survey of the town prior to the conveyance, and that the grantor produced the plat in question some years afterwards as such plat, is sufficient to identify it as that mentioned in the deed. Sharpstein and McFarland, JJ., dissenting.

2. Such plat, although on its face furnishing no *data* for locating the particular block in question, is sufficiently definite if, with the aid of parol evidence, the land can be identified from it. Sharpstein and McFarland, JJ., dissenting.

3. Where the ownership of land, described in a deed as a numbered block, as marked on a plat produced, is put in issue by a denial of the allegation of ownership in the complaint, the plaintiff must prove title; and the decree for plaintiff, following the metes and bounds of the block as alleged in the complaint, is erroneous, in the absence of evidence identifying them as those of the block described in the deed. Sharpstein and McFarland, JJ., dissenting.

In bank. Appeal from superior court, Tulare county; W W. Cross, Judge.

Action by Redd against J. P. Murry and wife to quiet title. Judgment for plaintiff. Defendants appeal. Reversed.

For former report, see 24 Pac. Rep. 841.

Brown & Daggett, for appellants. *N. O. Bradley* and *G. E. Lawrence*, for respondent.

De Haven, J. Action to quiet title. The plaintiff recovered judgment in the superior court, and the defendants appeal. The plaintiff claims the land in controversy by virtue of a deed made to her by the defendant J. P. Murry in June, 1871, in which the land conveyed to her is described as "situate, lying, and being in Porterville, county of Tulare, state of California, and bounded and particularly described as follows, to wit: On the north, two hundred and forty feet on Mill street; on the east, one hundred and ten feet on a thirty-foot alley; on the south, two hundred and forty feet on an alley; on the west, one hundred and ten feet by a thirty-foot alley; and being all of lots Nos. one, two, three, and four, all of block No. eight, as per plat of Johnson & Murry's addition to the town of Porterville, Tulare county, California." The defendant Martha Murry is the wife of plaintiff's grantor, and bases her claim to the land in dispute upon a deed made to her by her husband subsequently to the execution of the above-mentioned deed to plaintiff.

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[1] Pol. Code, § 2522, defines the duties of the wharfinger.

1. Plaintiff's deed is not upon its face void for uncertainty, as claimed by appellants, and parol evidence was properly admitted for the purpose of identifying the plat offered in evidence by her as the one referred to in such deed. It was incumbent upon plaintiff to produce, or, in the event of its loss or destruction, give secondary evidence of the contents of the maps referred to in her deed, as without such map there was no sufficient description of the land which the deed purported to convey, (Caldwell v. Center, 30 Cal. 542;) and the court did not err in admitting in evidence the map offered by plaintiff, and claimed by her to be the one mentioned in such deed. It is true no witness testified to having seen this particular map at any time prior to 1873, which was two years after the execution of plaintiff's deed, but still we think there was sufficient evidence before the court to justify it in finding that such plat was in existence at the date of that deed, and is the one to which reference is there made. The defendant J. P. Murry, in his deed to plaintiff, having described the land conveyed as block No. 8, as marked on the plat of Johnson & Murry's addition to the town of Porterville, such deed is of itself, as against him and his codefendant, who claims under him by a subsequent conveyance, sufficient proof of the fact there was such a plat in existence when he made his deed to plaintiff. Patton v. Goldsborough, 9 Serg. & R. 53. There was also evidence given which tended to show that such an addition to the town of Porterville was in fact surveyed prior to 1871, and that defendant J. P. Murry himself produced this map some years afterwards, as the plat of Johnson & Murry's addition to that town. We think these facts were amply sufficient to identify the map in question as the one mentioned in the deed, and entitled it to be admitted in evidence.

2. It is claimed by appellant that the map is upon its face void for uncertainty, and that it furnishes no starting point or *data* from which a surveyor or any other person could locate the particular lots or block described in the deed, and that the court should have so held as a matter of law, and excluded it as evidence. We do not think the court committed any error in overruling this objection of appellant. It is true that no field notes accompanied it, nor are there upon it any signs or letters to indicate the different points of the compass, or any express designation of it as the map of any particular place. But there is shown upon its face streets and alleys and blocks subdivided into lots, a country road, and a river. Many of the streets are named, and the blocks are numbered, and it may be that persons acquainted with the locality of which it is claimed to be a map would at once recognize it as such. It certainly cannot be said, as a matter of law, that they could not, or that it would be impossible for one familiar with the town of Porterville, and Johnson & Murry's addition thereto, to locate upon the ground the block of land described in plaintiff's deed, with reference to the streets marked in this plat, and, this being so, the map is not void upon its face. Whether the block in question is capable of being thus identified is a pure question of fact, and upon this point the oral evidence of persons who are acquainted with the town of Porterville, and what is known as Johnson & Murry's addition thereto, and with the different streets or other objects shown on the map, is admissible. If the land which plaintiff's deed purported to convey can be thus identified, with the aid of the map referred to, the map is sufficiently definite, and the deed is not void for insufficiency in its description of the same.

3. The court found that plaintiff is the owner of block 8 of Johnson & Murry's addition to the town of Porterville, and that it is more particularly described as "commencing at a point on the south boundary line of Mill street in said town of Porterville, thirty feet east of the northeast corner of lot five, in block twenty; thence running easterly along said boundary line of Mill street two hundred and forty feet; thence southerly, at right angles, one hundred and ten feet; thence westerly, at right angles, two hundred and forty feet; thence northerly one hundred and ten feet to the place of beginning," and thereupon entered a judgment quieting the title of plaintiff to the land thus described. The appellants contend that this finding is against the evidence, and it seems to us that, in so far as it states that plaintiff is the owner of the land therein particularly described by metes and bounds, this contention of appellants must be upheld. The evidence before the court would support a finding and judgment to the effect that plaintiff is the owner of block 8 as marked on the plat of Johnson & Murry's addition to the town of Porterville, but there is nothing in the record before us which tends in any degree to show that this block would fall within the specific metes and bounds mentioned in the findings and judgment of the court below. If the plaintiff desired that the judgment quieting her title to the land in controversy should give a more definite description of its boundaries than is contained in the deed under which she claims, she should have introduced evidence showing that the land, which is simply referred to as a block in that deed, could also be properly described by the specific metes and bounds given in the decree. It may be that this can be shown by witnesses who know its location, but, in the absence of all evidence upon the point, the court was not justified in finding that the land which it describes in the decree by specific metes and bounds is the block 8, conveyed by plaintiff's deed.

4. The plaintiff contends, however, that under the pleadings the fact is admitted that block 8 of Johnson & Murry's addition to the town of Porterville is also correctly described by the specific metes and bounds given in the judgment of the court, and that for this reason she was not required to prove the fact. We do not so construe the pleadings. The complaint, after alleging plaintiff's ownership of block 8, as marked on the plat of Johnson & Murry's addition to the town of Porterville, proceeds by way of recital to state that said block is particularly described according to certain specific metes and bounds, which are the same as those mentioned by the court below in its findings and judgment. The answer, without taking any special issue with the recital contained in the complaint as to the boundaries of the block claimed by plaintiff, simply denies that plaintiff is the owner of the land described in the complaint, or any part thereof. This was all defendants were required to do in order to throw upon plaintiff the burden of proving that she was the owner of the land mentioned in the complaint. It was unnecessary to particularly traverse the recital in the complaint as to the boundaries of the land claimed by plaintiff. The material allegation of the complaint is that which asserts plaintiff's ownerhip of the land described; and when this alleged fact was put in issue, as it was by the answer, the plaintiff was not entitled to a decree quieting her title to such land, no matter how it might be described, without proof that she had title to it; and the production of a deed which only described the land conveyed as a certain block, with reference to a plat, did not itself, in connection with the plat which was given in evidence upon the trial, show that such block might also be just as correctly described by the specific boundaries contained in the decree, and that, therefore, the land within such specific boundaries was conveyed by such deed.

Judgment reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

SHARPSTEIN, J. I dissent.

McFARLAND, J. I dissent, and adhere to former opinion. 24 Pac. Rep. 841.

95 Cal. 41

NILES v. EDWARDS. (No. 13,050.)

(*Supreme Court of California.* June 17, 1892.)

SUPREME COURT — POWERS OF COURT IN BANK—REHEARING—MODIFYING JUDGMENT—RECORDING ORDER.

1. Under Const. art. 6, one supreme court is constituted, whose jurisdiction is exercised coordinately either in department or in bank; but the court in bank exercises supervisory jurisdiction over the action of the court in department, the exercise of which by the justices of the court may be without a distinct order that the cause be heard in bank.

2. The provision in the constitution that, within 30 days after judgment pronounced in a cause by a department of the supreme court, it may be ordered to be heard and decided in bank, is merely a provision for the consideration and determination thereof after judgment, and does not imply an additional or oral argument, the court having discretion to hear on the record and arguments or to direct additional arguments; and the word "heard" signifies the consideration, as distinguished from the trial, of a cause, and the court has control and jurisdiction of a cause for that period; and the department that pronounced the judgment itself, the court in bank, or the justices of the court may proceed to reconsider the cause, and to modify, correct, or vacate the judgment, and do so of its own motion.

3. The action of the court is not dependent upon entry of its orders by the clerk, but upon the fact of the order made, which having been shown, it is as effective as if entered of record.

In bank.

Motion for *remittitur* upon the judgment for plaintiff, originally pronounced, in department 2, in the action of Elizabeth Niles against William Edwards, upon the grounds that the court in bank had no jurisdiction to modify said judgment until the cause has been heard in bank, and that the order modifying said judgment was not entered by the clerk till after 30 days therefrom. Denied. For former reports, see 27 Pac. Rep. 159, 296.

HARRISON, J. Upon an opinion that had been prepared in this cause by Mr. Commissioner TEMPLE, the court in department 2 made an order on the 29th of June, 1891, reversing the judgment, and directing the court below to enter a judgment on the findings in favor of the plaintiff. Subsequently thereto an application was made on behalf of the respondent that the cause be heard in bank, and on the 29th of July, 1891, an order was made by the court in bank modifying the judgment that had been rendered by the department, and directing that the cause be remanded for a new trial. An opinion embodying the reasons for this modification was at the same time prepared, but it was not filed with the clerk, nor was the order entered in his minutes until the next day. For a report of the case, see 90 Cal. 10, 27 Pac. Rep. 159, 296. The appellant has moved for a *remittitur* upon the judgment originally pronounced in department 2, upon the ground that the court in bank has no jurisdiction to modify the judgment of a department until after the cause has been heard in bank upon an order therefor, and also upon the ground that the order modifying the judgment was not entered in the minutes of the clerk until after the expiration of 30 days from the time when the judgment had been pronounced in the department.

Under the constitution of this state there is but one supreme court, and the jurisdiction which is vested in it may be exercised either in bank or in department, and in either case its exercise is of equal import. The jurisdiction of the court in bank and in department is co-ordinate, and although in bank it may exercise a control over the action of a department, yet such jurisdiction is supervisory rather than appellate. As the constitution requires the court to "always be open for the transaction of business," any order that is made by a majority of the justices is an order of the court in bank, and the exercise by the justices of this supervisory control of the action of a department is the action of the court in bank. Nor is it necessary for the exercise of this supervisory jurisdiction that a distinct order be made that the cause be heard in bank. The modification by the court of the action of a department implies that it has already given to such action its consideration, and includes or dispenses with the formal order therefor. The provision in the constitution that within 30 days after judgment has been pronounced in a cause by a department an order may be made that it be heard and decided in bank is merely a provision that the cause may, after such judgment, be considered and determined by the court in bank, and does not necessarily imply that an additional or oral argument must be made or listened to before it can be so considered and determined. The term "heard," as here used, is taken from the practice in equity procedure, and corresponds to the term "trial," as used in cases at law. It signifies the consideration and determination of a cause by the court or by a judge, as distinguished from a trial of a cause, which is a term more properly predicated of its determination by a jury. See 3 Bl. Comm. 451, 453; Akerly v. Vilas, 24 Wis. 171; Merritt v. Portchester, 8 Hun, 45. This construction finds support from a consideration of the subsequent clauses of the same section, viz., that the concurrence of four justices "present at the argument" is necessary for a judgment by the court in bank; and that, if four justices "so present" do not concur in a judgment, all the justices qualified to "sit" in the cause "shall hear the argument." These clauses are not to be construed as requiring that a judgment cannot be pronounced by the court in bank unless concurred in by four of the justices who were physically present at an oral argument, or that all of the justices qualified to "sit" shall literally "hear" an argument; although it may be conceded that whenever there is an oral argument only the justices who were present at such argument would be authorized to take part in the decision of the cause. The meaning of these clauses and the construction to be given them are that the argument shall be "considered" by the court, or by those of the justices who are qualified to "act" in the cause, and that the judgment to be rendered shall be concurred in by four of the justices of the court.

The provision that a judgment pronounced in department shall not become final until the expiration of 30 days, unless approved in writing by the chief justice and two associate justices, has merely the effect to make definite by a constitutional requirement that which, prior to the adoption of the present constitution, existed only by virtue of a rule of court. Within this period of 30 days the case is still within the jurisdiction of the court, and the judgment, as well as the opinion, is subject to its control, and may be changed, modified, or vacated by the court, either in the department in which it was heard or in bank. The provision that the judgment shall become final, unless within that time an order be made that the cause be heard in bank, has only the effect to limit the time within which the judgment may be changed or modified, but it does not deprive the court of its inherent power to modify or change its judgment without such order, so long as the cause is still pending before it, and has not become final. "It is one of the inherent powers of every appellate court to revise, to modify, and to correct its judgments, so long as they are under its control." In re Jessup, 81 Cal. 466, 21 Pac. Rep. 976, and 22 Pac. Rep. 742, 1028. By the constitution the judgment that has been pronounced by the court in department is for 30 days thereafter "under the control" of the court,—not merely under the control of the department which pronounced the judgment, but of the court in bank as well,—and during that time the court—either the department which pronounced the judgment, or in bank—has the authority to modify or to correct the judgment in any particular which it may deem essential to justice. In Jessup's Case, supra, page 472, 81 Cal., and page 1032, 22 Pac. Rep., the following propositions were held: "(1) The perfecting of an appeal gives us jurisdiction of a cause, and that jurisdiction lasts until a *remittitur* is regularly issued; (2) while the cause remains subject to our jurisdiction, we have the power derived from the constitution to grant a rehearing after judgment, just as we have the power, independent of legislative enactment, to reverse, affirm, or modify the judgment of the inferior court, and to enforce our own judgment; (3) by the constitution a majority, consisting of four justices, may decide any matter within our jurisdiction."

In the exercise of its power to hear a cause in bank after a judgment thereon has been pronounced in department, the court is not limited to an application therefor by a party to the cause, or to the grounds upon which such application may be made, but this power may be exercised by it upon its own motion, irrespective of such application. The department that pronounced the judgment may itself modify or vacate the same, as may also the court in bank, or a majority of the justices of the court. An application that a cause may be so heard, whether addressed to the chief justice or to the court, is in fact an application to the court in bank; and it has been the invariable practice of the court since its organization to consider such applications, when convened in bank. Although the application may be granted upon the order of the chief justice, with the concurrence of two associate justices, yet the order is none the less the result of a consideration by the court in bank, and is to be regarded as the action of the court in bank, by virtue of the provision in the constitution that an order so made shall have the same effect as if made by a majority of the members of the court. When, therefore, the court in bank, or a majority of the justices, in the exercise of this supervisory control over the action of a department, determines that the judgment or opinion of the department should be modified, or that it is erroneous, it has the power to correct such error or to make such modification therein as the nature of the case or justice may seem to demand. Whether this shall be done upon the record already before it in the cause, including the arguments theretofore presented, or whether the court will direct additional argument, rests in its own discretion, and such discretion is to be exercised according to the exigencies of the individual case. This is the construction which has been invariably given to this section of the constitution. At the first session of the court subsequent to the adoption of the present constitution, after a judgment had been pronounced in department, the court in bank modified the opinion that had been rendered by the department. Langley v. Voll, 54 Cal. 435. See, also, to the same point, Aldrich v. Willis, 55 Cal. 86; Pulliam v. Bennett, Id. 368. In Pollard v. Putnam, 54 Cal. 630, a judgment had been rendered by the court in department reversing the cause, and remanding it to the court below, with instructions to enter judgment in favor of the defendant; and thereafter the court in bank, without making any order that the cause be heard in bank, modified the judgment by remanding the cause for a new trial. Similar action was had in Withers v. Little, 56 Cal. 373; People v. Miles, Id. 402; and in many other subsequent cases. In Falkner v. Hendy, 80 Cal. 638, 22 Pac. Rep. 401, the court in bank made a radical change in the judgment that had been pronounced in department, without ordering the cause to be heard in bank. The department has itself modified its own judgment. O'Connor v. Flynn, 57 Cal. 297. These instances (and many more might be added) of the construction given to the constitution by those who were first called upon to expound it have been followed so frequently, and the practice has been so uniform, that, if we had any doubts as to its correctness, we would not feel authorized now to give such a construction as would imply that our predecessors were in error.

The order of the court was not rendered nugatory by reason of the failure of the clerk to enter it in his minutes. The constitution declares that this court "shall always be open for the transaction of business," while the duties of the clerk are by the constitution left to be defined by the legislature, (article 6, § 11;) and, under the statute prescribing his duties, (Pol. Code, § 1030,) he is not required to keep his office open upon holidays, or upon any day except between the hours of 10 A. M. and 4 P. M. The action of the court does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made, and, whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk. It was held in Adams v. Dohrmann, 63 Cal. 417, that although the last day of the 30 days within which an order granting a hearing in bank may be made, fell upon a holiday, yet, inasmuch as the constitution provides that this court shall always be open for the transaction of business, such holiday was one of the 30 days within which such action must be taken. Inasmuch, however, as the court has the entire period of 30 days within which to take such action, it must result that any action taken upon that day is to be given effect, although the office of the clerk be not open for the purpose of making a record in his minutes of such action, and although no record thereof be made until after the expiration of the 30 days. The same principle makes effective any action of the court that may be taken after the office hours of the day, and the closing of his office by the clerk. The subsequent entry in his minutes does not give any greater effect to the order, but merely perpetuates by record the action of the court. The effect of the order of the court is determined by the fact that it was made within the limits of its constitutional authority, and any mode which the court itself may adopt for the purpose of authenticating its action is sufficient. The motion is denied.

We concur: BEATTY, C. J.; MCFARLAND, J.; GAROUTTE, J.; DE HAVEN, J.; SHARPSTEIN, J.; PATERSON, J.

(95 Cal. 129)

TATUM *et al.* v. ROSENTHAL *et al.* (No. 13,683.)

(*Supreme Court of California.* June 18, 1892.)

CREDITORS' BILL—PLEADING—PARTIES.

1. A creditors' bill, based on a valid and subsisting judgment, wholly unsatisfied, against an insolvent corporation, need not allege that the judgment was based on a valid and subsisting debt.

2. In such a suit, an objection of defect or misjoinder of parties plaintiff cannot be taken by general demurrer on the ground that other creditors should be joined when the complaint does not show on its face that there are other creditors.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLOR, Judge.

Action by Henry L. Tatum and others against E. Rosenthal and others in the nature of a creditors' bill to recover the amount of a judgment debt against an insolvent corporation in which defendants owned part paid-up shares. Judgment for plaintiffs. Defendants appeal. Affirmed.

Whitworth & Shurtleff, for appellants. *George A. Rankin*, for respondents.

FOOTE, C. This action is in the nature of a creditor's bill to compel certain subscribers to the capital stock of an insolvent corporation to account for and pay in the unpaid portion of their subscriptions, to the satisfaction, as far as it may, of a judgment obtained against the corporation, upon which execution had been returned wholly unsatisfied. Demurrers were filed to the complaint, which alleged, among other matters, that the complaint did not state facts sufficient to show a cause of action. The demurrers were overruled, and answers were filed. A trial was had which resulted in a judgment for plaintiffs against certain of the defendants. Some of the latter have appealed from the judgment, and the only points made in their briefs for its reversal are:

1. That the complaint does not allege the indebtedness upon which the judgment set out in the complaint was recovered. As to this, it can be said that, when this judgment was rendered against the corporation, it established its liability conclusively, so far as a judgment can, to pay the debt. It concluded the stockholder, in a case like this, who was in privity with the corporation; and is valid until reversed in a direct proceeding. Thomp. Liab. Stockh. § 329. This being so, we can perceive no good reason why it should be alleged that this valid and subsisting judgment was also founded upon a valid and subsisting debt.

2. It is claimed that in all bills of the kind here involved it is essential that it should be alleged in the complaint that the proceedings are for the benefit of all the creditors of the insolvent corporation. It is true that in actions of this sort the fund realized from the payments by the subscribers to the capital stock was in equity equally a fund belonging to all the creditors, and in the distribution of it, if it appeared to the court that there were other creditors than those instituting the suit, it would be the duty of that tribunal to distribute to them their *pro rata* share of the fund. And this rule proceeds upon the idea that no one creditor can secure the payment of his debt to the exclusion of other creditors. Handley v. Stutz, 137 U. S. 369, 11 Sup. Ct. Rep. 117. But we do not think that under our statute, where the facts are as stated here, viz., that the judgment debt exists, that the corporation is insolvent, that the subscribers owe a certain sum on their unpaid subscriptions, that the execution issuing on the judgment has been returned wholly unsatisfied, and it does not appear from the complaint that there are any other creditors of the corporation,—that it should be held, because of the defect of or misjoinder of other creditors, or the failure to allege that the complaint is filed for the benefit of all creditors, that, upon a general demurrer, such as here involved, the complaint is bad. It would seem that such an objection must be taken by special demurrer, as for a defect or misjoinder of parties plaintiff, where it appears from the face of the complaint, as it does not here, that there are other creditors who should be made parties; or by an answer, if there are other creditors who should be joined, (Code Civil Proc. §§ 430, 433;) and, if this be not done, the defect or misjoinder is waived, (Id. § 434.) None of the cases cited to us involve this precise point, but Mr. Thompson, in his work on the Liability of Stockholders, has this to say upon the question, at section 351: "It has long been settled that a judgment creditor who has exhausted his legal remedy by an execution returned *nulla bona* may alone or with other judgment creditors file a bill against persons holding property of the debtor, which, on account of fraud or the existence of a trust, cannot be reached by execution." This doctrine seems to be sustained by good authority. Marsh v. Burroughs, 1 Woods, 467, where it is also said: "Where a case exists in which a fund can only be divided satisfactorily among a certain class of persons, it is necessary to frame the decree in such a manner as that all those persons may be brought in for their distributive shares; but even then the bill may often be filed by any one of them on his own behalf. It is only when it appears to the court by the subsequent pleadings or otherwise that a distribution must be made (as where an executor pleads want of sufficient assets) that a decree will be made for the benefit of all." The party objecting here is not a creditor, who says he has not been made a party, nor does it appear that any such has asked to be made a party, or that there are any other creditors. It would seem, therefore, that, if the defendants were of the opinion that other parties should be joined as plaintiffs, they should, under our statute, and under the complaint, have pleaded by answer the nonjoinder of parties plaintiff. We are strengthened in our view of this matter from the fact that in Harmon v. Page, 62 Cal. 448, where one creditor alone filed a bill, there did not seem to be any question made but what he could bring the action alone, and it was said: "It appears to us to be well settled that a suit such as was instituted by the plaintiff properly lies in a court of equity, unaffected by any remedy the creditor may have under the provisions of the constitution and the statutes." We perceive no merits in the points made, and advise that the judgment be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

95 Cal. 224

Theilman v. Superior Court of Alameda County *et al.* (No. 15,013.)

(*Supreme Court of California.* June 29, 1892.)

Mandamus to Judge—Dismissal of Suit.

Both plaintiff and defendant in a suit for divorce desired its dismissal, but defendant's motion to dismiss was resisted by plaintiff's attorneys, on the ground that fees were due them from plaintiff. The court refused to dismiss, on the ground that plaintiff's attorneys of record had absolute right to control the action in her behalf. *Held* that, even though the suit should have been dismissed, *mandamus* will not lie to compel the court to dismiss it, since plaintiff, if she wishes a dismissal, has an adequate remedy in a substitution of attorneys, and, as to defendant, plaintiff's affidavit and prayer for dismissal constitute a condonation by which he can at any time defeat the action.

In bank.

Petition by M. C. Theilman for a writ of *mandamus* to compel the judge of the superior court of Alameda county to dismiss an action. Writ denied.

T. C. Van Ness and *L. A. Redman*, for petitioner. *Dodge & Fry*, for respondents.

McFarland, J. This is an original petition in this court for a writ of mandate to compel the respondents to dismiss a certain action pending before them entitled Theilman vs. Theilman. L. D. Theilman, through her attorneys Dodge & Fry, commenced an action in the court of respondents against her husband, M. C. Theilman, to obtain a divorce. A demurrer was interposed to the complaint and overruled. Defendant then filed an answer, and the action is now pending and undetermined. The plaintiff, on March 8, 1892, made an affidavit that she did not desire to further prosecute the action, and prayed the court to dismiss it. Thereupon the defendant, M. C. Theilman, (petitioner herein,) upon notice to plaintiff's attorneys, moved the court to dismiss the action. At the hearing of the motion plaintiff's attorneys filed a written objection to the dismissal, which was based entirely upon the fact that plaintiff owed them a certain sum of money as attorneys' fees in the case, and in which they consented to the dismissal upon condition that said sum should be paid them. The objection was accompanied by the affidavit of one of plaintiff's said attorneys, showing the amount due them from plaintiff for legal services in the case. The court denied the motion. In the order denying it the court recites the fact that counsel for defendant were asked if they would pay said attorneys' fees, and declined to do so, and that plaintiff declined to consent to the dismissal unless their fee was paid, and contended that the action could not be dismissed without their consent while they remained attorneys of record; and the order declared that the motion was denied "on the ground that Messrs. Dodge & Fry, being attorneys of record for plaintiff, had the absolute right to control the action in her behalf." Thereupon the defendant (petitioner herein) commenced this proceeding to compel the respondents herein to dismiss said action.

It is not necessary to determine whether the respondents erred in refusing to dismiss the action. From the briefs we learn that the refusal to dismiss was based upon the authority of San Jose v. Younger, 29 Cal. 147. It may be remarked that the facts in that case were very different from the facts in this case. There it appears that the plaintiffs had authorized the dismissal of the action "under a misapprehension as to its true condition, and that they would not have done so had they been fully advised." The attorneys for plaintiff in that case refused to consent to the dismissal in order to protect the interest of their clients. They objected on behalf of their clients, and the court held that a client should have the benefit of the judgment and advice of his counsel, and that the control of a case by counsel was a "safeguard to the client against the intrigues of his adversary." But in Theilman v. Theilman it expressly appeared that counsel for plaintiff did not object to the dismissal "on behalf of" their client. They admitted that the dismissal was proper, and objected only on account of their fee, and were willing to consent if their fee was paid. Under these circumstances, it may be considered doubtful if San Jose v. Younger applies, particularly as the case was for a divorce. However, it is clear, we think, that *mandamus* will not lie. The plaintiff in Theilman v. Theilman, if she still wishes to dismiss the action, has an adequate remedy in a substitution of attorneys; and her affidavit and prayer for a dismissal constitute a condonation by which the defendant (petitioner herein) can at any time defeat the action. The prayer of the petitioner is denied, and the proceeding dismissed.

We concur: De Haven, J.; Garoutte, J.; Harrison, J.

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95 Cal. 88

Crane v. Barnard *et al.* (No. 14,694.)

(*Supreme Court of California.* June 18, 1892.)

Mortgages—Foreclosure—Decree—Costs.

1. In an action by the assignee of a mort gage for foreclosure, and the enforcement of a street assessment against the land, which he had paid, and for personal judgment on indorsement against the mortgagee for deficiency, if any, (the right to a personal judgment against the mortgagor having been lost by his decease and the mortgagee's failure to present the claim against the estate,) where the mortgagee denied the validity of the street assessment, and the owners of the land in their separate answers admitted "the truth of the allegations in the complaint," it was proper to order from the proceeds of the sale (1) payment of the mortgage, (2) payment of the street assessment, (3) the surplus, if any, to be paid to the owners of the land; and, in case of deficiency to pay the mortgage, then judgment therefor against the mortgagee alone.

2. Where a party appeals from a judgment in his favor, and the judgment roll fails to show that he filed or served a cost bill or moved for judgment for costs, he cannot complain that the court refused to allow him costs.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Action by Newton W. Crane against Charles Barnard and others to foreclose a mortgage, etc. From the decree entered plaintiff appeals. Affirmed.

W. H. Wilde, for appellant. *E. S. Hall, J. Hamar*, and *Blackstock & Shepherd*, for respondents.

VANCLIEF, C. On February 1, 1888, Robert W. Forth made his promissory note to the defendant Barnard for $400, payable one year after date, with interest at 1 per cent. per month, and to secure the same executed to Barnard a mortgage of same date on a lot of land situate in the town of San Buenaventura, county of Ventura. May 28, 1888, Forth died intestate. On June 16, 1888, the widow, Caroline, was appointed administratrix of Forth's estate. Publication of notice to creditors to present their claims within four months was duly made, commencing on June 22, 1888; but Barnard failed to present his note or mortgage within the four months, or at all. On March 14, 1889, Barnard assigned the note and mortgage to the plaintiff for a consideration of $400, then paid, which was equal to the amount then due upon the note, the interest having been paid to Barnard up to the date of the assignment. The written assignment of the note and mortgage, made on a separate paper, contained the following clause: "And the party of the first (assignor) does hereby make, constitute, and appoint the said party of the second part his true and lawful attorney, irrevocable, in his name or otherwise, but at the proper costs and charges of the said party of the second part, to have, use, and take all lawful ways and means for the recovery of the said money and interest." On December 31, 1889, the authorities of the town of San Buenaventura claimed to have levied a street assessment of $163.20 upon the mortgaged lot in favor of one Safford, who demanded payment thereof, and threatened to foreclose it as a lien upon the lot; whereupon plaintiff, as he alleges, to protect his mortgage interest, took from Safford an assignment of the street assessment and the alleged lien therefor, and paid Safford the amount of the assessment.

Plaintiff commenced this action on February 14, 1891, to foreclose both the street assessment and the mortgage, alleging substantially the facts above stated, and, in addition thereto, that Barnard indorsed the mortgage note; and praying judgment against the defendants for the amount due upon the note and mortgage for principal and interest; that the mortgaged premises be sold for cash, subject to the lien of the street assessment, "or, in default thereof, that the proceeds of said sale be appropriated and applied to the costs and expenses thereof, to the payment of the costs of this action and attorneys' fees therein, to the payment and discharge of said assessment and the amounts due thereon, and that the balance of said proceeds be applied to the payment of the amount due the plaintiff herein; * * * and that said plaintiff may have judgment and execution against the said defendant Charles Barnard for any deficiency," etc. The answer of defendants, other than Barnard, admits the facts stated in the complaint, and prays that any surplus of the proceeds, "after satisfying the judgment of the plaintiff herein," be paid to them; but, if there remains no surplus, that they "may go hence without costs," etc. The defendant Barnard, in his answer, denied that he indorsed the note. Admits that his name was written to a receipt indorsed upon the note for interest paid him before he assigned the note, but denies that it was written or intended as an indorsement of the note to plaintiff. Denies all the averments of the complaint relating to the street assessment. Alleges that at the time of the assignment the value of the mortgaged property was $800, and that plaintiff neglected to enforce payment of the note by suit or otherwise, nine months after the assignment, during which period he might have foreclosed the mortgage, and thereby realized the whole amount due thereon before the alleged street assessment was levied, and that since said assessment the property has greatly depreciated in value. Findings of fact were waived. The court decreed a sale of the mortgaged premises by the sheriff and from the proceeds ordered the sheriff to pay to the plaintiff $512,—the amount found to be due on the note and mortgage,—and from the surplus, if any, to pay plaintiff the further sum of $188.36 for principal and interest of the street assessment; and, should a surplus still remain, that it be paid into court for the defendants other than Barnard. And the court further ordered and adjudged that, if the money proceeds of the sale should be insufficient to pay the note and mortgage, the sheriff return the deficiency, and that the clerk docket a judgment therefor against the defendant Barnard alone, and that the other defendants be free from all liability for such deficiency. The plaintiff brings this appeal from the judgment, upon the naked judgment roll, without any bill of exceptions.

1. It is contended that the court erred in directing the proceeds of the sale to be first applied to the payment of the note and mortgage. That the street assessment should have been first paid, and that a judgment should have been docketed against Barnard for the deficiency of the proceeds of the sale to pay both the assessment and the mortgage, since he was liable for both, and the mortgage was subject to the assessment. This, however, involves the untenable assumption that the street assessment was valid. Barnard denied the validity of that assessment, and the presumption, from the judgment roll containing no bill of exceptions nor findings of fact, must be that the court found in his favor upon the issue as to the validity of the street assessment. That the court allowed the street assessment as against the other defendants, who were the owners of the mortgaged property, is accounted for by the fact that they, in their separate answer, expressly

admitted "the truth of the allegations in the complaint contained."

2. It is contended for appellant that the court erred in refusing plaintiff a judgment for costs. This point has no foundation in the record. It merely appears that there is no judgment for costs. It does not appear that plaintiff filed or served any cost bill, and it cannot be presumed that he did. Riddell v. Harrell, 71 Cal. 254, 12 Pac. Rep. 67; Thompson v. Brannan, 76 Cal. 618, 18 Pac. Rep. 783. Nor does it appear that he in any manner moved the court, either before or after final judgment, to allow him costs. But if the court erred in denying him costs before final judgment, the error should have been shown by bill of exceptions or statement on motion for new trial. Muir v. Meredith, 82 Cal. 19, 22 Pac. Rep. 1080. Had the court made an erroneous order after final judgment relating to costs, the only remedy would be by appeal from such order. Empire, etc., Co. v. Bonanza, etc., Co., 67 Cal. 406, 7 Pac. Rep. 810. Upon the record here it must be presumed that the judgment is correct. I think the judgment should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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94 Cal. 29

CAHILL v. MURPHY. (No. 14,047.)

(*Supreme Court of California.* March 26, 1892.)

SLANDER—EVIDENCE—HARMLESS ERROR.

1. In an action for slander, evidence of the number and ages of plaintiff's children is competent, since she is entitled to damages for mental suffering, and such suffering may have been increased by the fear that her family would suffer by reason of the slander; but evidence that the children are dependent on her for support is inadmissible.

2. The fact that plaintiff, in an action for slander, after testifying, as was permissible, as to the number and ages of her children, was erroneously allowed to testify that they were dependent on her for support, is not ground for reversing a judgment entered on a verdict in her favor, where the verdict is not excessive, and the jury are not shown to have been influenced by the testimony.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by Mary Cahill against Daniel Murphy for slander. From a judgment for plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

Frank McGowan, for appellant. *Weaver & Crowe*, for respondent.

FITZGERALD, C. This is an action for slander. The complaint alleges, in substance, that on or about the 21st day of September, 1889, and for a long time prior thereto, plaintiff, with her children, occupied certain rooms in an hotel of which the defendant was owner and proprietor; that one of these rooms was situated on the ground floor of the hotel, and used by her for the purpose of carrying on and conducting a general merchandising business; that on said last-mentioned date, the soot in the chimney leading from the room used as a store became ignited, causing an alarm of fire to be given; and it is further alleged, upon information and belief, that the fire was communicated to the soot in the chimney from a fire in the stove situated in said store. The slanderous words, out of which this action arose, are alleged to have been falsely and maliciously spoken by the defendant of and concerning the plaintiff, and are laid as follows: "This is twice you [the plaintiff meaning] have tried to burn us [the said hotel meaning] out to get your fourteen hundred dollars insurance. But I will report you [the said plaintiff meaning] to the insurance company to-morrow morning, and have your insurance taken away from you." It is further alleged that the defendant, by the use of these words, intended to convey the meaning that the plaintiff willfully and maliciously communicated the fire to the soot in said chimney, and that by so doing she was guilty of an attempt to commit the crime of arson, and that they were so understood by those in whose presence they were uttered, to the damage of plaintiff's character and business in the sum of $10,000. A demurrer was interposed to the complaint, which, upon the grounds stated, was properly overruled. Defendant thereupon answered, specifically denying the material allegations of the complaint, and, upon the issues thus joined, plaintiff had verdict and judgment for $1,200.

The only error complained of, which we deem it necessary to consider, relates to the ruling of the court upon defendant's objection to the following question propounded to plaintiff on her examination in chief as a witness, and after she had testified, without objection, that she had "a family of four children." "Question. How many of them are dependent upon you for support?" (Objected to on the ground that the question 'is incompetent and immaterial.' The objection was overruled by the court, and defendant excepted.) Answer. Three are dependent upon me at present." It is claimed that the effect and purpose of this testimony was to arouse the sympathies and sentimental feelings of the jury, to the prejudice of defendant's case, by the introduction of an element that did not belong to it, and which the jury could not properly consider in the assessment of damages. In Rhodes v. Naglee, 66 Cal. 681, 6 Pac. Rep. 863, the ruling of the court below permitting the plaintiff, against defendant's objection, to prove that he was a married man, and had a family, was held not to be erroneous. And in Dixon v. Allen, 69 Cal. 527, 11 Pac. Rep. 179, the mother of the plaintiff was allowed to testify as to the number of her children, their ages, and the death of her husband. The rule laid down by this court in Rhodes v. Naglee, supra, and cited with approval in Dixon v. Allen, supra, rests upon the principle (although not stated) that, as mental suffering entitled the plaintiff to compensation in cases of this character, such suffering may be increased, and the damages consequently enhanced, by the fact that the members of the plaintiff's family would suffer by reason of the disgrace visited upon her by the slanderous charge. It was therefore competent in this case, on the question of damages, and for that purpose only, to prove the number and ages of plaintiff's children; but that they were dependent on her for support was irrelevant, and not within the issues raised by the pleadings; therefore erroneous. But was it such a material error as would justify a reversal? The rule in this state is well settled that injury will be presumed from error unless the record affirmatively shows to the contrary. It was competent, as we have stated, for the plaintiff to prove the number and ages of her children, and, if it appeared from the evidence that they were minors, the presumption would be that they were naturally and legally dependent on her for support. The effect, therefore, of such evidence would be the same as if proven by direct testimony. The evidence upon which the verdict was founded shows that the slanderous words charged were spoken wantonly and maliciously. The plaintiff was therefore entitled to recover of the defendant exemplary or punitive damages, and the assessment of such damages was almost entirely in the discretion of the jury. In view, therefore, of the enormity of the charge, and the situation of the parties, the plaintiff being a defenseless woman, coupled with the amount of damages awarded by the jury as compared with the sum sued for, we are satisfied that the jury was not influenced by this evidence prejudicially to the defendant's case. The verdict might well have been for a much larger sum, and yet not obnoxious to the objection that it was excessive. In this case we think the evidence immaterial, and its admission by the court a mere technical error. People v. Fick, 89 Cal. 144, 26 Pac. Rep. 759. The judgment and order should be affirmed, and we so advise.

We concur: Temple, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(94 Cal. 576)

Byrne v. Byrne. (No. 14,567.)

(*Supreme Court of California.* May 25, 1892.)

Action against Estate — Administrator both as Plaintiff and Defendant.

Where some of the heirs of a decedent bring an action against the administratrix of the estate, who is also one of the plaintiffs, to recover money from the estate, defendant is not qualified to represent the other heirs and the creditors of the estate, and a judgment for plaintiffs, without all the heirs and creditors having been made parties, is erroneous.

In bank. On rehearing. For former report, see 29 Pac. Rep. 1115.

Per Curiam. This cause having been considered by the court in bank in connection with the respondent's petition for a rehearing, the opinion and judgment of the department is modified as follows: All of said opinion following the words quoted from the case of Brown v. Mann, 12 Pac. Rep. 51, and the judgment, are stricken out, and the following substituted: According to the principle of this decision, Mary F. Byrne being disqualified to represent the interest of the heirs and creditors of the estate by reason of her adverse interest as claimant under the alleged trust, it was necessary to make all creditors of the estate, as well as all heirs, parties to the action. The record does not show that all creditors were made parties, and the judgment is therefore erroneous. The inability of Mary F. Byrne to appear as one of the parties plaintiff and also as a party defendant, by reason of the antagonism of her interests in the two capacities, can be obviated by following the course pointed out in section 382, Code Civil Proc. For these reasons the judgment must be reversed, and the cause remanded, with directions to the superior court to allow the plaintiffs to amend their complaint by making the necessary parties defendant; and it is so ordered.

Rehearing denied.

(95 Cal. 160)

Tyler v. Mayre *et al.* (No. 13,043.)

(*Supreme Court of California.* June 18, 1892.)

Trust—Attorneys—Limitations—Witnesses.

1. The owner of a note, who had brought suit on it against the maker, assigned the note, together with all the avails of the suit, to a trustee for the purpose of securing certain persons who had become sureties for him upon a bond, "first deducting and paying out of any money that may be realized all charges for costs and attorney's fees." *Held*, that such assignment created a trust in favor of the assignor's attorney for his fees and disbursements for costs in the suit on the note. 27 Pac. Rep. 160, affirmed. Sharpstein, J., dissenting.

2. Upon the death of such trustee the trust devolves upon his administrator, whose liability to the attorney may be enforced by suit. 27 Pac. Rep. 160, affirmed.

3. The attorney's right of action to enforce such trust is not within the purview of Code Civil Proc. Cal. § 1493, which limits the time for presenting against the estates of decedents claims arising upon contract. 27 Pac. Rep. 160, affirmed.

4. In an action against the administrator of a trustee and the administrator of the trustor to enforce the execution of the trust by the former, Code Civil Proc. Cal. § 1880, which makes parties in actions upon claims against decedents incompetent as witnesses as against the representatives of the decedent, renders the plaintiff an incompetent witness to prove the contract between himself and the trustor, by virtue of which he became the *cestui que trust.* 27 Pac. Rep. 160, overruled.

In bank. On rehearing.

Per Curiam. After hearing in bank we are satisfied with the conclusion reached in department, and with the opinion therein delivered by Commissioner Vanclief, 27 Pac. Rep. 160; and for the reasons stated in such opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

De Haven, J., (*concurring.*) I concur in the judgment of reversal, but dissent from that part of the opinion which holds that the court erred in sustaining the objection made to plaintiff's offer to show by his own testimony that it was "agreed between plaintiff Jane E. Chase and Wm. Irvine, that plaintiff should continue to prosecute the case as attorney for plaintiff, and if he finally succeeded in getting a judgment he should be paid out of the proceeds of said judgment, when collected, a reasonable fee," and the further offer to show by the same testimony what was agreed at the same time in reference to the written agreement referred to in the testimony of witness Reinstein.

We concur: HARRISON, J.; GAROUTTE, J

SHARPSTEIN, J., (*dissenting.*) There are four assignments of error herein, two of which are based upon the refusal of the court to permit plaintiff to testify to matters of fact occurring before the death of Jane E. Chase, deceased, whose administratrix, Clara J. Slater, was a defendant in the action. The only question which arises upon the exceptions to the rulings of the court upon the objections to the competency of the plaintiff to testify as to the matters of fact occurring before the death of Jane E. Chase is whether the action is prosecuted against the administratrix of her estate upon claim or demand against said estate. The complaint states facts sufficient to constitute a cause of action against said administratrix, and the plaintiff prays for judgment; that there is due him from defendant Clara J. Slater, as administratrix of Jane E. Chase, deceased, the sum of $1,570, payable out of the amount due on a judgment recovered in the action of said Jane E. Chase against one Evoy, in the prosecution of which plaintiff alleges that he rendered the services as the attorney of said Jane E. Chase, for which he claims there is due him from the administratrix of said estate said sum of $1,570. The circumstance of his asking to have it adjudged that said amount is payable out of the amount due on said judgment does not change the character of the claim. If it is not a claim against the estate it cannot be adjudged payable out of a judgment belonging to the estate. The plaintiff was not a competent witness to prove the facts which he offered to prove by his own evidence, and the court properly sustained the objection to his testifying to said facts. Section 1880, Code Civil Proc. The court did not err in permitting the defendants to prove by the witness Reinstein that he had seen a written agreement between plaintiff and Jane E. Chase in which it was stipulated that plaintiff should receive $250 or $300 for his services in the action of Chase v. Evoy. The finding of the court that Jane E. Chase did not assign anything to William Irvine in trust for the purpose of paying to plaintiff for his services as her attorney, or for the purpose of paying him any charge or claim whatsoever, is, in my opinion, justified by the evidence. In the assignment of Jane E. Chase to Irvine the plaintiff is once, and only once, mentioned. After declaring that the assignment is made in trust for the following uses, intents, and purposes, to wit, there follows this clause: "To secure Geo. W. Tyler and H. K. W. Clark their and each of their heirs, executors, and administrators, for their respective obligations and liabilities incurred by them, and either of them, as the bondsmen of the party of the first part, as administratrix of the estate of M. S. Chase, deceased, made and delivered on her appointment as such administratrix, and also to secure any other substitutes of said bondsmen, or either of them, to be hereafter substituted as her bondsmen in the matter of her administration of said estate, first deducting and paying out of any moneys that may be realized out of said claims all charges for costs and attorneys' fees and charges, to provide for the payment of which this assignment and transfer is also made." I fail to discover any intention to assign the claim against Evoy in trust for the payment of plaintiff's fees and charges for prosecuting an action to recover the same. Therefore, in my judgment, the finding that no such assignment was made or trust created should not be disturbed. I think the judgment and order should be affirmed.

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95 Cal. 105

CITY OF SANTA CRUZ v. ENRIGHT *et al.*

(No. 13,667)

(*Supreme Court of California.* June 18, 1892.)

CONDEMNING WATERS—RIGHT OF CITY—NECESSITY—PRESUMPTION OF GOVERNMENT TITLE — EXPERT EVIDENCE.

1. Under Const. art. 11, § 6, providing that all cities shall be controlled by general laws; and Civil Code, § 1001, and Code Civil Proc. § 1238, providing that any person may by exercise of eminent domain acquire private property for the use of "canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants" of any city,—a city, though not authorized by its charter so to do, may condemn the waters of a creek for the use of its inhabitants.

2. Where the waters of the creeks from which a water company receives its supply are insufficient in the summer time to supply the present wants of the inhabitants of a growing city to whom the company furnishes water, the city shows a necessity for condemning the waters of a stream sufficient in quantity and superior in quality, all other streams nearer the city being used by the water company.

3. In favor of one's claim of right in the waters of a creek by appropriation there is no presumption that at the time of the appropriation the lands were public lands, the provision of Act March 26, 1856, authorizing such presumption, being only for the protection of settlers, and to quiet land titles,

4. There being sufficient and uncontradicted evidence to prove defendant's title by prescription to the use of the waters of a creek, the rejection of evidence that his grantor conspicuously posted a notice at the point where he subsequently built a flume diverting the waters, stating that he claimed the waters to a certain extent for irrigation and domestic purposes, was harmless error.

5. There is no error in rejecting the testimony of one asked to give his opinion as an expert as to the effect of irrigation on lands in the mountains of Santa Cruz, it appearing that his experience had been confined to the southern part of Santa Clara county, and that he had never been on the lands under consideration except for a day in the winter; it being necessary, under such circumstances, to show that conditions as to climate, soil, topography, and rainfall were the same in both places, of which the court cannot take judicial notice.

In bank. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Action by the city of Santa Cruz against James Enright and others to condemn waters of a creek. Judgment for plaintiff. Defendants appeal. Affirmed.

Defendants' fifth and sixth requested instructions were: (5) "It is a fact admitted in this case that the Santa Cruz Water Company is a corporation organized for the purpose of supplying the city of Santa Cruz and its inhabitants with pure, fresh water, and that said company has acquired, and now holds title to, and the right to divert, the waters of Major's creek and both branches of Branciforte creek for the purpose of so supplying said city and its inhabitants. In view of this admitted fact, the court instructs you that the city of Santa Cruz has the power to acquire from said company the waters of said streams, either by purchase or condemnation; and if you find from the evidence that the waters from said streams are sufficient to supply said city and the inhabitants thereof with water, and you further find that both said streams are in much closer proximity to said city than Laguna creek, and that they can be brought into and distributed through said city at less expense than the waters of Laguna creek, then the court instructs you that the taking and acquisition of the waters of Laguna creek is not, within the meaning of the law, necessary, and you will find a verdict for the defendants." (6) "If the jury find from the evidence that the waters of Laguna creek, at the point at which it is proposed to divert them, are eleven miles distant from the city of Santa Cruz, and they further find that, much nearer than this to said city, are the waters of Major's creek, and of both branches of Branciforte creek, and that said Major's creek and Branciforte creek afford a perennial flow of pure, fresh water, sufficient to supply said city and its inhabitants with pure, fresh water, and the jury further find that the waters of Major's creek and Branciforte creek have already been diverted and appropriated to and are being used for the purpose of supplying said city and the inhabitants thereof with water, then the court instructs you that the acquisition of the waters of Laguna creek is not necessary for the supply of said city and its inhabitants, and the jury will find a verdict for the defendants."

D. M. Delmas, (*Jos. M. Shirm*, of counsel,) for appellants. *W. D. Storey*, (*Fox & Kellogg*, of counsel,) for respondent.

Paterson, J. This is an action to condemn the waters of Laguna creek, a small stream in Santa Cruz county, for the purpose of supplying the wants of plaintiff and its inhabitants. The defendant Enright is the owner of a tract of land lying below the point of the proposed diversion, and bounded on the northwest for about three miles by the creek. The defendant Enright claims that there is neither any authority nor any necessity for the exercise of the power of eminent domain, but that, if such authority exist, he is entitled to compensation for the injury he will sustain, not only as a riparian proprietor, but as a prior appropriator and owner by prescription. The jury found in favor of the plaintiff on the main issues, and assessed the defendant Enright's compensation at $8,000, and the damages to be paid to each of the other defendants who claimed some interest in the property at $1. The defendants Enright and Sylva moved for a new trial. The motion was denied, and they have appealed from the order and from the judgment.

It may be conceded for the purposes of this decision that the charter of the city of Santa Cruz confers no authority upon the municipal authorities to condemn water for the use of the inhabitants of the city. Its warrant for the exercise of the power is found in the constitution and general laws of the state. Section 6, art. 11, of the constitution, provides that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted, by authority of this constitution, shall be subject to and controlled by general laws." Section 1001, Civil Code, provides that "any person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, either by consent of the owner, or by proceedings had under the provisions of * * * the Code of Civil Procedure." Section 1238, Code Civil Proc., provides that the right of eminent domain may be exercised in behalf of the following uses: "(3) * * * Canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, village, or town." These provisions of the Codes are "general laws," applicable to municipal corporations which were formed before, as well as to those which were formed after, the adoption of the constitution of 1879. Thomason v. Ashworth, 73 Cal. 73, 14 Pac. Rep. 615; People v. Henshaw, 76 Cal. 446, 18 Pac. Rep. 413; Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604. In the case last cited our chief justice, speaking for the whole court, said: "It follows, therefore, that under this general law—general in the fullest and widest sense of the term—any public or private corporation, or any natural person, may, for any of the uses defined in section 1238 of the Code of Civil Procedure, acquire private property without the consent of the owner. * * * But the mode of exercising the power of eminent domain, and the conditions upon which it may be invoked, are no part of municipal organization. They are the subject of general laws, applicable to every person alike, and the legislature has no power to make arbitrary discriminations in this respect between different classes of persons." Although the precise point to which these remarks were addressed in that case was the right of the legislature to impose upon cities of the fifth and sixth classes the duty of making an effort to agree with the owner as a condition precedent to the exercise of the power of eminent domain, yet the principles there announced are as applicable to the questions before us herein. If sections 1001 and 1238, supra, are general laws for one purpose, they are general laws for all purposes within the scope of their provisions; and the act of March 19, 1889, which is also a general law, provides how indebtedness for such works may be incurred and paid by municipal corporations. St. 1889, p. 399.

The court did not err in refusing to give the fifth and sixth instructions proposed by the defendant, relating to the question of necessity. The evidence shows that the waters of the creeks from which the Santa Cruz Water Company receives its supply are insufficient in quantity, and a portion of them inferior in quality. They are nearer the city than Laguna creek, and in the winter season afford an abundant supply of water; but in the summer months a large portion of the city is left without water sufficient for domestic purposes, and the population of the city is steadily increasing. Distance is, of course, a matter to be considered, but it is not controlling. One of the engineers testified as follows: "There are four elements to be considered in determining the availability of a stream for supplying a city: *First*, quality; *second*, quantity; *third*, elevation; and, *fourth*, distance. The waters of the Laguna creek are excellent in quality. Their quantity is abundant; their elevation is sufficient, and their distance,—it is the nearest source of supply to said city after Major's creek and both branches of Branciforte creek."

The instructions of the court on the questions as to the power to condemn, and the necessity claimed to exist, were full, clear, and correct; and, as there was no error in the rulings of the court in admitting or excluding evidence, we are clearly satisfied that the judgment, so far as this branch of the case is concerned, should be affirmed.

It is claimed that the court erred in instructing the jury that the defendant could not acquire any right in the waters of the creek by mere appropriation. This contention cannot be sustained. Alta Land Co. v. Hancock, 85 Cal. 223, 24 Pac. Rep. 645. It does not appear whether the lands through which the stream ran at the time defendant claims to have acquired his right of appropriation were private or public property. If they were public lands of the United States at that time, we think it devolved upon the defendant to show that fact. It is contended that the presumption of law is that in 1873 the lands were public lands of the United States, and Burdge v. Smith, 14 Cal. 380, and Smith v. Doe, 15 Cal. 101, are cited in support of the proposition. We do not think such a presumption can be indulged in favor of the defendant upon his claim of right by appropriation. The decisions in the cases referred to were based upon the provision in the act of March 26, 1856, for the protection of settlers, and to quiet land titles, which reads as follows: "All lands in this state shall be deemed and regarded as public lands until the legal title is shown to have passed from the government to private parties."

During the examination of Gusshe, defendants' grantor, a notice signed by Gusshe, and dated April 14, 1873, stating that said Gusshe claimed the water flowing in Laguna creek to the extent of 125 inches under a 4-inch pressure, for irrigation and domestic purposes, was offered in evidence, and, upon objection of the plaintiff, was excluded, to which ruling the defendants excepted. The defendants offered to show that the notice had been posted in a conspicuous place at the point where Gusshe subsequently built his flume and diverted the waters of the creek, and that within 10 days a copy of the notice was recorded. The offer was rejected, and the defendants again excepted. We think this ruling of the court was erroneous. The notice was admissible on the question of title by prescription. It tended to show that defendant claimed the right to divert the water adversely to all other claimants. In view of the undisputed evidence, however, we do not see how the error could operate to the prejudice of the defendant. As stated by counsel himself in discussing another proposition: "The case was such as to leave no room for any possible doubt on the part of the jury. The evidence upon the adverse character of the diversion and use of the water by the defendant and his predecessor, Gusshe, for a period of over 15 years, was all one way. There was no conflict on the subject,—nothing which could leave any room for doubt. The witness Gusshe, the original owner, testified: 'The diversion of the water for the purposes that I have mentioned has been continued by me uninterruptedly from the time I commenced in 1873 or 1874 until I sold the land to Enright. * * * I diverted that water from the beginning, under a claim of right, openly and notoriously. All my neighbors knew of it, I suppose. No one ever objected to my doing so. I claimed that right as against everybody else on the stream.' The defendant Enright testified that 'he had continued to divert and use upon said land the waters of Laguna creek by means of the flume and ditch mentioned; that said use had been uninterrupted, open, notorious, under a claim of right against the whole world.' No witness whatever was called to contradict this, or to show that the use of the water was by permission, expressed or implied, or was otherwise than adverse." There is not a word of evidence in the record tending to impeach this statement. It is not claimed that Gusshe diverted the water under a license from any one. Gusshe stated that he had no grant from any owner of the land upon the stream to divert the water, nor any permission from any one to do so. Under these circumstances, the defendant was entitled to an instruction directing the jury to find that he had fully sustained by proof his allegation of title by adverse use; and it would have been error if such an instruction had been refused. The evidence being all one way—there being no room for doubt, as stated—on the question of adverse use of the water, we think the ruling of the court could not possibly operate to the prejudice of the defendant. The evidence offered would have been superfluous; it could have added nothing to the case which the defendant had already made on that subject. The jury were fully and fairly instructed upon all of the questions involved in the defendant's plea of title by prescription, and we must assume that they properly considered the evidence relating thereto, and included in their assessment of damages the value of defendant's prescriptive right.

We cannot say that the court erred in excluding the testimony of the witness Ray, called on behalf of the defendant. He was requested to give his opinion as an expert as to the effect of irrigation upon the lands owned by the defendant. Counsel for plaintiff objected to the question, on the ground that the witness was not shown to be competent to testify It appeared that the experience of the witness had been confined to the county of Santa Clara, and that he had never been upon the tract of land owned by the defendant, except for a period of one day in the winter prior to the time of the trial. To entitle the witness to testify it ought to have been shown that the conditions as to climate, soil, topography, and rainfall were the same in the mountains of Santa Cruz as they were in the southern part of Santa Clara county, where the witness resided. The court cannot take judicial notice of such matters.

We have carefully examined the instructions given to the jury, and, while there are two or three sentences obnoxious to criticism, when considered independent of the context, we think the charge of the court fairly presented the law applicable to the questions involved, and that the jurors were not misled by the expressions criticised by appellant. Judgment and order affirmed.

We concur: McFarland, J; Sharpstein, J., De Haven, J.; Garoutte, J.

Harrison, J., did not participate in the foregoing decision.

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95 Cal. 154

Jatunn v. Smith *et al.* (No. 13,829.)

(*Supreme Court of California.* June 18, 1892.)

Water Courses — Diversion — Prescription—Railroad Grant—When Title Passes.

Acts Cong. July 1, 1862, and July 2, 1864, granting sections of land to a railroad company in aid of the construction of its road, passed the legal title thereto upon the identification of the land by the survey and location of the road as of the date of the grant, rather than of the issuance of the patent, and consequently the title to land purchased from the company after the issuance of the patent in 1884 was not in the United States in 1874, and by a diversion of water running through it, commenced in the latter year, and continued for the statutory period, a prescriptive right to divert the same was acquired.

In bank. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by James F. Jatunn against J. M. Smith and another to enjoin the diversion of a stream. From a judgment of nonsuit, plaintiff appeals. Affirmed.

C. W. Kitts, for appellant. *P. F. Simonds*, for respondents.

De Haven, J. The plaintiff is the owner of a tract of land through which flows a stream of water known as "Wolf Creek," and the defendants, more than five years prior to the commencement of this action, diverted the waters of said stream at a point above where it enters upon the land of plaintiff. This action is brought for the purpose of enjoining the defendants from hereafter taking or diverting any of the waters of said stream, and for a judgment that plaintiff is entitled to have the stream flow down its natural bed and across the land of plaintiff. In their answer the defendants allege that plaintiff's cause of action is barred by the statute of limitations. The plaintiff was nonsuited, and from this judgment he appeals. The land owned by plaintiff is an odd-numbered section which was granted to the Central Pacific Railroad Company to aid in the construction of its road by the acts of congress of July 1, 1862, (12 St. at Large, p. 489,) and July 2, 1864, (13 St. at Large, p. 356,) and the patent therefor did not issue to the railroad company until April, 1884, which was less than five years before this action was brought. The railroad, however, was constructed from Sacramento to the Nevada state line, and fully completed and equipped in the manner prescribed by said acts of congress as early as November 3, 1869, and this fact was on that day properly certified to by the commissioners appointed by the president for the purpose of examining and reporting in relation to the construction of said road, as is shown by the recitals contained in the patent. The title of plaintiff to the land owned by him is founded upon a deed executed to him by the Central Pacific Railroad Company, in December, 1884, after it obtained its patent from the United States. The defendants diverted the waters of Wolf creek in 1874, and it is not claimed by the appellant that the evidence given upon the trial in the superior court was insufficient to show that such diversion was thereafter continued under claim of right and under such circumstances as to ripen into a prescriptive right in defendants if the statute of limitations commenced to run in their favor prior to the date of the patent issued by the United States to his grantor, the railroad company. The contention of appellant is that the United States, by its patent, conveyed to the railroad company the legal title to the land now owned by him, with all its natural riparian rights as they existed at the date of the definite location of the railroad, and that as defendants could not hold adversely to the United States they can derive no advantage from their acts of diversion and user prior to the date of the United States patent. It was held by this court in the case of Mathews v. Ferrea, 45 Cal. 51, that there could be no successful assertion of a claim to a prescriptive right to divert waters from a stream to the injury of a riparian proprietor below who had acquired his title from the United States within five years, the court, in its opinion, saying that "prescription or adverse user will not mature into a title as against the United States, and that it will not avail as a defense unless the user has been adverse for the requisite period after the title passed from the United

States." There can be no doubt of the correctness of the rule as thus declared. The general government is not subject to the jurisdiction of the state, and the latter is without power to prescribe the time within which the United States shall assert its rights in order to preserve them, and it must be regarded as settled that the statute of limitations of a state does not apply to the government of the United States, and, as a consequence, that there can be no adverse possession of land under such a law or adverse user of water to the natural flow of which such land is entitled while the title remains in the United States. Fremont v. Seals, 18 Cal. 434; Nessler v. Bigelow, 60 Cal. 98; Gardiner v. Miller, 47 Cal. 570; Treadway v. Wilder, 12 Nev. 108; Gibson v. Choteau, 13 Wall. 98. But we are unable to agree to the proposition contended for by appellant, that the legal title to the land owned by him remained in the United States until the issuance of the patent therefor to the Central Pacific Railroad Company in 1884, and that the effect of such patent was to then convey to the railroad company the legal title to such land with all the riparian rights which belonged to it at the time of the definite location of the line of such railroad. On the contrary, the grant of land to that company by the acts of congress of July 1, 1862, and July 2, 1864, to aid in the construction of its road, was a grant *in præsenti* of every alternate section of land not reserved by such granting acts, passing the legal title thereto as of the date of the grant as soon as those sections were identified by a legal survey and the definite location of the road for which the grant was made.

In defining the nature of the grant made by the acts of congress just mentioned, the supreme court of the United States, in the case of Salt Co. v. Tarpey, 142 U. S. 241, 12 Sup. Ct. Rep. 158, say: "As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was therefore in the nature of a 'float;' but when the route of the road was definitely fixed the sections granted became susceptible of identification, and the title then attached as of the date of the grant, except as to such parcels as had been in the mean time under its provisions appropriated to other purposes. * * * The terms used in the granting clause of the act of congress, and the interpretations thus given to them, exclude the idea that they are to be treated as words of contract or promise, rather than, as they naturally import, as words indicating an immediate transfer of interest. The title transferred is a legal title, as distinguished from an equitable or inchoate interest." See, also, Denny v. Dodson, 32 Fed. Rep. 899, and Forrester v. Scott, 92 Cal. 398, 28 Pac. Rep. 575, in which similar grants are construed in the same manner. And it was further held in the case from which we have just quoted that, although the acts of congress above referred to provide for the issuance of patents to the railroad company for the lands granted, upon the conditions therein named, such patents are not needed to convey the legal title to such lands, and it was not contemplated by those acts that they should be issued for any such purpose. Upon this point the court said: "While not essential to transfer the legal right, the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the lands; and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would be thus, in the grantee's hands, deeds of further assurance of his title, and therefore a source of peace and quiet to him in his possession." It necessarily follows from this view of the nature of the grant made to the Central Pacific Railroad Company by the acts of congress before mentioned, the position of appellant, that upon the completion of its railroad such company became only the equitable owner of the lands granted to it, and that the United States thereafter held the legal title to such lands in trust for it until the issuance of the patents provided for by said acts of congress, cannot be sustained. The land owned by plaintiff is an odd-numbered section, and the legal title to it passed from the United States to the Central Pacific Railroad Company when identified by a survey and the definite location of the line of its road. The title passed by the words of grant contained in the acts of congress, and not by the patent subsequently issued to it. When the legal title to land is granted by act of congress, the title of the government is as effectively divested as it would be by the issuance of a patent therefor by the executive department, under authority of law, and such land then becomes subject to the limitation laws of the state in which it is situated, and an adverse possession thereof after the date of such grant for the requisite period fixed by such laws will ripen into a legal title in favor of the adverse possessor, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor in pursuance of such act of congress. Langdeau v. Hanes, 21 Wall. 521; Longlois v. Crawford, 59 Mo. 456; Peting v. De Lore, 71 Mo. 1; Ryan v. Carter, 93 U. S. 78. The recitals contained in the patent under which plaintiff claims show that the line of the Central Pacific Railroad Company was definitely located prior to November 3, 1869, and that the company on July 26, 1882, filed with the register and receiver at Sacramento a selection of plaintiff's land, under the acts of congress before referred to, and that such selection was on that day properly certified to or approved by such register and receiver. These recitals are sufficient proof of the fact that the land was at the date of such selection surveyed by authority of the United States, and identified as land to which the grant made to that company had then attached, and that the costs of such survey, and other fees required by law, had been paid by such company. This being the case, it must be held, in accordance with the views contained in this opinion, that the legal title to such land was at that time vested in the Central Pacific Railroad Company, and the defendants, by their continued diversion of the waters of Wolf creek thereafter, under claim of right, until the commencement of this action in 1889, a period of more than five years, have acquired a prescriptive right to do so. Judgment and order affirmed.

We concur: HARRISON, J.; SHARPSTEIN, J.; PATERSON, J.; GAROUTTE, J.

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95 Cal. 152

SPENCE v. SCOTT *et al.* (No. 14,969.)

(*Supreme Court of California.* June 18, 1892.)

FORECLOSURE—DEFICIENCY JUDGMENT—STAY ON APPEAL.

Under Code Civil Proc. § 945, where a deficiency judgment is rendered on the foreclosure of a mortgage the proceedings will not be stayed if the appeal bond fails to provide for the payment of such deficiency.

In bank. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Action by E. F. Spence, trustee, against Jesup W. Scott, Henry I. Kowalsky, and others, to foreclose a mortgage. Judgment for plaintiff. Defendant Kowalsky applies for a stay of proceedings pending appeal. Application dismissed.

David Friedenrich, for petitioner. *A. B. Hotchkiss* and *Houghton, Silent & Campbell*, for respondent.

PER CURIAM. This cause is now before us upon the application of appellant, Kowalsky, for an order restraining the sheriff of Los Angeles county from executing a deed to respondent pursuant to a foreclosure sale, upon the ground that said Kowalsky has appealed to this court from the judgment of foreclosure, and has executed an undertaking on appeal, which stays all proceedings. A temporary order was made so restraining the sheriff pending the hearing and determination of the application. It appears now that the decree of foreclosure included a deficiency judgment, and that the undertaking on appeal in this case does not provide for the payment of such deficiency. It was substantially decided in the case of Johnson v. King, 91 Cal. 307, 27 Pac. Rep. 644, that in such a case the appellant, whosoever he may be, if he desires a stay of proceedings, must give an undertaking for the deficiency. And that case is not in conflict with either Association v. Wilkins, 64 Cal. 379, 1 Pac. Rep. 348, or Englund v. Lewis, 25 Cal. 337, cited by appellant. In the former case an opinion seems to have been first rendered in department, but a hearing in bank was ordered, and in the opinion of the court in bank the point involved here was not determined; while Englund v. Lewis is strictly in accord with Johnson v. King. It is true that in Johnson v. King the appellant was in possession, although he was not the mortgagor, and there was no deficiency judgment against him; but it was held that the provision applies to all appellants. Section 945, Code Civil Proc., is entirely clear upon the subject. It provides that a judgment of foreclosure shall not be stayed unless there be an undertaking "on the part of the appellant" to the effect, among other things, that "when the judgment is for the sale of mortgaged premises and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." The temporary restraining order is discharged, and the application is dismissed.

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95 Cal. 39

GREEN v. HEBBARD, Judge. (No. 15,071.)

(*Supreme Court of California.* June 17, 1892.)

MANDAMUS TO JUDGE—REFUSAL TO FIX AMOUNT OF BOND.

Mandamus will lie to a judge to compel him to fix the amount of a bond, by a person having a right to appeal, necessary to stay the operation of a writ of possession under Code Civil Proc. § 945.

Department 2.

Mandamus by Green against Hebbard, judge of the superior court. Granted.

T. M. Osmond, for petitioner. *E. F. Fitzpatrick*, for respondent.

PER CURIAM. The petitioner is entitled to appeal from the order denying her motion to vacate or modify the order made in the action of Hyde v. Boyle, 29 Pac. Rep. 247, for the writ of possession. People v. Grant, 45 Cal. 97; City of San Jose v. Fulton, Id. 316. Having the right of appeal, it is the duty of the respondent, upon her application, to fix the amount of the undertaking necessary to stay the operation of the writ of possession under section 945 of the Code of Civil Procedure. We cannot, upon this present application, consider whether the court was right or wrong in its ruling upon petitioner's motion to vacate or modify the order for the issuance of the writ of possession, as the questions which would be involved in such an appeal are not before us. Ordered that a peremptory writ of mandate issue in accordance with the prayer of the petition.

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95 Cal. 134

BERRY *et al.* v. KOWALSKY, (two cases. Nos. 13,116, 13,309.)

(*Supreme Court of California.* June 18, 1892.)

CONTRACT TO PURCHASE — NONPERFORMANCE BY PURCHASER—ACTION FOR DAMAGES—PLEADING—EVIDENCE.

1. A complaint averred that plaintiff paid defendant for the privilege of delivering to him a quantity of wheat at a stated price, set forth a receipt signed by defendant wherein it was acknowledged that in consideration of the money so paid defendant allowed plaintiff "the privilege of delivering" the alleged quantity of "S | 87 wheat," and alleged that defendant refused to receive and pay for the same. *Held*, that it sufficiently showed a contract on defendant's part to receive and pay for the wheat, and was not demurrable because it did not aver the meaning of the words "S | 87 wheat," which could be explained by parol.

2. An alleged contract to buy a quantity of "S | 87 wheat," on which an action was brought for the refusal of the purchaser to receive and pay for the wheat, was written on paper on which was

printed the rules of a produce exchange and call board, of which plaintiff had been, and his agent, who effected the contract, was, a member, and in which defendant owned a seat, though he had temporarily leased it. There was evidence that the words "S | 87 wheat" was an abbreviation used in the call board; that it meant that the seller was to have the season of 1887 in which to complete the contract; and that it meant that "No. 1 wheat" should be delivered. From other evidence it appeared that it meant that the wheat was not to be delivered, but merely "call-board contracts." *Held*, that the testimony of plaintiff that the printed words constituted no part of the contract; that he had never read them; and that the contract had no connection with the produce exchange,—was admissible, as was also for defendant that of a member of the produce exchange, who heard the preliminary negotiations, as to whether or not the contract was a "call-board contract," and was to be performed under the rules of the exchange and call board.

In bank. Appeal from superior court, city and county of San Francisco; T. F. LAWLER, Judge.

Action by F. G. Berry and another against E. H. Kowalsky. From a judgment for plaintiffs, and an order denying a motion for a new trial, defendant appeals. Reversed.

Thornton & Merzbach, for appellant. *Whittemore & Sears*, for respondents.

PER CURIAM. "There are two appeals in this case upon distinct records. No. 13,116 is from the final judgment, and upon the judgment roll. No. 13,309 is from an order denying defendant's motion for a new trial, upon a record consisting of a statement of the case in addition to the judgment roll. On the appeal from the judgment it is contended that the court erred in overruling the defendant's demurrer to the complaint, and that the findings do not support the judgment. On the appeal from the order the errors assigned are errors in law occurring at the trial. The following is a copy of the verified complaint: 'The said plaintiffs complain of the said defendant, and for cause of action herein allege: That on the 15th day of July, 1887, the plaintiffs paid to defendant the sum of one hundred dollars for the right and privilege of delivering to defendant five hundred tons of wheat at any time within thirty days from said 15th day of July, at the rate of one dollar and eighty cents per cental. Said contract is in the following words and figures, to wit: "San Francisco, July 15, 1887. Received of A. Gerberding one hundred dollars, for which I allow him the privilege of delivering me at any time, within thirty days from date, five hundred tons S | 87 wheat, at one dollar and eighty cents per cental. E. H. KOWALSKY." That said contract was made in the name of A. Gerberding, as the agent of plaintiffs, but the plaintiffs were and still are the real parties in interest. That said plaintiffs, on the 13th day of August, 1887, in the said city and county of San Francisco, at the office of said defendant, tendered the delivery of said five hundred tons of wheat to said defendant, and performed all the conditions on their part under said contract. Said plaintiffs then and there demanded from said defendant the sum of eighteen thousand dollars, payment as the price of said wheat according to said contract; that said defendant denied having purchased said wheat, and refused to pay for said wheat, to the damage of plaintiffs in the sum of eighteen thousand dollars. That said plaintiffs made said contract with said defendant in good faith for the purpose of delivering said wheat to said defendant, and had said wheat in warehouse in San Francisco for the purpose of delivering the same on said contract to said defendant. Wherefore plaintiffs pray for judgment against said defendant in the sum of eighteen thousand dollars, interest, and costs of suit, and for such other and further relief as justice may require. WHITTEMORE & SEARS, Att'ys for Plaintiffs.' This complaint was demurred to on the grounds (1) that it is ambiguous, unintelligible, and uncertain, in that 'no meaning is alleged of the words "S | 87" in the contract;' and (2) that the complaint does not state facts sufficient to constitute a cause of action. The alleged contract is not, does not purport to be, and is not alleged to be, an agreement 'to sell and buy;' nor an agreement on the part of the plaintiffs to sell wheat at any time. It imposes upon the plaintiffs no obligation to be performed by them. If it be a valid contract, it is an agreement by the defendant, for an executed consideration, to buy and accept delivery of, from the plaintiffs, a certain quantity of wheat, within a certain period of time, for a certain price, at the option of the plaintiffs, and to pay plaintiffs the price therefor. Civil Code, §§ 1726–1730; Whart. Cont. § 453*a*. Nor is the action brought to recover the price or value of wheat 'sold and delivered,' or 'bargained and sold,' but to recover damages for defendant's breach of his alleged conditional agreement to buy the wheat at plaintiffs' option.

"1. As against a general demurrer, I think the facts expressed and implied in the complaint barely constitute a cause of action. The written instrument set out purports to have been signed by the defendant, and it is designated as the contract for the breach of which (afterwards alleged) the action is brought. This implies that it was executed by the defendant. The instrument admits the receipt of a consideration of $100, for which defendant 'allows' (gives) plaintiffs the 'privilege' (option) to deliver (or not) to defendant, within thirty days, 500 tons of wheat, 'at (the price of) one dollar and eighty cents per cental.' The giving of the privilege to deliver the wheat to defendant at a certain price implies that he will receive and pay for it the price specified. The foregoing, I think, is the only admissible construction of the instrument as pleaded. If it will not bear this construction, it can have no effect as an agreement. As a breach of this agreement it is alleged that within thirty days the plaintiffs tendered a delivery of the wheat, and demanded payment of the price, thus creating the condition upon which defendant's liability depended, and that defendant refused to pay the price. This shows a breach of the agreement, for which the plaintiffs were entitled to such damages as proximately resulted therefrom.

"2. The grounds of the special demurrer, that the 'complaint is ambiguous, unintelligible, and uncertain,' do not appear on the face of the complaint. The words or abbreviations, 'S | 87,' appear to have been used as descriptive of the wheat, and to require oral evidence of their customary meaning in the business of dealing in wheat; but such oral evidence need not be stated in a pleading in which the written agreement is set out *in hæc verba*. The meaning may be proved on the trial for the purpose of enabling the court to interpret the words. Civil Code, §§ 1636, 1644–1646; Callahan v. Stanley, 57 Cal. 476. Had it appeared on the face of the complaint that even with the aid of parol evidence the words 'S | 87,' as used, were meaningless, and that a complete contract was expressed without them, they might have been disregarded as surplusage, —Harrison v. McCormick, (Cal., No. 13,039,) 26 Pac. Rep. 830; and certainly a complete contract is expressed without them. But it does not appear that, read in the light of admissible oral evidence, they are meaningless or unintelligible. So read, they may have a certain, unambiguous meaning, descriptive of the subject of the contract. Therefore the court could not see on the trial of the demurrer that those words were unintelligible, or that their use rendered the complaint ambiguous or uncertain.

"3. The execution of the contract and the breach thereof, as alleged, are found as facts. Therefore the findings support the judgment.

"4. The contract as set out in the complaint being denied, it appears by the statement on motion for new trial that to prove the contract plaintiffs offered in evidence a paper on which was written the alleged contract as pleaded. Above the manuscript, and on the same paper, was printed matter, composed of what was admitted to be extracts from the rules of the produce exchange and call board of San Francisco. The paper was objected to by counsel for defendant on the ground that it varied from the contract as pleaded, the printed matter not being set out in the complaint. Thereupon, for the apparent purpose of proving that the printed matter was no part of the contract, and that the 'contract was entirely independent of the printed heading, the plaintiff Berry, on behalf of plaintiffs, testified to the circumstances under which the contract was made, and to what he claimed to have been all the verbal negotiations (all that was said by each party) preceding and leading up to the signing of the written contract, which, he said, was drawn by him according to the verbal understanding. He was further permitted to testify, against the objection of defendant's counsel, that the 'contract was drawn independent of any connection with what is known as the "Produce Exchange." * * * I was not figuring on the contract on the board. It was business outside. * * * I never read the printed matter on the top of the contract. It had nothing whatever to do with the contract. It is the written portion of this piece of paper that constitutes the entire contract between myself and the defendant.' F. J. Bonney, a witness for the defendant, testified that he was a farmer, and was a member of the produce exchange and call board on or about July 15, 1887, and was somewhat familiar with the rules thereof, and that he was present when the contract in suit was made, and heard the preliminary talk between the parties, but was not present when defendant signed the contract. Thereupon defendant's counsel asked the witness the following questions, each of which was objected to on the ground that the effect of the answer thereto would be to vary the written contract; and the objection to each question was sustained by the court, defendant duly excepting. 'Question. Was there any reference had in the conversation between these parties to what was known as the "Call-Board Contract?" Q. Was anything said about the contract which was to be entered into between the parties being governed or to be complied with or performed under the rules of the San Francisco produce exchange and call board? Q. Was the term "board contract" used in reference to the contract proposed to be executed by them in regard to the dealing in wheat upon which they were entering?' The defendant's counsel also offered in evidence all the rules and regulations of the produce and exchange call board, but upon objection by plaintiffs' counsel they were excluded by the court. It appears that Gerberding (in whose name the contract was made) was a member of the exchange board at the date of the contract. The defendant, at the same time, owned a seat in the board, but was not then occupying it, having leased it temporarily to another person. The plaintiff Berry had formerly been a member of the board. As to whether, under the facts and circumstances disclosed by the evidence, the contract could properly be considered a 'board contract,' and as to what extent, if at all, it was governed or affected by the rules and customs of the board, the testimony was conflicting."

The foregoing is adopted from the opinion of Commissioner Vanclief, delivered in department. 27 Pac. Rep. 286.

It is testified that the phrase "S | 87 wheat," used in the contract sued on, is an abbreviation which originated in the call board, where, from the necessities of business, such a phrase is understood to mean what it would take quite a number of words to express in detail. It was testified by most of the witnesses that "S | 87 wheat" meant that the seller was to have the season of 1887 on which to complete his contract, and that it meant also that the wheat should be "No. 1 white wheat." There was also testimony to the point that the said phrase "S | 87 wheat" does not mean that the one party is to actually deliver the amount of wheat stated in the contract, or that the other party is bound to receive it all and pay the whole amount at the stated price; but that the seller is simply to produce what are denominated "Call-Board Contracts" for the wheat, instead of the wheat itself. And owing to the peculiar character of the contract here sued on, and the testimony as to the technical meaning of some of its terms, we think that the court could not arrive at a just decision of the case without knowing whether the printed matter was a part of the contract, whether it should be considered as a "board contract," and whether the phrase "S | 87 wheat" has any meaning other than that given to it by said board, and what that meaning is. The solution of these questions involves matters of fact to be determined upon evidence. We think, therefore, that the testimony of plaintiff Berry, when testifying for plaintiffs, was properly admitted over the objections of defendant, and that the court erred in sustaining objections to the questions asked by defendant of the witness Bonney as above stated, and also in sustaining the objections to the introduction of the rules and regulations of the stock exchange and call board. The contract may turn out to be a pure gambling contract, and therefore void; but from any point of view the said evidence offered by defendant should have been admitted. Judgment and order reversed, and a new trial ordered.

95 Cal. 142

Home for the Care of the Inebriates v. Reis, Treasurer. (No. 13,741.)

(*Supreme Court of California*. June 18, 1892.)

Fines—How Applied—Mandamus—When Lies.

1. Act March 17, 1876, (St. 1875–76, p. 325,) provides that the fines, not to exceed $800 in any one month, collected by the police court in the city of San Francisco for drunkenness, shall be paid by the clerk to the Home for the Care of Inebriates. Act March 5, 1889, (St. 1889, p. 62,) § 10, provides for the reorganization of the police court in San Francisco, and declares that all fines collected by that court shall be paid into the treasury of the city by the clerk once a week. Section 13 repeals all acts or parts of acts in conflict therewith. *Held*, that the latter act did not repeal that part of the former which entitles the home to the fines; and the money paid to the city treasurer to which the home is entitled is held by him for the use of the home. Sharpstein, Paterson, and Harrison, JJ., dissenting.

2. Conceding that the act of 1889 does not conflict with the act of 1876, entitling the home to the fines collected by the police court, since no law authorizes the city treasurer, after the money has reached his hands, to pay the same to the home, the remedy of the home is by action, rather than by *mandamus*. McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Application of the Home for the Care of the Inebriates, a corporation, for *mandamus* to Christian Reis, treasurer of the city and county of San Francisco. The writ was denied, and petitioner appeals. Affirmed.

Tilden & Tilden, for petitioner. *Geo. Flournoy, Jr.*, and *John H Durst*, for respondent.

Sharpstein, J. Appellant applied to the superior court of the city and county of San Francisco for a writ of mandate to compel respondent, as treasurer of said city and county, to pay to the petitioner certain moneys received by him in his official capacity. A general demurrer to the petition was interposed and sustained, and this appeal is from the judgment thereupon entered denying the relief sought. A writ of mandate may be issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Code Civil Proc. § 1085. The contention of appellant is that the law specially enjoins upon respondent, as a duty resulting from his office as treasurer, the payment to appellant the moneys demanded of him by it, by reason of certain acts of the legislature, the first of which was approved April 1, 1870, and provides, among other things, that "the Home for the Care of the Inebriates of San Francisco shall always be kept open for the reception and care of inebriates, both male and female, of every nationality and sect, free of charge for their support, care, or medical attendance while they necessarily remain therein;" and that "any police judge or magistrate of the city and county of San Francisco is hereby empowered to commit any person whom he shall convict of habitual intemperance to said home." But the act mainly relied on in support of appellant's contention is an act entitled "An act to provide for the care and maintenance of inebriates and certain insane persons in the city and county of San Francisco," approved March 17, 1876, which provides that "the fines and forfeitures, not exceeding eight hundred dollars in the aggregate in any one month, imposed and collected by the police judges' court in and for the city and county of San Francisco, from persons arrested for being drunk or under the influence of liquor, shall be by the clerk of said police judge's court immediately paid to the president, secretary, and treasurer, or a majority of them, at the Home for the Care of Inebriates, of said city and county, for the support and maintenance of said Home for the Care of Inebriates, and the construction and improvement of a building for said Home for the Care of Inebriates;" and that "all persons in said city and county, charged with being insane, and pending their examination, or found to be insane and *en route* for a state insane asylum, shall be placed in the said home, without charge to said city and county." The treasurer of the city and county of San Francisco is not by this act enjoined, nor even authorized, to receive or disburse any of said moneys, but the duty of paying said moneys to the officers of the home is expressly imposed upon the clerk of the police judge's court, and he is required to pay it to them immediately. Section 75 of article 6 of the consolidation act requires that "all fines, penalties, and forfeitures imposed for offenses committed within the said city and county shall be received by the clerk or magistrate of the respective court, and paid into the treasury thereof as a part of the police fund."

And since the passage of the act of March 17, 1876, it has been the duty of said clerk or magistrate to pay into said treasury any excess over $800 received in any one month by them for fines, etc. Whatever sum or sums the treasurer received from that source became at once a part of the police fund out of which the fixed salaries of police captains and officers, chief of police, police judge, and clerk of the police court could alone be paid. It is the duty of the treasurer to safely keep all moneys belonging to or paid into the treasury, and not to pay out any part of said moneys except upon demands authorized by the consolidation act. By an act approved March 5, 1889, the clerk of each department of the police court is required to pay into the treasury of said city and county, once a week, all fines and forfeitures imposed by said court. This act is clearly repugnant to that which required the clerk of said court to pay an amount not exceeding $800 in any one month, of the fines and forfeitures imposed and collected by the police court from persons arrested for being drunk or under the influence of liquor, immediately to certain officers of appellant. Besides, the act of 1889 contains a clause repealing all acts and parts of acts in conflict with any of its provisions. But, whatever effect may be given to this latter act, there is not, nor ever has been, any law which specially enjoins it as a duty of the respondent resulting from an office, trust, or station, to pay to appellant any money from the treasury, no matter from what source received. Judgment affirmed.

I concur: Paterson, J.

De Haven, J., (*concurring.*) I concur in the judgment of affirmance upon the ground that *mandamus* is not the proper remedy, but I dissent from so much of the opinion of Mr. Justice Sharpstein as holds that the act of March 17, 1876, (St. 1875-76, p. 325,) is repealed by the later act of March 5, 1889, (St. 1889, p. 62,) and upon this latter point I adopt as a correct statement of the law the opinion of Mr. Commissioner Belcher, prepared for the court upon the former submission of this case. In that opinion it is said:

"By an act of the legislature approved April 1, 1870, (St. 1869-70, p. 585,) it was provided that 'the Home for the Care of the Inebriate of San Francisco shall always be kept open for the reception and care of inebriates, both male and female, of every nationality and sect, free of charge for their support, care, or medical attendance, while they necessarily remain therein;' and that 'any police judge or magistrate of the city and county of San Francisco is hereby empowered to commit any person whom he shall convict of habitual intemperance to said home.' By another act, entitled 'An act to provide for the care and maintenance of inebriates and certain insane persons in the city and county of San Francisco,' approved March 17, 1876, (St. 1875-76, p. 325,) it was provided that 'the fines and forfeitures, not exceeding eight hundred dollars in the aggregate in any one month, imposed and collected by the police judge's court, in and for the city and county of San Francisco, from persons arrested for being drunk or under the influence of liquor, shall be, by the clerk of said police judge's court, immediately paid to the president, secretary, and treasurer, or a majority of them, of the Home for the Care of Inebriates, of said city and county, for the support and maintenance of said Home for the Care of Inebriates, and the construction and improvements of a building for said Home for the Care of Inebriates;' and that 'all persons in said city and county, charged with being insane, and pending their examination, or found to be insane and *en route* for a state insane asylum, shall be placed in the said home, and shall be cared for by the officers thereof, while in said home, without charge to said city and county.' The petitioner is now, and has been for more than twenty-five years, an eleemosynary corporation duly incorporated and existing under the laws of this state, and situated in the city and county of San Francisco. It has a duly elected, qualified, and acting president, secretary, and treasurer, and is the owner of a lot and building thereon in the said city and county, which is now, and has been for several years, used as a home for inebriates and insane persons committed to its care. It has always, since the passage of the aforesaid acts, fully complied with their provisions, and has at all times kept its home open for the reception and care of inebriates, both male and female, of every nationality and sect, free of charge for their support, care, and medical attendance, and has received therein all persons in said city and county, charged with being insane, and pending their examination, and all persons found to be insane and *en route* to an insane asylum; and has cared for, supported, and furnished medical attendance to them without charge. It has now under its care a large number of persons who are habitually intemperate, and others who are insane; and the money appropriated by the act of March 17, 1876, is necessary to pay for the maintenance of the said home. Between the 5th day of March and the 1st day of November, 1889, certain fines and forfeitures, the amount for each month being specifically named, were by the police court of the city and county of San Francisco imposed upon and collected from persons arrested for being drunk or under the influence of liquor; and all of the moneys so collected were paid into the hands of the respondent, as treasurer of the said city and county, and are now in his possession. Prior to the commencement of this proceeding, petitioner duly demanded of respondent payment of all the said several sums of money, except the amounts in excess of eight hundred dollars, but respondent refused, and has ever since refused, to pay the same, or any part thereof, to it or to any of its officers, or to any one in its behalf. Wherefore judgment is asked commanding such payment to be made.

"The respondent contends that the act of March 17, 1876, was repealed by an act approved March 5, 1889, (St. 1889, p. 62.) The last-named act is entitled 'An act to create a police court in and for the city and county of San Francisco, state of

California,' and the provisions relied upon as effecting the repeal are sections 10 and 13, which read as follows: Section 10: 'All fines and forfeitures imposed by said court shall be paid into the treasury of said city and county by the clerk of each department once a week.' Section 13: 'All acts and parts of acts that are in conflict with the provisions of this act are hereby repealed.' It will be observed that no special reference is made to the act of March 17, 1876, and the repeal, if any was effected, was therefore by implication. But the general and well-settled rule is that repeals by implication are not favored. Judge Cooley, in his work on Constitutional Limitations, (6th Ed.) p. 182, states the law as follows: 'Repeals by implication are not favored; and the repugnancy between two statutes should be very clear to warrant a court holding that the latter in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect.' In End. Interp. St. § 223, this language is used: 'A general act is to be construed as not repealing a particular one,—that is, one directed towards a special object or a special class of objects. * * * Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature has been turned to the special act, and that the general one was intended to embrace the special cases within the previous one. * * * The general statute is read as silently excluding from its operation the cases which have been provided for by the special one. * * * The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction.' And see People v. Quigg, 59 N. Y. 83; Merrill v. Gorham, 6 Cal. 42; Crosby v. Patch, 18 Cal. 439.

"Under the law, as thus declared, can the respondent's contention be sustained? We do not think it can. The police judge's court was created by the consolidation act of the city and county of San Francisco, passed in 1856, and it was therein provided that the clerk of the court should 'receive and pay weekly into the treasury of the city and county all fines imposed by said court.' The act of March 5, 1889, was, in effect, an amendment of the consolidation act, and, though it slightly changed the name of the old police court, it was not intended, and did not have the effect, to abolish that court, but only to add another judge thereto, and to reorganize the court thus increased in numbers by dividing the same into departments with a presiding judge. Ex parte Lloyd, 78 Cal. 421, 20 Pac. Rep. 872. The legislature had no power, by a local or special law, to create new offices or to prescribe the powers and duties of officers, (Const. art. 4, § 25, subd. 28;) nor did it attempt to do so. It simply, so far as the duties of the clerk as to paying over fines were prescribed, repeated, in substance, the language of the old act. In this we see nothing to indicate that the attention of the legislature was turned to the special act of March 17, 1876, or that there was any intention or purpose to repeal it. It results that when the respondent received the money in controversy he received and held it for the use of petitioner."

But conceding this to be so, *mandamus* is not the proper remedy, and if defendant, or the city and county of San Francisco, wrongfully withholds money which belongs to the petitioner, his remedy is by action in the ordinary course of law.

We concur: BEATTY, C. J.: GAROUTTE, J.

MCFARLAND, J. I dissent. I concur in the opinion of Mr. Justice DE HAVEN, except as to the remedy.

HARRISON, J., (*concurring*.) The appellant is a private corporation in the city and county of San Francisco, under the management of officers entirely disconnected with the municipal government, and asks for a mandate against the treasurer of said city and county, directing him to pay to it a sum of money to which it claims a right under the provisions of the act of March 17, 1876. St. 1875-76, p. 325. It may be very seriously questioned whether, under the former constitution, the legislature had the power to compel a donation of the city's money to a private corporation, or to direct the payment in each month to such corporation of a specific sum of money, irrespective of any benefit or service rendered by it to the city. Without passing upon this question, the act above referred to is, however, obnoxious to the charge of violating section 31 of article 4 of that constitution, within the principles declared in the cases of San Francisco v. Spring Valley Water Works, 48 Cal. 493; Turnpike Road Co. v. Cole, 51 Cal. 381; Railroad Co. v. Baldwin, 57 Cal. 160. The act of April 1, 1870, (St. 1869-70, p. 585,) prescribing the powers and duties of the officers of the appellant, which it claims affords the consideration for which it was authorized to receive the money directed to be paid under the act of 1876, was clearly without the power of the legislature to enact. The legislature had no power to confer such special privileges upon any corporation, or to pass any special act conferring authority upon it, or prescribing the powers and duties of its officers. The attempt by these acts to impose any duty or obligation upon the plaintiff was without the constitutional authority of the legislature, and the plaintiff, by virtue of said acts, neither acquired any right, nor became subject to any duty. The provisions of section 10 of the act of March 5, 1889, (St. 1889, p. 62,) that all fines and forfeitures imposed by the police court shall be paid into the treasury of the city and county of San Francisco by the clerk thereof, is in direct harmony with section 16, art. 11, of the present constitution, which directs all municipal moneys to be paid to the treasurer, and operates as a direct repeal of that portion of the act of 1876 which authorized the clerk of the police court to pay certain moneys to the appellant. By bringing this action against the treasurer the appellant impliedly admits that the act of 1876 is repealed so far as it directs the payment to it by the clerk of the fines collected by him, but it contends that the other portion of the act is left in force. Inasmuch, however, as under the provision of the constitution above referred to, the legislature could not have authorized the payment of those fines to any other officer than the treasurer of the city and county, it must be held that the entire act is repealed, even if it had any validity when originally enacted. After the money has once been received into the treasury, the treasurer is not authorized to pay out any portion thereof, except as authorized by law, and after the demand therefor shall have been duly audited. Section 82 of the consolidation act provides that "no payment can be made from the treasury, or out of the public funds of said city and county, unless the same be specifically authorized by this act, nor unless the demand which is paid be duly audited, as in this act provided, and that must appear upon the face of it." Section 84 of the same act declares that "every demand upon the treasury * * * must, before it can be paid, be presented to the auditor of the city and county to be allowed, who shall satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury of the city and county is authorized by law, and out of what fund. * * * No demand can be approved, allowed, audited, or paid unless it specify each several items, date, and value composing it, and refer to the law by title, date, and section authorizing the same." It is not alleged by the appellant that the claim which it asks that the treasurer be directed to pay was in any respect audited, as above provided. The provision in section 10 of the act of 1889, directing the clerk of the police court to pay these moneys into the treasury, is not in the creation of any new office, or the conferring of any additional powers upon an existing officer, but a mere direction to him for the disposition of the moneys which he may receive. Nor did the provisions of the act of 1876, even if that act was constitutional, create a contract between the appellant and the city, or give to the appellant any rights or privileges which could not at any time thereafter be revoked by the legislature. It was but an act of legislation subject to repeal at the will of the body which enacted it. For these reasons, as well as for those contained in the opinion of Mr. Justice Sharpstein, the judgment should be affirmed.

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95 Cal. 206

Reay v. Butler *et al.* (No. 13,637.)

(*Supreme Court of California.* June 18, 1892.)

EJECTMENT—TITLE TO SUPPORT—POSSESSION—REVIEW ON APPEAL.

1. If two owners in severalty of adjoining tracts by mutual consent inclose them by a fence around the exterior boundaries of both, the inclosure constitutes possession by each of the tract claimed by him, as against a mere intruder who brings ejectment; and it is immaterial whether the land is public or private.

2. While T. was in possession of land, plaintiff, claiming under a deed from one in whom he did not even suppose there was title, entered and began to build a shanty, but T., when he learned of it, tore it down, and drove him off. A few days afterwards, plaintiff again attempted to build the shanty, and slept there without bedding, but T. again tore it down before completion, and drove him off. Nothing further was done by plaintiff for three years, when he brought ejectment against T. *Held*, that plaintiff had no such title or possession as entitled him to maintain the action.

3. The rule that the appellate court will not review the findings of fact where the evidence was conflicting, applies though the evidence consisted entirely of depositions, affidavits, and notes of testimony given at a former trial before another judge, and is not limited to cases where there were witnesses before the court.

In bank. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action of ejectment by J. W. Reay against John Butler and others. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

J. B. Mhoon and *W. W. Foote*, for appellant. *Fisher Ames*, (*S. M. Wilson* and *W. S. Goodfellow*, of counsel,) for respondents.

McFarland, J. This is an action of ejectment, and was commenced by plaintiff on February 20, 1866, in the former district court of the fifteenth judicial district, against John Butler and P. H. Owens, who were the only persons named as defendants. In the complaint it is averred that on the 1st day of January, 1863, plaintiff was "seised and possessed" of certain described land, situate in the city and county of San Francisco; and that on said 1st day of January, 1863, the defendants (Butler and Owens) wrongfully entered upon said land "and ousted and ejected plaintiff therefrom, and ever since have held and now hold possession thereof from plaintiff." There was a former appeal in this case, reported in 69 Cal. 573, 11 Pac. Rep. 463, and from the opinion of this court, then delivered, it appears that Butler and Owens answered, denying all the averments of the complaint, averring that J. P. Treadwell was "the owner and in possession" of the land sued for; that they (Butler and Owens) were there only by license of Treadwell, and praying that the latter be allowed to defend the action, and that they be dismissed; and that by leave of court Treadwell filed an intervention, in which he set up matters upon which he claimed certain equitable relief. It appears, further, that the district court, after having impaneled a jury to try the cause, and after the trial had commenced, concluded to try what were supposed to be the equitable issues first, and, against the objections and exceptions of plaintiff, discharged the jury, and, after a hearing of said equitable issues, rendered judgment perpetually enjoining plaintiff from further prosecution of his action. But on the appeal from that judgment, this court held that there were no equitable issues, and that plaintiff was entitled to a jury trial, and reversed the judgment, with directions to strike out the intervention, and that the representative of the intervener (said Treadwell in the mean time having died) be allowed to defend the action. When the case went down to the superior court, new answers were filed for Owens and Butler, and Mrs. Mabel Treadwell, who was then administratrix of said J. P. Treadwell, filed an answer, by leave of court, in her own name. In her answer she denied all the averments of the complaint; and she averred that at the commencement of the action, and for more than five years prior thereto, said J. P. Treadwell, by himself and his grantors and predecessors, was and had been the owner and in possession of all that part of the land sued for which was known as the "Speck Ranch," and was in possession of the same continuously until his death, which occurred in December, 1884; that since his death, she as administratrix, has been in possession thereof, and the estate of said Treadwell, deceased, and his heirs and devisees are the owners and entitled to the possession thereof; and that, at the time of the commencement of the action, the defendants Owens and Butler were not in possession of any of the land described in the complaint, but were, to plaintiff's knowledge, the mere servants and employes of said J. P. Treadwell. Both parties waived a jury, and the court, after a second hearing of the case, made its findings of fact, and found as a conclusion of law "that defendants are entitled to judgment in this action." Whereupon judgment was entered that "plaintiff take nothing by this action," and that defendants be dismissed, and recover costs of plaintiff. Plaintiff made a motion for a new trial, which was denied, and he appeals from the judgment, and from the order denying his said motion.

There is only one assignment of error occurring during the trial, which will be noticed hereafter. The main contentions of appellant are that the evidence is insufficient to justify the findings of fact, and that the decision is against law. It is clear, however, that if the findings are justified by the evidence, then the conclusion of law and the judgment are correct; so that the real question in the case is, does the evidence justify the findings? At the trial, by consent of the parties, a large part of the testimony taken at the first trial was read without recalling the witnesses, and two or three depositions were introduced; and appellant contends that, when a case has been decided by the lower court upon this kind of evidence, the rule that this court will not disturb a finding when there is a conflict of evidence does not apply, and that this court should sit practically as a *nisi prius* court, and draw its own conclusions from the evidence, regardless of the conclusions arrived at by the jury or the judge in the trial court. While, for the reasons hereafter stated, the determination of this point is not absolutely essential to the decision of this appeal, it may be well for the benefit of future litigants to intimate that the doctrine contended for has not, thus far at least, become the settled law of this state. It has been held here in more than a hundred cases, commencing with Payne v. Jacobs, in the first published books of reports of this court, (1 Cal. 39,) and ending with Dobinson v. McDonald, in the last volume of such reports, (92 Cal. 33, 27 Pac. Rep. 1098,) that the finding of a jury or a court as to a fact decided upon the weight of evidence will not be reviewed by this court, and so the general rule is clearly established. It was said, however, in the opinion of the court in two or three cases, notably in Wilson v. Cross, 33 Cal. 60, that the reason of the rule is that the court below has the advantage of observing the appearance and bearing of the witnesses, and that such reason does not obtain when the witnesses do not appear personally in court. But it may be well argued that such is not the only reason of the rule; that it is founded in the essential distinction between the trial and the appellate court under our system, and grows out of considerations of jurisdiction; that it is the province of the trial court to decide questions of fact, of the appellate court to decide questions of law; that this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion. Indeed there are numerous cases in which the decisions of this court have been directly contrary to the doctrine contended for by appellant. For instance, it has been held directly in several cases that the rule as to conflicting evidence applies to a case where the trial was before one judge and the motion for a new trial passed upon by his successor, and where the latter saw none of the witnesses; or where the trial was before the old district court, and the motion before the succeeding superior court. Bauder v. Tyrrel, 59 Cal. 99; Altschul v. Doyle, 48 Cal. 535; Macy v. Davila, Id. 647. The same rule has been applied on appeal from an order dissolving an injunction, where all the evidence in the lower court was upon affidavits. Parrott v. Floyd, 54 Cal. 535. In Bauder v. Tyrrel, supra, the court says: "The trial court decides as to the facts, the court of review (in this state) as to questions of law only." The appellate court will, no doubt, look a little more closely into the evidence when it consists entirely of depositions, or affidavits, or notes of former testimony; but it cannot be taken as settled that in such a case the rule as to conflicting evidence does not apply. But even if the rule were as appellant contends, it would not apply to the case at bar; for in this case two or three witnesses, including the plaintiff himself, whose former testimony was read, were re-examined at the last trial, and about 15 new witnesses were examined whose testimony was to a large extent important and material; and under these circumstances, it is quite clear that the general rule as to conflicting evidence applies. Blum v. Sunol, 63 Cal. 341.

The appellant's objections to the findings, as not supported by the evidence, refer mainly to those findings which set forth the possessory right of the said J. P. Treadwell to the land in controversy at the time of the alleged ouster. The findings as to such right, are, in brief, as follows: In the year 1853 one Alexander Speck entered upon a tract of land containing about 41 acres, and known afterwards as the "Speck Ranch,"—being part of the premises described in the complaint. It was then part of the unoccupied pueblo lands of San Francisco. In that year (1853) he built a house on the land, and lived there during part of that year, and during the next year, and down to October, 1855. He made charcoal at various times from wood on the land, and had a garden on it, and raised vegetables. A man named Killian claimed a piece of land containing about 39 acres, which adjoined the Speck ranch on the north; and in 1853, Speck and Killian jointly built substantial brush fences around the exterior boundaries of the two tracts, which fences, together with some fencing which had been built by other adjoining claimants, inclosed the two tracts with fences sufficient to turn cattle; and these fences were at all times, down to the commencement of the action, sufficient to turn cattle. There was no fence along the boundary line between the land claimed by Speck and that claimed by Killian, but each recognized the claim of the other, and the fences were built jointly for the purpose of protecting each in the possession of what he claimed. In October, 1855, Speck went to the mines, but did not abandon the Speck ranch. He left it in the possession and keeping of one Robert Sheridan, as tenant of himself and Killian. Sheridan lived with his family in the Speck house, manufactured charcoal out of wood on the land, kept the exterior fences around both tracts in good condition, and held possession until the spring of 1859. After Sheridan left, Killian took charge and possession of the two claims for himself and Speck, and early in 1860 placed one Markgraf in possession as employe of both. Markgraf repaired the fences, and built some new fencing. He resided on the Killian claim within the common inclosure until Christmas, 1861. He also built a new house on the Killian claim, and Killian resided in said new house from some time in 1861 to the end of 1862. In February, 1861, Speck executed to one Marye a power of attorney (recorded March 6, 1861) to sell and convey the Speck ranch on his (Speck's) behalf, and on March 1, 1861, Marye sold and conveyed the same to one Austin E. Smith,—deed recorded March 6, 1861. Through conveyances from Smith and his grantee, all right and title of said Speck to said Speck ranch vested in said J. P. Treadwell on April 28, 1862. Treadwell was a *bona fide* purchaser, and entered into possession without notice of any other claim to the land except that of the city and county of San Francisco. The defendants Owens and Butler never had any possession of the land in contest; but at the time of the commencement of the action were the mere employes of Treadwell, and occupied in building a house for the latter. The foregoing are the main facts found with respect to the possessory right of Treadwell; but there are many details in the findings not necessary to be recited here. There was conflicting evidence as to some of the facts found, particularly as to whether the fences around the two tracts were kept up in good condition; whether Speck's house was below or above the line between his land and that of Killian; whether Speck abandoned his claim when he went to the mines; whether Sheridan and Markgraf were in possession under Speck; whether Killian always recognized the right of Speck, and was in possession for both himself and Speck, etc. But upon an examination of the evidence we find that it sufficiently supports the findings of the facts upon which Treadwell's possessory rights are based, and we perceive no abuse of discretion committed by the lower court in making such findings.

It is contended by appellant that the common inclosure of the two tracts by an exterior fence around both did not constitute possession by either claimant, there being no tenancy in common between them. But if two owners in severalty of adjoining tracts of land, by mutual consent, inclose the two tracts together by a fence around the exterior boundaries of both, it seems clear enough that the inclosure thus made constitutes possession as against any third party who is a mere intruder. It is contended also that, even if this rule were good as to private lands, it cannot be applied to the possession of public lands; but we fail to see the distinction, so far, at least, as to affect the case at bar. Here there is no question as to what kind of possession, or what acts, would give to the occupant of public land the right to acquire the title in fee from the public proprietor. The case merely presents a contest of alleged possessory rights between the parties to the action, and the title of the real proprietary owner cuts no figure.

2. But really the court below and counsel have attached more than its just importance to the right acquired by J. P. Treadwell from Speck. This is an action of ejectment, in which plaintiff must rely upon the strength of his own title, no matter how weak the title of his opponent may be. And when we come to examine the right of plaintiff to recover, we find that it has no foundation. The court finds that "the plaintiff herein never had, nor did any ancestor, predecessor, or grantor of plaintiff ever have, any possession of the lands or any part of the lands described in the complaint;" and this finding is amply supported by the evidence, whether we look at it with the eyes of an appellate or *nisi prius* court. The only facts upon which his alleged possessory claim rests are these: During the first half of October, 1862, plaintiff employed two men to build a small wooden shanty on the land; but after they had worked about two days, and before the shanty was finished, Treadwell heard of it, and went upon the land, tore down the shanty, and drove the men away. A few days afterwards plaintiff again went upon the land, and attempted to build a wooden shanty, when the same thing again happened,—that is,

Treadwell tore down the shanty before it was completed, and drove away the man who, together with two bulldogs, was sleeping in it, without bed or bedding. No further act was done by plaintiff in the premises; but between three and four years afterwards he commenced this action of ejectment; and we think it so clear that these acts do not constitute such a possession as will support ejectment that an elaboration of the point would be useless. He did not have even a "scrambling" possession of any land except the spot on which the shanties were commenced to be built; and that spot cannot now be definitely located. Appellant claims that when he commenced to build the shanty he had a deed from P. H. Owens, which purported to convey the premises described in the complaint; and he invokes the doctrine that one entering upon land under color of title given by a deed has constructive possession to the limits of the boundaries described in the conveyance. But in the first place, the court found that he never had such a deed. The evidence on the point was this: Appellant testified that he once had such a deed and had lost it; and Owens testified positively that he had never executed any such deed; and under such circumstances we certainly could not hold the finding unwarranted by the evidence. And in the second place, it plainly appears from the evidence that if appellant ever had such deed, he did not take it in good faith, believing that Owens had any title, (and he did not have any,) but for the express purpose of asserting color of title. And as this court said in Wilson v. Atkinson, 77 Cal. 492, 20 Pac. Rep. 66: "It could not be justly said that a party was founding his claim upon a written instrument, as being a conveyance, when he knew the instrument to be absolutely void. The Code should be construed as requiring the claim to be made in good faith, believing the deed to be a conveyance of the property." (What effect such a deed would have upon the rights of a party who had held possession for five years, and pleaded the statute of limitations, does not here arise.)

It is contended that the court erred in ruling upon the admissibility of evidence during the examination of the witness Mrs. Ann Cook. The alleged error, if it existed, would not be important enough to affect the determination of the case; but there was no error. The appellant was trying to get from the witness declarations of Speck tending to show his abandonment of his claim to the land; and the record merely shows that the court sustained an objection to general conversations not relating to the land. Appellant then asked the witness, "Did he say in that conversation that he would not return to this land?" and an objection that it was leading was sustained. The question was then asked, "Did he say anything about this land; if so, what?" and the witness, without any objection, went on to tell what he did say. In all this we see no error,—certainly no prejudicial error.

In his assignments of error, and in his briefs, appellant has stated his positions under many subdivisions and heads of discussion; but we think that we have referred to all matters necessary to be noticed. We see no good reason for disturbing the judgment. Judgment and order denying a new trial affirmed.

We concur: GAROUTTE, J.; SHARPSTEIN, J.; PATERSON, J.

DE HAVEN, J. I concur in the judgment upon the second ground discussed in the foregoing opinion.

HARRISON, J., being disqualified, did not participate in the foregoing decision.

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95 Cal. 116

ALVARADO v. NORDHOLT *et al.* (No. 14,403.)

(*Supreme Court of California.* June 18, 1892.)

ADVERSE POSSESSION—RECOVERY OF LAND—OUSTER OF TENANT IN COMMON—RUNNING OF STATUTE—PATENT TITLE.

1. A widow continued in possession of land occupied by her husband as a home until her death, when it was administered as her property, and the purchaser went into possession under the deed of her administrator, where he remained for about 20 years, receiving all the rents, and paying all the taxes and assessments; and, though the land was within 200 yards of the business center of a city, no one else was shown to have made claim to it. There was also evidence that such purchaser always claimed to be the owner of the property, and that his claim was open, notorious, and generally known. *Held* that, conceding that the widow was the owner merely of an individual interest which alone the purchaser took under his deed, so that he became a tenant in common with the widow's children as heirs to their father, still the evidence was sufficient to show an ouster of them by him, and an adverse possession by him thereunder, barring an action by them under Code Civil Proc. § 318, providing that an action for recovery of real estate cannot be maintained, unless plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property within five years.

2. One of the widow's daughters having lived for a year after the purchaser took possession under his deed, during which time she might have maintained an action to recover her interest, the running of the statute was not thereafter suspended during the minority of her child.

3. Evidence that prior to the issue of a patent there was no publication of notice of the survey and plat on which the patent was based, is inadmissible to show that the patent did not vest title in the patentee.

4. The fact that on publication of a notice by the United States surveyor general of a survey on which a patent had been issued the patentee filed objections which were overruled, does not show that the patent was rejected by the patentee, or that it did not convey the legal title, or that it was recalled and canceled with the consent of the patentee.

In bank. Appeal from superior court of Los Angeles county; WALTER VAN DYKE, Judge.

Action by Thomas Alvarado against W. H. Nordholt and others for possession of an interest in lands. Judgment for defendants. Plaintiff appeals. Affirmed.

Lee & Scott, for appellant. *Stephen M. White* and *Shinn, Edgerton & Ling*, for respondents.

DE HAVEN, J. Action to recover possession of an undivided interest in a certain lot in the city of Los Angeles, which plaintiff claims to own in common with four of the defendants, the other defendants being tenants of these four. The plaintiff claims title to a portion of the interest sought to be recovered by him by inheritance from his grandfather, Francisco Javier Alvarado, and to the remaining portion by purchase from certain heirs of the same person. The answer denied plaintiff's alleged ownership, and also contained a plea of the statute of limitations. The court found that plaintiff was not the owner of any interest in the property, and also that his cause of action is barred by section 318[1] of the Code of Civil Procedure, and thereupon judgment was entered in favor of defendants.

The plaintiff insists that the findings of the court are not sustained by the evidence. The land in controversy is within the limits of the former pueblo of Los Angeles. No written evidence of title in plaintiff's grandfather was produced, but it was shown that he occupied the premises as a house lot from 1817 until the date of his death, in 1831, and that his widow continued in the occupation thereof until her death, in 1851. It was also proven that there is not to be found in the archives of the city of Los Angeles, the successors to the pueblo, any record of titles or grants made by the pueblo prior to 1828, and that there are no formal municipal records of the pueblo of a date prior to 1832. If it should be assumed that these facts are sufficient upon which to base the presumption contended for by plaintiff that the pueblo of Los Angeles did in fact grant to his grandfather the land in controversy, and that the written evidence thereof had been lost or destroyed, still, if the court was right in its findings that defendants have acquired title by adverse possession, the judgment must be affirmed, and this question we proceed to consider. As we understand this record, the grandfather of plaintiff left surviving him a widow, 10 children, and the grandchildren of a deceased daughter. The widow, with some of her children, continued to occupy the land in controversy from the death of her husband, in 1831, until her own death, in 1851. Proceedings for administration upon her estate were commenced in 1859, and the land was appraised as property belonging to it, and was sold by the administrator of said estate to one William Nordholt, and, this sale being confirmed by the probate court, the said Nordholt received the administrator's deed therefor on February 14, 1866, and thereafter continued in possession of the land so conveyed until his death, in 1885, at which time the defendants succeeded to his title. It is claimed by appellant that, as the widow of his grandfather was only the owner of an undivided interest in this land at the time of her death, her children and grandchildren having succeeded to the remaining portion of her husband's estate, the effect of this deed was only to convey such interest as she had, and that said Nordholt thereupon became a tenant in common with the children of such widow, the remaining heirs of the elder Alvarado. Conceding this to be so, we think the evidence was sufficient to justify the court in finding that said Nordholt entered into possession, and thereafter until his death continued to hold the same, claiming the whole of said land as his own, and to show an ouster of his cotenants within the rule announced by this court in the cases of Unger v. Mooney, 63 Cal. 586; Bath v. Valdez, 70 Cal. 350, 11 Pac. Rep. 724; and Winterburn v. Chambers, 91 Cal. 170, 27 Pac. Rep. 658. Whether Nordholt entered into possession, acknowledging himself as a cotenant of those under whom plaintiff claims, or whether he entered claiming the whole title, and whether his possession thereafter was adverse and of such notoriety that his alleged cotenants must, in the nature of things, be presumed to have known of his claim of exclusive ownership, were questions of fact to be determined by the lower court upon a view of all the circumstances in evidence. It was admitted upon the trial that, from the date of the administrator's deed referred to down to the commencement of this action, the said Nordholt, and defendants who have succeeded to his title, received all the rents of the property and paid all taxes which have been assessed against it. There was also evidence tending to show that all street improvement assessments charged against said property had been paid by defendants or their predecessors. The land is within 200 yards of the business center of the city, and the record does not show that the plaintiff, or any of those to whose alleged rights he has succeeded, ever made any claim for this property until some time in 1884. Upon these facts, and other evidence tending to show that Nordholt always claimed to be the owner of the property, that this claim was open and notorious and generally known to the community, the court was warranted in finding that his alleged cotenants had notice of his claim of exclusive ownership, and that his possession was adverse to them.

The plaintiff himself attained his majority within five years before the commencement of this action, but, as his mother, under whom he claims, lived for something more than a year after Nordholt took possession under his deed, and could have maintained an action to recover her interest in the land during her lifetime, the running of the statute of limitations was not suspended during the minority of plaintiff. McLeran v. Benton, 73 Cal. 329, 14 Pac. Rep. 879.

The court did not err in its ruling on plaintiff's offer to prove that there was no publication of notice of the survey and plat upon which was based the patent to the city of Los Angeles of August 9, 1866, prior to the issuance of that patent, and in excluding proof of the other matters contained in plaintiffs' offer. In the case of Cruz v. Martinez, 53 Cal. 239, this court substantially passed upon the same question, and held such proof inadmissible, saying: "The patent to the city of Los Angeles, bearing date the 9th day of August, 1866, having been duly signed and recorded in the proper book in the general land office, vested in the city the legal title to the lands therein described." We see no material difference between the facts contained in plaintiff's offer and those before the court in that case. The fact offered to be shown by plaintiff to the effect that after the issuance of the patent of August 9, 1866, the United States surveyor general published notice of the prior survey upon which such patent was in fact based, and that the city of Los Angeles then filed objections to such survey, which were overruled, is not sufficient to show that such patent was rejected by the city, or that it did not convey the legal title, or that it was recalled and canceled with the consent of the city. In fact we do not understand that it is claimed, or that plaintiff offered to show, that such patent was in fact recalled or canceled. In addition to this, plaintiff's offer contained an admission that at the time the city filed its objections to such survey "its common council, mayor, and authorities" did not know of the issuance of the prior patent, and never heard of the same "until after the execution of said patent of August 4, 1875; but said corporation in January, 1876, demanded from said commissioner the delivery of said patent of 1866." The rule in regard to a United States patent is that when it is signed, sealed, and recorded in the records of the land office, then, so far as the government is concerned, the title to the land therein described has been transferred to the grantee, and "its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue his refusal to accept it is explicitly declared, and such refusal is communicated to the land office." Leroy v. Jamison, 3 Sawy. 391; Case of Mutell, 3 Op. Attys. Gen. 654. It is very apparent that under this rule the matters offered to be proven by plaintiff were not sufficient to show that the patent of August 9, 1866, did not vest in the city of Los Angeles the title to the land therein described, at its date, or that such title was not acquired by the city until the issuance to it by the United States of the subsequent patent for the same land on August 4, 1875. There are no other assignments of error which require special discussion. Judgment and order affirmed.

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[1] Code Civil Proc. § 318, provides that no action for the recovery of real estate, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action.

We concur: SHARPSTEIN, J.; McFARLAND, J.; HARRISON, J.; PATERSON, J.; GAROUTTE, J.

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95 Cal. 184

ALLEN v. ALLEN *et al.* (No. 13,005.)

(*Supreme Court of California.* June 18, 1892.)

CONFLICT OF LAWS—REDEMPTION FROM MORTGAGE —LIMITATION OF ACTIONS — PLEADING —OBLIGATION OF CONTRACTS.

1. In 1869 plaintiff, by parol contract, borrowed money from defendants, without fixing a time for repayment, and gave them as security an absolute deed of land in California. The contract was made in New York, where both parties resided. Neither of them ever had actual possession of the land, nor were they ever in California before 1885, and prior to that date plaintiff never made any demand for an accounting, nor offer to redeem, nor did defendants assert any claim of title to the land adverse to plaintiff's right to a reconveyance on repayment of the loan. In 1887 plaintiff brought an action to redeem. *Held*, that the contract was governed by the laws of New York, but the effect of the deed by the laws of California; and since, under the laws of New York, an action by defendants to recover the loan was there barred in 1877, and since, in California at that time, when a debt secured by a mortgage was barred, the remedy on the mortgage fell with it, an action to foreclose the mortgage was barred by Code Civil Proc. § 361, which provides that when a cause of action has arisen in another state, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action shall not be maintained against him in California; and under the law of California at that time this resulted in barring the right to redeem, that right and the right of the creditor to sue on the contract being reciprocal. BEATTY, C. J., dissenting.

2. No subsequent legislation could change the rights or obligations of the parties, or extend the time for action, and therefore Code Civil Proc. § 346, allowing an action to redeem to be brought against the mortgagee in possession "unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage," which was enacted after the deed was executed, though before the action to redeem was barred, does not apply. BEATTY, C. J., dissenting.

3. The fact that in New York an action to redeem from a mortgage of land there situated could be maintained, although an action to recover the debt was barred, if true, is immaterial, since the effect of the deed depends upon the laws of this state existing at the time the contract was made.

4. The fact that prior to 1885 there had been no adverse claim to the land by defendants is immaterial, since, under the law of this state at the time the contract was made, the absolute deed as security for the loan conveyed the legal title to defendants.

5. Decisions of the highest court of the state declaring that a mortgage did not convey the legal title to the mortgagee formed no part of the contract in which a mortgage was given so as to prevent the mortgagor's right to redeem from being affected by subsequent decisions overruling the former as erroneous, and declaring that a mortgage did convey the legal title, since every one is presumed to know the law, and decisions do not change, but merely attempt to declare it. BEATTY, C. J., dissenting.

6. Under Code Civil Proc. § 361, providing that when a cause of action has arisen in another state, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, it is not necessary for a defendant relying on the statute to set out in his pleading facts showing that the cause of action arose in the other state, and that it is barred by the laws thereof; since Code Civil Proc. § 458, declares that in pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be generally stated that the action is barred by the provisions of a section of the Code of Civil Procedure, (giving the section,) and if the allegation is controverted the facts showing the bar must be established on the trial.

In bank. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

Action to redeem from an absolute deed given to defendants by plaintiff, as security for a loan. From a judgment for defendants, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

E. W. Wilson, for appellant. *Chamberlain & McGowan*, for respondents.

Paterson, J. Appellant received from the state a certificate of purchase for the lands described in the complaint, on March 28, 1860, and in August following assigned the same to one Collins, to secure an indebtedness of $30, and thereafter a patent was issued from the state to Collins. Appellant paid Collins the amount due him; and the latter, by request of appellant, conveyed the land to John H. Allen, who paid no consideration therefor. Respondents thereafter advanced to the appellant certain sums of money for the payment of taxes which had become delinquent, and, to secure the repayment to them of said sums, the appellant, on June 12, 1869, caused said John H. Allen to convey the lands to them as security for the repayment of the money they had advanced. This deed was absolute in form. John H. Allen received no consideration for the deed. Neither of the parties has ever been in actual possession of the land. The contract of loan was oral, and no time was fixed in which appellant was to make repayment. Plaintiff never made any demand for an accounting, or any offer to redeem, prior to the year 1885, and defendants did not, prior to that time, assert any claim of title to the lands adverse to plaintiff's right to a reconveyance upon payment of the indebtedness. This action was commenced March 15, 1887. The court below rendered judgment for the defendants. A motion for a new trial was denied, and plaintiff appealed from the order, and from the judgment.

1. The court below held that plaintiff's cause of action was barred by the provisions of section 361, Code Civil Proc. That section provides: "When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held a cause of action from the time it accrued." It is claimed by appellant that under that section it was incumbent on the respondents to set out the facts upon which they rely, to show that the cause of action arose in the state of New York, and that, under the laws of that state, it was barred by the statute of limitations. A complete answer to this contention is found in section 458, Id., which provides: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be generally stated that the cause of action is barred by the provisions of section (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure, and if such allegation be controverted the party pleading must establish on the trial the facts showing that the cause of action is so barred." The rule thus established was intended to simplify the form of pleading such defenses, and is one which the court cannot depart from on a conjecture that the legislature intended to except from its operation cases of this kind.

The contract was made in New York, where all the parties resided, and neither of them was in this state thereafter until the year 1885; and it is claimed by appellant that, under sections 346, 351, Id., and 2903, Civil Code, the respondents' right to foreclose their mortgage was not barred at the date of the commencement of this action; that appellant remained the equitable owner of the property, and his right to redeem was kept alive. Those sections read as follows: "Sec. 346. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." "Sec. 351. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action." "Sec. 2903. Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed." Civil Code. In support of this contention, counsel for appellant say, in substance: "Respondents' action to foreclose could have been brought only in this state. The word 'return,' as employed in section 351, supra, is applicable to persons coming from abroad, as well as to citizens who have left the state for a temporary purpose and returned thereto. The statute had not commenced to run in 1885, because the respondents had never been in the actual occupancy of the premises. Section 2903, Civil Code, and section 346, Code Civil Proc., provided rules of limitation different from those which had previously been followed by the courts of this state, and those new rules are applicable to mortgages made before, as well as those made after, the adoption of the Codes, unless the remedy was extinguished at the time the Codes took effect. Respondents were not only mortgagees but trustees of appellant; and the statute could not commence to run in their favor until an offer to redeem was made by appellant. There could be no laches on the part of appellant, because the legal title remained in him, and no adverse claim was made by respondents." These contentions cannot be lightly passed over. They deserve to receive and they have received our careful attention. In the solution of the question presented as to the effect of the deed, we must read, as a part of the contract, the laws of this state existing at the time the contract was made, (Klinck v. Price, 4 W. Va. 4, U. S. v. Crosby, 7 Cranch, 115,) although the nature of the construction of the contract of loan, which was made in New York, is determined by the latter state, (De Wolf v. Johnson, 10 Wheat. 367.) It is true an action to foreclose must be brought where the property is situated; but it does not follow that respondents could have maintained an action to foreclose at the time this suit was commenced. Both parties resided in the state of New York, where the contract was made, and either could have maintained an action there on the contract. The plaintiff could have enforced his right to redeem, and the defendants could have recovered the amount for which they held the land as security. Montgomery v. Spect, 55 Cal. 352; Kanawha Coal Co. v. Kanawha & O. Coal Co., 7 Blatchf. 415; Gardner v. Ogden, 22 N. Y. 327; Williams v. Fitzhugh, 37 N. Y. 444. In this state, when an action on a promissory note, secured by mortgage of the same date upon real property, is barred by the statute of limitations, the mortgagee has no remedy upon the mortgage. Lord v. Morris, 18 Cal. 482; Heinlin v. Castro, 22 Cal. 100. The debt is regarded as the principal, and the mortgage as a mere incident. When the debt is barred, the remedy upon the mortgage is also barred. McCarthy v. White, 21 Cal. 495. If, therefore, respondents could not maintain an action in New York for the recovery of the money due, they could not maintain an action in this state to foreclose the mortgage. Section 361, Code Civil Proc. At the time the conveyance was made by John H. Allen to the respondents, a deed absolute in form, but intended as a mortgage, in this state, transferred the legal title, and there was left in the person executing it a mere equity of redemption; and whenever the debt, to secure which the deed was made, became barred by the statute of limitations, the right to redeem was barred. Hughes v. Davis, 40 Cal. 117; Espinosa v. Gregory, Id. 58. The right to redeem and the right of the creditor to sue on a contract were reciprocal. When one was lost the other could not be enforced. Cunningham v. Hawkins, 24 Cal. 403; Arrington v. Liscom, 34 Cal. 366; Grattan v. Wiggins, 23 Cal. 35. No subsequent legislation could change the rights or obligations of the parties, or extend the time for action. The right and time to redeem were fixed by the laws in force at that time. Bronson v. Kinzie, 1 How. 316; Walker v. Whitehead, 16 Wall. 318; Heyward v. Judd, 4 Minn. 483, (Gil. 375;) Phinney v. Phinney, 81 Me. 450, 17 Atl. Rep. 405. Under the decisions just cited, section 346, Code Civil Proc., is inapplicable, because it would effect a material change in the rights and obligations of the parties, (Phinney v. Phinney and Heyward v. Judd, supra;) and for the same reason Raynor v. Drew, 72 Cal. 307, 13 Pac. Rep. 866, and other and later cases declaring the rule stated in that section, are not in point. They are based upon that section of the Code, and it was passed posterior to the time the parties entered into the contract.

It is claimed by the appellant that the finding of the court, "that the cause of action stated in the complaint is barred by the provisions of section 361 of the Code of Civil Procedure," is not supported by the evidence. The defendant introduced in evidence section 91, c. 3, tit. 11, Wait Code. It is not disputed that this section applies to personal actions, and supports the fourteenth finding of the court "that, by the laws of the state of New York, an action upon a verbal agreement for the payment of money is barred within six months after the cause of action accrues thereon, and the right of defendants to maintain any action against plaintiff to recover the said sum of $500, as security for which the said deeds from Cox and John H. Allen were executed to them, has been barred by the laws of said state at all times since the 20th day of November, 1874; and the right of defendants to maintain any action against plaintiff to recover the moneys advanced by them to him, as stated in finding No. 11, has been barred by the laws of said state at all times since September 13, 1877." But it is claimed that, as the appellant's cause of action is one to ascertain the amount due upon a mortgage, and that he may be permitted to pay the same, and remove a cloud from his title, the section referred to does not apply to the case, but is governed by section 97, which provides that an action for relief not otherwise provided for must be commenced within 10 years after the cause of action shall have accrued. As we have seen, however, as soon as the debt is barred the remedy upon the mortgage is lost. Respondents could not have maintained an action in New York for the recovery of the money due. They, therefore, could not maintain an action in this state to foreclose the mortgage, and the right to redeem was lost; and as the right to redeem and the right to maintain an action on the contract are reciprocal, the fourteenth finding of the court, which is not attacked, is conclusive against the plaintiff's right to maintain this action.

If it be conceded that in New York an action to redeem from a mortgage of lands situated in that state can be maintained, although an action for the recovery of the money due could not be maintained there, the result must be the same, because, as stated before, the effect of this deed depends upon the laws of this state existing at the time the contract was made. The interest of each party in the land was measured and controlled by the *lex loci rei sitæ*. Klinck v. Price and U. S. v. Crosby, supra. The right to redeem is governed by the laws of this state.

It is claimed that, at the time the contract was entered into, it was the established rule in this state that a conveyance absolute in form, but intended merely as security, did not pass the legal title to the grantee. It is true there had been decisions to that effect; but in the year following it was held (Espinosa v. Gregory and Hughes v. Davis, supra) that a deed absolute in form intended as a mortgage did convey the legal title. These decisions did not change the law; they simply declared what was the law. Every one is conclusively presumed to know the law, although the ablest courts in the land often find great difficulty and labor in finally determining what the law is. The courts cannot make or repeal a law. "They can say what a law means; and if afterwards they see that they have made a mistake, they can correct their error by an overruling of a former decision, the consequence of which overruling is that the blunder is thenceforward deemed never to have been law." Bish. Cont. § 569. It has been held here that, although it appears the parties have entered into a contract relying upon a previous decision of the supreme court, they would not be relieved from the obligations thereof because of a subsequent decision by the same court overruling the former one, and declaring a different rule upon the same subject. Kenyon v. Welty, 20 Cal. 637. There are some cases in which the supreme court of the United States has held that the construction given to a statute by the highest tribunal in the state, whether sound or not, must be taken as correct, so far as contracts made under the act are concerned, and no subsequent decision altering the construction can impair their validity. The construction becomes a part of the statute,—as much so as if it were an amendment made by the legislature. Gelpcke v. Dubuque, 1 Wall. 175; Louisiana v. Pilsbury, 105 U. S. 294; Douglass v. Pike Co., 101 U. S. 677; Thomson v. Lee Co., 3 Wall. 327. These cases, however, all involved the question as to the validity of negotiable securities. We think that the case of Oullahan v. Sweeney, 79 Cal. 537, 21 Pac. Rep. 960, is distinguishable from the case at bar. The amendment therein referred to simply required the purchaser of property sold for delinquent taxes to serve upon the owner of the property a notice stating that the property had been sold for delinquent taxes, the date of the sale, the amount for which it was sold, the amount then due, the time when the right of redemption would expire, and when the purchaser would apply for a deed. This requirement was a mere incident to the right of the purchaser to receive a deed; it merely prescribed the manner in which he should proceed to demand the deed to which he was entitled. It was conceded, "for the purposes of the case, that the legislature cannot make an absolute extension of the time for redemption of property previously sold." We think the court below held the right view of the case, and its judgment and order are therefore affirmed.

We concur: McFarland, J.; Harrison, J.; Garoutte, J.; De Haven, J.

Sharpstein, J., concurs in the judgment.

(June 23, 1892.)

Beatty, C. J. I dissent. According to the opinion of the court, the plaintiff's action was barred by section 361 of the Code of Civil Procedure, because, and only because, an action by defendants to foreclose would have been barred by said section. I am not satisfied with the reasoning by which the conclusion is reached that the defendants were barred of their action to foreclose before this action was commenced, but, conceding it to be correct, it does not follow, in my opinion, that the plaintiff's right of action was thereby lost. That the right to redeem and the right to foreclose were barred at the same time was undoubtedly the law of this state prior to the Codes, but since they were enacted the right to redeem is unaffected by the extinguishment of the right to foreclose. Code Civil Proc. § 346; Civil Code, § 2903; Raynor v. Drew, 72 Cal. 370, 13 Pac. Rep. 866; Booth v. Hoskins, 75 Cal. 271, 17 Pac. Rep. 225; De Cazara v. Orena, 80 Cal. 134, 22 Pac. Rep. 74; Hall v. Arnott, 80 Cal. 354, 22 Pac. Rep. 200; Warder v. Enslen, 73 Cal. 291, 14 Pac. Rep. 874. In other words, the Codes have prescribed another rule for the limitation of actions to redeem from mortgages and other liens. By the old rule the right to redeem was barred when the right to foreclose was barred, and whether this resulted from the fact that each was covered by the same clause of the statute, or from the equitable doctrine of mutuality of rights and remedies under such contracts, the rule itself had no other effect than to fix a period of limitation to the right to redeem. This rule has been changed, and the period of limitation enlarged, by a law passed since the making of the contract here involved, but before the right of action of either of the parties had been lost, and before the commencement of this suit. The question, therefore, is, which rule applies, the old or the new?

That these provisions of the Codes were intended to apply to all actions commenced after they took effect is to my mind perfectly clear. It is true the Codes are not retroactive, (Civil Code, § 3; Code Civil Proc. § 3,) and it is also true that vested rights should never be impaired by giving a retroactive effect to a law. But a law enlarging the period of limitations upon existing contracts is not a retroactive law, and it impairs no vested rights. Unless restricted in its operation by its own terms, a new rule of limitations necessarily applies to all actions thereafter commenced, and to all causes of action not already extinguished by the running of time under the pre-existing rule. This being so, we have only to look to the express provisions of the Codes to see how far the new rules by them prescribed are restricted in their operation upon actions commenced after they took effect. In section 6 of the Civil Code we find the following provision: "No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions." Section 8 of the Code of Civil Procedure contains the same language. The clear implication is that actions not commenced and rights not vested prior to the adoption of the Codes are to be controlled by their provisions. The more specific provision respecting the application of the new rules of limitation is found in section 362 of the Code of Civil Procedure, and is as follows: "This title does not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws now in force are applicable to such actions and cases, and are repealed subject to the provisions of this section." Here the implication is equally clear that the new rules apply to all actions not already commenced, and to all cases where the time prescribed by existing statutes for barring the remedy has not fully run. In this case the time had not run, and the action had not been commenced. The conclusion, therefore, cannot be avoided that the rule of the Code applies, unless its application would have the effect of changing the contract or impairing its obligation. The respondents contend, and the court holds, that such would be its effect. They say that the law of the state of California, as it existed at the date of their deed from John H. Allen, defining the mutual rights and obligations of the parties to the transaction, entered into and became a part of the contract, and that such law gave them (the respondents) an important right which the above-cited provisions of the Codes would take away or materially abridge. If this is true, it must be conceded that the Code provisions are inapplicable. But is it true? What are the rights conferred by the law of 1869 which the Codes take away or impair? They do not take away or impair the right of a mortgagee to foreclose, they merely enlarge the time within which the mortgagor may redeem, and this is all the respondents have to complain of. By the law of California prior to the Codes, they say a mortgage in the form of an absolute conveyance invested the mortgagee with the legal title to the land, leaving in the mortgagor a mere equity of redemption which was barred and extinguished at the same moment that the debt was barred, thereby creating in the mortgagee a title complete, absolute, and indefeasible, without the necessity of a foreclosure; and, therefore, they insist it must be held that this right to obtain a complete title without foreclosure was among the advantages they bargained and paid for, and is a right of which they could not be deprived by subsequent legislation, as they would be if subjected to the Code provisions, (section 346, Code Civil Proc.; section 2903, Civil Code,) under the operation of which they could never perfect their title except by foreclosure, or by five years' adverse possession of the mortgaged premises after condition broken. The completeness of this argument is marred by the fact that it assumes too much for the law of California before the Codes. The decisions relied on by respondents do not go to the extent claimed for them. The cases cited are Hughes v. Davis, 40 Cal. 117; Espinosa v. Gregory, 40 Cal. 58; Pico v. Gallardo, 52 Cal. 206, etc. A critical examination of this line of decisions will show that the only case in which a mortgagee by deed absolute could acquire an indefeasible title to the mortgaged estate without foreclosure was when he had possession. This was the case in Espinosa v. Gregory. The mortgagee was in possession, the right to foreclose was barred, and it was held that the mortgagor had thereby lost the right to redeem. The mortgagee got the land without foreclosure. But in Hughes v. Davis, and Pico v. Gallardo, the mortgagors were in possession, and the mortgagees were suing in ejectment after their right to foreclose was barred. It was held that the mortgagees had the legal title to the lands, and that they were entitled to recover possession, in the absence of allegations in the answers setting forth the equities of the defendants, with an offer to pay the amount of the mortgage liens, and prayer that the conveyances be declared mortgages. In other words, a right of redemption on the usual terms, against the mortgagee out of possession, was distincty admitted, athough the right to foreclose was barred.

Now, what right of these respondents, under the law as declared in the cases referred to, would be taken away or impaired by sustaining plaintiff's action to redeem? They never had possession of the mortgaged premises, and had no right to the possession. If, after their right to foreclose was barred,—if it ever was barred,—they had anticipated the plaintiff in taking possession of the land, their title might thereby have become perfect under the doctrine of Espinosa v. Gregory; but if plaintiff had anticipated them in taking possession, their only remedy would have been to sue in ejectment, in which case he could have set up his equity, and effected a redemption, according to the doctrine of Pico v. Gallardo, upon precisely the same terms that can be imposed in this action. The only difference between this case and the case supposed is that plaintiff, without taking possession, and without waiting to be sued, offers the respondents, in advance, all that he would be compelled to pay in order to redeem if he had taken possession, and waited for them to sue. To allow this would surely not be to deprive the respondents of any valuable right. Enough has been said, I think, to show that respondents never brought themselves within the rule of Espinosa v. Gregory, because they never had possession of the land; but if the fact had been otherwise all the decisions of this court are to the effect that a law extending plaintiff's right of redemption would be valid. Take the case of tax sales: Prior to March, 1885, the purchaser of land sold for delinquent taxes became at once entitled to a tax deed if the property was not redeemed before the expiration of the year. In March, 1885, the law was so amended as to require the purchaser to give 30 days' notice to the owner or occupant of the land of his intention to apply for a deed. This amendment to the law was held to apply to sales made before its adoption. Oullahan v. Sweeney, 79 Cal. 539, 21 Pac. Rep. 960. It is impossible to distinguish that case from this, and if it was correctly decided there can be no doubt of the power of the legislature to extend the right of a mortgagor to redeem. See, also, Moore v. Martin, 38 Cal. 438, and Redemption Co. v. Sedgwick, 15 Cal. 515. In the briefs of counsel a large number of decisions are cited from the reports of other states bearing more or less directly upon this point, with respect to which it can only be said that they are so conflicting as to furnish no ground for reversing our own decision in Oullahan v. Sweeney, supra. A decision on this point by the supreme court of the United States would of course be binding authority, as the immunity asserted arises under the constitution of the United States, but no such decision has been cited. What was said by Judge Taney, in Bronson v. Kinzie, 1 How. 316, has been pronounced *obiter*, and its authority denied by this court. See dissenting opinion of Judge Heydenfeldt, in Thorne v. San Francisco, 4 Cal. 156, adopted in Moore v. Martin, 38 Cal. 438. Of the cases cited in the department opinion heretofore filed, (27 Pac. Rep. 30,) that of Phinney v. Phinney, 81 Me. 450, 17 Atl. Rep. 405, comes nearer than any other to sustaining the contention of respondents, but even that might be distinguished, for the law there held unconstitutional was one by which the equity of redemption could be indefinitely extended at the suit of a stranger to the mortgage. Finally, it may be said that if the doctrine under discussion is to control the decision of this case, it may be invoked by the appellant with quite as much justice as by respondents. The cases of Hughes v. Davis and Espinosa v. Gregory were not decided until the year following the deed of John H. Allen, and they directly overruled a long line of decisions by this court holding that a mortgage by deed absolute did not pass the legal title. The construction given to our laws by these decisions was the law itself at the date of that deed, and fixed the rights of the parties so that they could not be changed by a subsequent construction any more than by subsequent legislation. Douglas v. Pike Co., 101 U. S. 677; Gelpcke v. Dubuque, 1 Wall. 175. For these reasons I conclude that the finding of the superior court, that plaintiff's cause of action was barred by section 361 of the Code of Civil Procedure, is not sustained by the evidence, and, therefore, that a new trial should have been granted, and that the order appealed from and the judgment should be reversed, and the cause remanded for a new trial.

(95 Cal. 220)

Spring Valley Water Works v. Drinkhouse. (No. 12,623.)

(*Supreme Court of California.* June 18, 1892.)

Eminent Domain — Possession Pending Litigation—Restitution—Constitutional Law.

1. The power conferred by Code Civil Proc. § 957, providing that when a judgment is reversed the appellate court may make complete restitution of all property and rights lost by the judgment, so far as such restitution is consistent, etc., is discretionary, and where, after an appeal by the landowner from a judgment of damages in condemnation proceedings, the court allows plaintiff to take possession of the land, and occupy it pending the litigation, as authorized by Code Civil Proc. § 1254, on the payment into court of a sum in addition to the judgment, the supreme court, on reversing the judgment and remanding the cause for a new trial as to the amount of damages only, will not put the landowner back into possession unless the circumstances render it just and necessary.

2. Code Civil Proc. § 1254, allowing the court in condemnation proceedings to authorize plaintiff, on the payment of a sufficient amount into court, to take possession of and use the property "during the pendency of and until the final conclusion of the litigation," is not unconstitutional, and the court may, upon payment into court by plaintiff of a sufficient sum, allow him to take and retain possession pending determination of an appeal by the landowner from its judgment, and pending a new trial on the question of damages ordered by the appellate court on reversing the judgment.

In bank. Appeal from superior court of San Mateo county; E. F. Head, Judge.

Condemnation proceedings by the Spring Valley Water Works against Mary Drinkhouse. Plaintiff, on the payment of money into court in addition to the amount of the judgment which had been appealed from, was given possession of the land pending the litigation. The judgment was reversed by the supreme court, and the case remanded for a new trial on the question of the amount of damages only. Defendant now petitions the supreme court for a writ of restitution. Writ denied.

Ben Morgan and *A. Ruef*, for appellant. *Wm. F. Herrin*, for respondent.

Garoutte, J. After judgment was entered in the trial court, July 27, 1887, in favor of the plaintiff for the condemnation $14.45 acres of defendant's land to public use as part of a reservoir site, (compensation and damages to defendant being assessed at $5,103 and $100 costs,) and pending defendant's appeal therefrom, the court below, upon due application therefor by plaintiff, entered an order October 8, 1887, under section 1254 of the Code of Civil Procedure, authorizing the plaintiff, upon paying into court $5,000 in addition to the amount of the judgment, to take possession of and use the property condemned "during the pendency of and until the final conclusion of the litigation," and staying all actions and proceedings against the plaintiff on account of such possession and use. In pursuance of this order, after paying into court the sums above required, plaintiff took possession of the land in controversy, and has since used the same as part of the lower Crystal Springs reservoir site, the lower part of the land being now covered with water 30 feet in depth; there being held in this reservoir, above the lowest level of the land in question, 3,682,546,000 gallons of water. The water in this reservoir is used to supply San Francisco and its inhabitants with water, and is necessary to maintain an adequate supply therefor.

Upon defendant's appeal from the judgment and from an order refusing a new trial, this court, on December 29, 1891, (28 Pac. Rep. 683,) entered the following order: "Judgment and order reversed, with directions to the court below to retry the issues as to the value of the land sought to be taken and the damage to the remaining portion of the land not taken; and thereupon to enter judgment in accordance with the prayer of the complaint, and in favor of the defendant for such value and damages and costs." It has therefore been finally determined in this action that the use to which plaintiff proposes to put the defendant's land is a use authorized by law, and that its taking by plaintiff is necessary to such use, and all that remains to be determined upon a new trial is the amount of compensation and damages to be awarded to the defendant.

Appellant now petitions this court for a writ of restitution, under section 957 of the Code of Civil Procedure, which section provides that, "when the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent," etc. It is insisted that the reversal of the judgment gives appellant the absolute right to a restitution of the premises, but the wording of the statute will bear no such construction. The section is not mandatory upon the court, but the power conferred thereby is to be exercised when the circumstances of the case call for the use of a judicial discretion. In a case with conditions similar to the one under investigation, where the judgment has been reversed and the cause remanded for the sole purpose of determining the amount of compensation to which appellant is entitled, and where it is not contended that the amount deposited with the trial court is not amply sufficient to satisfy any judgment for damages which may be recovered at a future trial of the action in the court below, taken in connection with the additional facts heretofore recited, we see nothing to demand the exercise of that discretionary power vested in the court under section 957 of the Code of Civil Procedure. This amount of money was deposited with the trial court under the provisions of section 1254 of the Code of Civil Procedure, which allows certain amounts to be paid into court by plaintiff, whereupon the court "may authorize the plaintiff, if already in possession, to continue therein, and, if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation," etc. The final conclusion of this litigation has not yet been reached, and if said section of the Code is not in conflict with the constitution of the state, then this proceeding must fail, for the order of the trial court is still in full force and effect. This section of the Code is not violative of any provision of the constitution, but directly in line with that instrument wherein it treats of such matters. Section 14, art. 1, provides: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." It would seem that the framers of both the constitution and the statute had in view the delays incident to condemnation proceedings, and the necessity in many cases of allowing property to be taken and used for a public use during the progress of the litigation, provided an adequate fund to fully reimburse the landowner was first paid into court. This construction of a quite similar provision of the constitution of the state of Missouri was fully adopted in the case of St. L. & S. F. Ry. Co. v. Evans & Howard Brick Co., 85 Mo. 326. It is conceded that respondent's possession of the premises was lawful down to the time of the reversal of the judgment. The authorities are uniform to that extent. Now, the order of the court, made in the language of the statute, gave respondent possession of the premises "during the pendency of and until the final conclusion of the litigation." If the legislature had the power by statute to give the possession of the premises to the respondent pending proceedings upon appeal, under certain conditions and limitations, it had the same power to extend respondent's possession "until the final conclusion of the litigation." The latter clause is no more violative of the constitutional provision than the former. These views are fully supported in Railway Co. v. Kinsey, 87 Ind. 514.

Subsequent to the final submission of this motion to the court, facts have been presented upon affidavit, pertaining to matters which have arisen since the date of such submission. These matters are foreign to the merits of the motion under consideration, and cannot be considered upon this application. Let the application for the writ be denied.

We concur: McFARLAND, J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

(95 Cal. 171)

BARNES v. BARNES. (No. 13,968.)

(*Supreme Court of California.* June 18, 1892.)

DIVORCE — EXTREME CRUELTY — WHAT IS — DISMISSAL OF ACTION — CONTINUANCE—DISCRETION OF COURT.

1. The court does not lose jurisdiction of a case by plaintiff's filing a written statement that "the above-entitled action is hereby dismissed," where no judgment of dismissal is entered.

2. As a ground for divorce, Civil Code, § 94, defines extreme cruelty as "the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." *Held* that, where the complaint shows that the acts complained of caused grievous mental suffering, it is sufficient without showing that such acts had an injurious effect on plaintiff's health. Waldron v. Waldron, 24 Pac. Rep. 649, 858; 85 Cal. 251, overruled.

3. In an action for a divorce, after issue was joined, and on October 25th, on motion of plaintiff, trial was set for December 2d. The motion was opposed on the ground that depositions would have to be taken in New York; that defendant was an actress by profession, dependent on herself for a living, and could not attend at that time. Counsel for plaintiff waived notice of the issuance of the commission to take the depositions, but it was not issued until November 18th. December 2d the trial was continued to December 6th, when defendant moved for a continuance to January 15th, on the ground that the depositions had not been returned, and that defendant was ill in Missouri, and unable to attend the trial without endangering her prospects of recovery. From the papers filed in support of the motion it appeared that between November 15th and December 6th defendant had been traveling with her company in several eastern states. *Held*, that the refusal to grant the continuance was not an abuse of discretion. BEATTY, C. J., and DE HAVEN and HARRISON, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; WALTER N. LEVY, Judge.

Bill for divorce by Barnes against Barnes. Plaintiff had decree, and defendant appeals. Affirmed.

E. L. Campbell, W. T. Baggett, W. W. Foote, and *John P. O'Brien,* for appellant. *W. S. Hinkle,* for respondent.

PER CURIAM. Action for divorce upon the ground of extreme cruelty. Judgment was entered in favor of plaintiff, and the defendant appeals.

1. After the filing of the complaint in this action, and before any appearance on the part of defendant, the attorney for plaintiff filed with the clerk of the superior court a paper properly entitled in the cause, and stating, "The above-entitled action is hereby dismissed;" but no judgment of dismissal was entered. It is claimed by appellant that upon the filing of this paper the court lost jurisdiction of the action, and that jurisdiction was not restored by the subsequent appearance and answer of defendant. This objection to the jurisdiction of the court was made in various forms in the court below, and overruled. The court did not err in its rulings upon this point. The filing of the paper referred to was, in effect, an order for a dismissal of the action, and would have been sufficient authority for the clerk to have entered a judgment of dismissal; but until the entry of such judgment the court retained jurisdiction of the case. Page v. Superior Court, 76 Cal. 372, 18 Pac. Rep. 385; Acock v. Halsey, 90 Cal. 215, 27 Pac. Rep. 193; Rochat v. Gee, 91 Cal. 355, 27 Pac. Rep. 670.

2. It is urged by appellant that the facts alleged in the complaint and found by the court do not entitle plaintiff to the decree which he obtained, dissolving the marriage which existed between him and appellant. The cruelty alleged and found is that appellant inflicted grievous mental suffering upon plaintiff by imputing to him, in the presence of others, the grossest immorality and personal impurity. It is not necessary to state here, with any particularity, the language by which these charges were made. It is sufficient to say that such charges, if false, were well calculated to bring upon a person of ordinary sensibility grievous mental suffering. But it is not alleged in the complaint, nor is it found by the court, that the charges of which plaintiff complains had any injurious effect upon his health, and for this reason it is claimed that the complaint and findings do not support the judgment under the law as declared by this court in Waldron v. Waldron, 85 Cal. 251, 24 Pac. Rep. 649, 858. It was held in that case that a finding to the effect that the defendant had inflicted upon the plaintiff therein grievous mental suffering, but without injury to her health, was not equivalent to a finding of extreme cruelty upon the part of the defendant, and would not sustain a judgment for divorce upon that ground; and in discussing the question as to what constitutes such extreme cruelty as will justify a divorce, the court said: "Although the character of the ill treatment, whether it operates directly upon the body or primarily upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of the sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party." And it was further said in that case "that the practical view of the law is that a degree of cruelty which cannot be perceived to injure the body or the health of the body 'can be practically endured,' and must be endured if there is no other remedy than by divorce; because no 'scale' by which to gauge the purely mental susceptibilities and sufferings has yet been invented or discovered, except such as indicate the degrees thereof by their perceptible effects upon the physical organization of the body." Tested by this rule, it must be conceded that the findings here are insufficient to sustain the judgment. But the case from which we have just quoted was decided by a bare majority of the court as it was then constituted, and, while the conclusion there reached finds support in many earlier cases cited in the opinion, we do not think it can be sustained without a wide departure from the letter and spirit of section 94 of the Civil Code of this state, which declares: "Extreme cruelty

is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." The language of this section is plain, and cannot be properly construed as declaring that only grievous bodily injury shall constitute extreme cruelty, and that extreme mental suffering, which is not shown to have injuriously affected the body or health of the complaining party, is not sufficient. The tendency of modern decisions, reflecting the advanced civilization of the present age, is to view marriage from a different standpoint than as a mere physical relation. It is now more wisely regarded as a union affecting the mental and spiritual life of the parties to it,—a relation designed to bring to them the comfort and felicities of home life,—and between whom, in order to fulfill such design, there should exist mutual sentiments of love and respect. "It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the feelings of the other or so utterly destroys the peace of mind of the other as to seriously impair the health, * * * or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty under the statute." Carpenter v. Carpenter, 30 Kan. 744, 2 Pac. Rep. 122. Section 94 of the Civil Code is in harmony with the law as thus stated, and under it the infliction of grievous mental suffering is extreme cruelty. It may be true that there is "no scale by which to gauge the purely mental susceptibilities and sufferings" of another, nor is it necessary that there should be any such exact measure. The common judgment of mankind recognizes the fact that there may be unfounded charges and cruel imputations which are not more easily borne than physical bruises, and the necessary effect of which is to cause great mental distress to the person against whom they are made. Whether in any given case there has been inflicted this "grevious mental suffering" is a pure question of fact to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given. As said by Mr. Justice McFarland in his dissenting opinion in Waldron v. Waldron, supra: "Every case where a divorce is sought on this ground must depend upon its own particular facts; and a correct decision must depend—as most cases depend—upon the sound sense and judgment of juries and courts." We cannot say in this case that the court was not fully justified in finding that the conduct of the defendant inflicted upon plaintiff grevious mental suffering, as alleged in the complaint. The evidence was sufficient to sustain the finding of the court that plaintiff had been a resident of the state for more than six months prior to the commencement of the action.

The refusal of the court to grant a continuance cannot be held to be an abuse of discretion. In Kneebone v. Kneebone, 83 Cal. 647, 23 Pac. Rep. 1031, the court said: "It is settled law in this state that applications for continuance are addressed to the sound discretion of the trial court, and its action will not be disturbed on appeal, unless the record affirmatively shows that it abused its discretion. In Musgrove v. Perkins, 9 Cal. 212, the court, per Field, J., said: 'The granting or refusing a continuance rests in the sound discretion of the court below, and its ruling will not be revised except for the most cogent reasons. The court below is apprised of all the circumstances of the case, and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than the appellate court; and when it exercises a reasonable, and not an arbitrary, discretion, its action will not be disturbed.' And similar language has been used in many subsequent decisions." This action was commenced on May 14, 1889. The defendant was personally served with summons nine days later, and on June 21st she appeared, and demurred to the complaint. On July 28th the demurrer was withdrawn, and the defendant was allowed 30 days in which to answer the complaint. She procured further extensions of time, and filed an answer and cross complaint on October 15, 1889. An application was made on the 16th of October to have the cause set for trial, but by reason of the illness of the presiding judge the hearing of the motion was postponed until the 25th, when the cause was set for trial on December 2d following. Counsel for defendant objected to the order of the court setting the case for trial on December 2d on the ground that it would be necessary to take the depositions of witnesses residing in New York; that defendant was an actress by profession, and dependent upon herself for a living; and that her senior counsel would be necessarily absent from the state for about a month. Counsel for plaintiff stated that he would waive service of notice for the issuance of the commission to take depositions, and thereupon the order was made as stated. An application was made on December 2d for a continuance until the 15th day of January, 1890, and the cause was continued until the 6th day of December, 1889, at which time the motion for a continuance to January 15th was made and denied. The commission to take depositions was not issued until the 18th day of November, 1889. When the cause came on for trial, December 6, 1889, counsel for defendant filed an affidavit, and in connection therewith several letters and telegrams received from the defendant, as a basis for his motion for a further continuance until January 15th. It is apparent from the language of the court in denying this last motion that it believed the defendant was not acting in good faith, but was endeavoring to postpone the action of the court until her business engagements would bring her to San Francisco, and we cannot say that such conclusion may not have been fairly drawn from all the circumstances of the case. Defendant had actual notice more than six months prior to the day of the trial of the charge which plaintiff made against her, and the cause was at issue nearly two months before the trial occurred. It appears from the letters and telegrams that the defendant was at Minneapolis, Minn., November 15th; Milwaukee, Wis., November 19th; Marshalltown, Iowa, November 22d; Des Moines, Iowa, November 23d; Kansas City, November 26th and 27th; St. Louis, December 2d, 4th, and 6th; and was informed at these times of all that had occurred. The court doubtless concluded that, if the defendant could thus travel about in the east, she was able to make the trip to San Francisco in time to be present at the trial; and, as stated before, we cannot say that its order was an abuse of discretion. It has been held here that there is no abuse of discretion in refusing a motion for a continuance if the circumstances cast suspicion on the good faith of the application, and induce the belief that it was intended only for delay. People v. Mortimer, 46 Cal. 120. While the trial court should be most liberal in granting continuances in divorce cases, because the public as well as the parties to the action are interested in the result of the suit, a defendant must be held to the exercise of good faith and diligence, and cannot be heard to complain if the failure to present his defense results from an attempt to subordinate the business of the court to his own business engagements and convenience. The judgment and order are affirmed.

De Haven, J. I dissent from the judgment and from so much of the foregoing opinion as holds that the action of the court below in denying the motions of defendant for a continuance was not an abuse of discretion. The defendant is a nonresident of the state, and her answer was filed October 15, 1889, and on the 25th of that month the court, on motion of plaintiff, and against the objection of defendant, set the case for trial on December 2, 1889; and afterwards the time for trial was continued by consent until December 6, 1889, without prejudice to the right of defendant to move for a further continuance. Upon that day the defendant moved for a continuance of the case until January 15, 1890. The motion was upon the ground that depositions of certain witnesses had not been returned, and also for the alleged reason that defendant was ill at Kansas City, Mo., and unable to come to San Francisco without endangering her prospects for recovery. This motion was supported by the affidavit of one of her attorneys, which stated, among other things, "that affiant is further informed by telegrams received from defendant on the 23d, 26th, and 30th days of November, 1889, and also from affidavits of Dr. J. C. Rogers, hereto attached, and affiant believes, and thereupon states, that defendant is now ill at Kansas City, Missouri, and unable to travel without danger to her health." Accompanying this was the affidavit of defendant herself and her physician to the same effect. Many telegrams from defendant to her attorney were also produced. I am unable to find anything in the record which directly contradicts the facts stated in these affidavits in regard to the state of defendant's health. That which comes the nearest doing so is found in the statement or affidavit of plaintiff's father, wherein it is said: "I am informed and believe that she is now performing as an *opera bouffe* artist with a company, and has been doing so for many months, and is not too sick to come here or travel." Manifestly, this is not an assertion that the defendant was not in fact sick, as stated in the affidavits of herself and physician; but it is argued that the telegrams, dated at different places, show that she was traveling with her company, and, therefore, that she was not sick. These telegrams certainly show that she had not severed her connection with the company, and that she was able to travel between the places, but it does not necessarily follow, because she did this, that it would have been prudent for her to attempt the longer overland journey. The motion for a continuance until January 15th was denied, and upon the next day the defendant moved for a continuance for one week. The motion was made upon the same affidavits, and additional telegrams and a letter from defendant. One telegram was dated upon the previous day, December 6th, and is as follows: "Allow sufficient time for traveling. Last notice too short. Fight for continuance. Telegraph early." The letter was dated December 2, 1889, and was addressed to her attorney. In it she said: "I am very anxious to hear definitely about the trial. I am unable to take so long a journey alone at present. I have worried myself ill, until nervous prostration got the better of me. I am also suffering from rheumatism. I must give notice this week to the company, if I intend to remain with them, and open January 13th in San Francisco. I can't put them off in this matter. I can't hear from you, and every night they send for decided answer, and I am unable to decide. If I come to San Francisco, I give up my engagement in the middle of winter. You say nothing about the divorce being granted to me, if I accept settlement. I have done nothing to grant a divorce, but if there is no other alternative I must." This motion was also denied, and in so doing, as well as in its denial of the previous motion, I think the court erred. The defendant was a nonresident of the state, an actress by profession, and under engagement as such; and while it appears from the letters and telegrams to her counsel that she did not wish to break this engagement if she could avoid it, and that this was one reason why she may have desired a postponement of the trial, still there is nothing in these letters and telegrams to warrant the inference that she and her counsel were acting in bad faith with the court in asking for a continuance upon the ground of the state of her health, as represented in the affidavits of herself and physician, or that such affidavits were untrue.

In actions for divorce public policy imperatively requires that nothing should be done in haste. The public are interested in having no divorce granted except for adequate cause, and the surest way to determine whether there is good cause or not is to hear both sides. In accordance with this rule, it has always heretofore been held by this court that in actions for divorce, applications to set aside a judgment of default, and for leave to answer, a more liberal rule is to be applied than in other cases, in which only private rights of property are involved. Thus in the case of Wadsworth v. Wadsworth, 81 Cal. 182, 22 Pac. Rep. 648, this court reversed the action of the lower court in refusing to set aside a default, although it was admitted that the appellant had been guilty of such negligence as would in an ordinary action have deprived her of the right to such relief. The court there said: "So far as the divorce awarded to the defendant is concerned, the motion should have been granted under the rule laid down in McBlain v. McBlain, 77 Cal. 509, 20 Pac. Rep. 61. In that case the court, per PATERSON, J., said: 'The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce. The policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters.' In the present case there seems to have been an honest desire on the part of the plaintiff to present her side of the case; and while, in an ordinary action, the neglect shown might be sufficient to deprive her of a right to relief, yet in this kind of case a more liberal rule should prevail." It is plain to my mind that if the court below had kept in view the rule as thus declared it would not have denied to the absent defendant a continuance for one week, which would have enabled her to be present, and give evidence in her own defense; more especially when such motion was based upon the solemn affidavit of her counsel, in which he assured the court, upon his information and belief, "that it was the intention of the defendant to be present in San Francisco at said trial on December 2, 1889, and that she was and is prevented therefrom by her said illness, and not otherwise." It is very apparent from all of the telegrams, letters, and affidavits submitted to the court that defendant desired to be present at the trial, and neither of the motions for a continuance called for any unreasonable delay, and there is nothing in this record to show that plaintiff could possibly have been injured if either of them had been granted. Under such circumstances, the refusal of the court to postpone the trial was error, and not within the limits of that judicial discretion which the law intends shall govern and restrain courts in their rulings upon such questions, and which discretion is never capricious, arbitrary, or unjust, but is always "exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice." Bailey v. Taaffe, 29 Cal. 424. Whatever cause may have existed for a divorce in this case, or however unwise or unfortunate the marriage between the parties may have been in the first instance, I can find in such facts no justification for bringing on the trial against a nonresident woman in 53 days after issue joined, in the face of a demand for the limited and reasonable postponement asked for by her counsel, and which motions it must be presumed from this record were made in good faith. The marriage was a lawful one, and gave to the defendant rights of which she should not be deprived without full and complete opportunity for defense. The judgment and order should be reversed.

We concur: BEATTY, C. J.; HARRISON, J.

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95 Cal. 63

KOPP v. GUNTHER. (No. 14,783.)

(*Supreme Court of California*. June 17, 1892.)

TRUSTS—REVOCATION.

A voluntary conveyance was accepted by the grantee by a written instrument reciting that the grantor had conveyed the land to him in trust, which trust he accepted and agreed to carry out according to the terms of the grantor's will, made the same day. In this will the grantor, after a declaration of trust to take effect after his death, to which the acceptance of the trust by defendant referred, expressly stated that "the said trust property so conveyed as aforesaid forms no portion of my estate herein by this, my last will, disposed of." *Held*, that the conveyance was not a part of the will liable to be annulled by its revocation, and cannot be declared to have created a naked trust, or be avoided for want of consideration.

In bank. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by Frederick W. Kopp against Robert Gunther to decree a conveyance of land from plaintiff to defendant to be a naked trust, and for a reconveyance thereof. Judgment for defendant. Plaintiff appeals. Affirmed.

Buck & Cutler, for appellant. *Chamberlin & Wheeler*, for respondent.

MCFARLAND, J. This action was brought to have it decreed that a certain conveyance of lands by plaintiff to defendant created a mere naked legal trust, and to compel defendant to convey said lands to plaintiff. Defendant interposed a general demurrer to the complaint, which was sustained, and, plaintiff declining to amend, final judgment was rendered for defendant. Plaintiff appeals from the judgment.

The conveyance referred to is dated January 23, 1891, and is an ordinary grant, bargain, and sale deed, by which, for a named consideration of $5,000, the plaintiff conveys to the defendant in fee simple certain lots of land in the city of Eureka. It was duly acknowledged and recorded. At the same time defendant executed a written instrument, which, after reciting that plaintiff had conveyed said lots to defendant in trust, proceeds as follows: "I hereby accept such trust, and hereby agree to carry out the terms thereof as the same appear in that certain declaration of trust set forth and contained in the last will and testament of the said Kopp this day made, which said declaration of trust is hereby referred to and made a part hereof." On the same day plaintiff made his will, in which, after providing for the expenses of his last sickness, funeral, etc., he gives all the residue of his estate to one Regine Wagner. The will then proceeds as follows: "Having this day made, executed, and delivered unto Robert Gunther a deed conveying to him lots one and eight in block thirty-six, and the southwest quarter of block ninety-four, in the city of Eureka, according to the official map of said city, said property being conveyed to him in trust to be held, managed, incumbered, or disposed of in accordance with certain directions by me given to him, the said Gunther: Now, in order to avoid any uncertainty in relation to said trust, I hereby declare said trust to be as follows, to wit: (1) That said Gunther is to hold and manage said real property from this date henceforth in such manner as he may deem best; and upon my death he is at once to pay, or cause to be paid, from out said trust property, the following amounts, to wit: To Catarina Kopp, [and five other persons,] the sum of one hundred dollars each. (2) To cause to be erected over my grave a tombstone, to cost about $150. (3) Any money the said Gunther shall pay out of said property, either for taxes, insurance, or otherwise, and any and all sums of money he may advance or loan to me between this date and the time of my death, are to be considered a preferred charge on said lands; and the said Gunther is to first reimburse himself for such amounts so paid from said trust property. (4) Upon the payment of the foregoing, and such additional sums as the said Gunther may deem a reasonable compensation for his services as such trustee, he, the said Gunther, is to at once convey said property as follows, to wit: Unto Regine Wagner the said lots one and eight of block 36; and unto Augusta Wagner, the sister of the said Regine, the said southwest quarter of block 94. (5) Should it be necessary or expedient to sell or incumber said property in order to carry out said trust, said trustee has full power so to do, it being left to his discretion to so act in relation thereto that the diminution in value suffered by said trust property by reason thereof will be borne proportionately by the respective shares of the said Regine and Augusta Wagner. I here expressly state that the said trust property so conveyed as aforesaid forms no portion of my estate herein by this, my last will, disposed of; nor is it my wish or desire that said trust property be administered upon in probate."

The substantial averments of the complaint are these: The plaintiff, at the time of the execution of these instruments, was advanced in years, and in feeble health, and was "harassed by an unconscionable suit," brought against him by a woman who wanted damages for an alleged breach of promise of marriage. "Being oppressed by illness and anxiety about said suit," he sought the advice of defendant, in whom he had confidence, and under these circumstances, and "being thereto advised by defendant," he executed the said instruments. "In the execution of said instruments plaintiff understood and believed that he was making a testamentary disposition of his property; and he did not understand thereby, nor intend thereby, to place said real estate, nor any portion of his property, beyond his control or other disposition thereof." Said deed expresses a consideration of $5,000. No consideration was paid, and it was executed "solely for the purpose of securing defendant for small amounts of money to be loaned to plaintiff by defendant, and as a part of his last will as aforesaid." Since then "said unconscionable suit for breach of promise of marriage has been tried, and judgment thereon was, on the 14th day of March, 1891, duly given and made in favor of this plaintiff [defendant in said action] for his costs." It is further averred that "plaintiff has revoked said will, and every part thereof, and has also revoked the naked trust, if any, created by said conveyance." It is also averred that defendant had advanced to plaintiff about $300; that plaintiff has offered to pay said sum, and is ready to pay any other indebtedness which may be found due defendant; has demanded a reconveyance, and tendered to defendant a deed to be executed by him; but that defendant has refused to execute such deed, and claims to hold the legal title for the benefit of said Regine and Augusta Wagner.

The demurrer was properly sustained. The complaint contains no averments of undue influence, fraud, or any other of the ordinary grounds upon which the avoidance of solemn conveyances of property is usually based. It goes upon the theory that the deed was part of the will, and that plaintiff, by revoking the latter, annulled the former. But this clearly was not so. The revocation of the will released from its operation all property which would have been devised or bequeathed thereby if the testator had died without making the revocation. But the plaintiff in the will did not devise, or attempt to devise, the property conveyed by the deed. On the contrary, the latter was expressly excepted from the will, in which it was expressly stated that "the said trust property so conveyed as aforesaid forms no portion of my estate herein by this, my last will, disposed of." It is true that the instrument in which the will was written also contained a declaration of trust to which the acceptance of the trust by defendant referred; but the declaration of trust was as effective after the revocation of the will as before, and would have been equally effective if the will had never been valid as a will,—that is, if, for want of proper attestation, or from some other defect, it had never been legally executed. The deed is not part of the will, but the declaration of trust contained in it is referred to in the deed for the purpose of showing the nature of the trust. A present interest passed to defendant. He received the title in fee, with full power to control, to incumber, or to sell the property. It was a voluntary trust without power of revocation; and the averment of want of consideration is immaterial. Civil Code, §§ 863, 1040, 2216. The averment of a mistake of law does not bring the case within that extreme class of mistakes of law from which equity will relieve. Id. § 1578; Goodenow v. Ewer, 16 Cal. 471; Kenyon v. Welty, 20 Cal. 640; Burt v. Wilson, 28 Cal. 638. Moreover, it is apparent upon the face of the complaint that plaintiff did exactly what he intended to do. It is also clear that one of the main purposes of the deed was to put plaintiff's property beyond the reach of an unfavorable judgment on the pending action for breach of marriage promise, which, of course, could not have been effected by a mere testamentary disposition of said property.

The judgment is affirmed.

We concur: GAROUTTE, J.; SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.; DE HAVEN, J.

95 Cal. 227

PEOPLE v. DEVINE. (No. 20,911.)

(*Supreme Court of California.* July 8, 1892.)

LARCENY—INTENT.

Under Pen. Code, § 484, providing that larceny is the felonious stealing, leading, or driving away the personal property of another, where one drives away and sells stock of another, thinking it his own, as there is no felonious intent, he is not guilty of larceny.

Department 2. Appeal from superior court, Tulare county; WHEATON A. GRAY, Judge.

Devine was convicted of larceny, and appeals. Reversed.

R. Irwin, *J. S. Clark*, and *Bradley & Farnsworth*, for appellant. *Attorney General Hart*, for the People.

SHARPSTEIN, J. "Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another." Pen. Code, § 484. In this case the evidence is sufficient to justify a jury in finding that appellant took and carried away the property of another; but insufficient to justify the finding that appellant feloniously stole the same. Therefore the evidence is insufficient to justify the verdict of guilty of larceny against the defendant, and for that reason he is entitled to a new trial. The evidence shows that the appellant and Robert Doherty occupy adjoining tracts of land, and that each of them keeps upon his own tract a considerable number of hogs. Appellant, wishing to sell some of his hogs, directed two men in his employment to collect his hogs in a pen or inclosure, so that he might select therefrom some denominated "feeders," to take and sell to a butcher by the name of Sam Bee, whose place of business was several miles distant from appellant's farm. Out of 40 or 50 hogs in the corral, appellant, with the assistance of his son and the two men who had driven the hogs into the inclosure, selected 11 "feeders," which were loaded on a wagon, and conveyed to Sam Bee's place, and sold to him by appellant. There is evidence tending to prove that 3 of these 11 "feeders" were marked with Doherty's mark, which differed materially from appellant's mark, but the difference was not noticed by any save one of several witnesses who had equal opportunities with the appellant of observing the difference in the marks; and the witness who testified to having detected the difference does not state that he mentioned the fact to appellant, or any one else. Sam Bee, who purchased the hogs from appellant, testified that he did not observe the difference in the marks until his attention was called to it by William Doherty, about a week after the hogs were sold and delivered to him, Bee, by appellant. No part of the transaction was characterized by secrecy or attempted concealment. Appellant acted throughout as he would be expected to act if he thought he was dealing with his own property, and the evidence tends strongly to prove that he really and honestly so thought. We think the evidence, coupled with the presumption of innocence, which attends the accused from first to last, sufficient to overcome the presumption of a guilty intent, arising from a wrongful appropriation of the property of another. He was not informed that any of the hogs he carried away and sold were not his own, and all the evidence tends to prove that he honestly believed they were all his own. There is no evidence to the contrary. The rule applicable to such a case is illustrated by Sir Matthew Hale as follows: "If the sheep of A. stray from the flock of A. into the flock of B., and B. drives them along with his flock, or by pure mistake shears him, this is not felony; but if he know it to be another's, and marks with his mark, this is an evidence of a felony." 1 Hale, P. C. 507. "Every taking, by one person, of the personal property of another, without his consent, is not larceny; and this, although it was taken without right or claim of right, and for the purpose of appropriating it to the use of the taker. Superadded to this, there must have been a felonious intent, for without it there was no crime." McCourt v. People, 64 N. Y. 583. "One person may take or carry away the property of another, of the value of fifty dollars, without being guilty of any offense whatever. But if he does the act feloniously, the statutory crime is committed." People v. Cheong Foon Ark, 61 Cal. 527. "It is clear that a charge of larceny, which requires an intent to steal, could not be founded on a mere careless taking away of another's goods." 1 Bish. Crim. Law, § 320. In a note to State v. Homes, 57 Amer. Dec. 269, Mr. Freeman says: "To constitute the offense of larceny it is absolutely necessary that the taking of the goods be with a felonious intent;" and cites more than a hundred cases in support of that rule. "We cannot sustain the conviction without confounding the distinction between criminal acts and such as, however reprehensible, involve only a violation of private rights and injuries, for which there is a remedy only by civil action." McCourt v. People, 64 N. Y. 583.

We think the verdict in this case was largely, if not wholly, owing to an instruction given to the jury, which, although in the language of section 485 of the Penal Code, was not applicable to this case, and was liable to mislead the jury. The instruction to which we refer reads as follows: "One who finds lost property, under circumstances which give him knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without making a reasonable and just effort to find the owner and restore the property to him, is guilty of larceny." Section 485, of which this instruction is a copy, "relates in terms to property lost (in the apparent possession of no one) and found." People v. Walenzuella, 6 Pac. Coast Law J. 561. There is no evidence in this case of the finding of any lost property. The property was in the apparent possession of the appellant, who could not have intended to steal it unless he knew it was not his own property. The objection to that instruction in this case is that the jury may have construed the instruction to mean that, if appellant had the property of another in his possession, and appropriated it to his own use, without making any effort to find the owner and restore the property to him, he was guilty of larceny, although he may not have known or suspected it to be the property of another. In other words, if, by the exercise of due circumspection, he might have ascertained that some of the hogs in his possession belonged to some one else, he was as guilty as if he had known that they were the property of some one else. There are cases in which all the knowledge which a person might have acquired by due diligence is to be imputed to him. But where a felonious intent must be proven it can be done only by proving what the accused knew. One cannot intend to steal property which he believes to be his own. He may be careless, and omit to make an effort to ascertain that property which he thinks his own belongs to another; but so long as he believes it to be his own he cannot feloniously steal it. We think if this instruction had not been given, the jury, under the instructions which preceded it, would have returned a different verdict. In People v. Buelna, 81 Cal. 135, 22 Pac. Rep. 396, one of the defenses was that the defendant found the property as lost property, and took it up in good faith, to be accounted for to the true owner. In that case section 485 of the Penal Code might properly be given as an instruction to the jury. But in this case there is no such defense or claim set up. The two cases are so clearly distinguishable as to deprive what was said in the earlier case of any weight upon the question we are now considering. In some cases an inapplicable instruction can do no harm; but when it is liable to mislead a jury to the prejudice of one of the parties, it becomes as grave an error as though it were not "correct as an abstract proposition of law." We agree with appellant's counsel that "the statements, questions, and remarks of the district attorney were peculiarly calculated to prejudice the substantial rights of the defendant." We think what was said by this court in People v. Lee Chuck, 78 Cal. 327, 20 Pac. Rep. 719, and People v. Bowers, 79 Cal. 415, 21 Pac. Rep. 752, peculiarly applicable to the conduct of the district attorney in this case, and we hope the court may not again have occasion to animadvert upon similar conduct of a prosecuting officer. The record presents no other material errors. Judgment and order reversed, and cause remanded for a new trial.

McFARLAND, J. I concur.

DE HAVEN, J., (*concurring.*) I am not prepared to say that the evidence is insufficient to justify the verdict, but I concur in the judgment of reversal because of the error in giving the instruction referred to in the opinion of Mr. Justice SHARPSTEIN,—as to what facts are sufficient to show a larceny of lost property,—and also because of the misconduct of the district attorney in asking the defendant upon cross-examination certain questions, and in making a statement in reference thereto in the presence of the jury. The questions were as follows: "You know, as a matter of fact, you had been stealing his hogs right along?" and, "The only reason you have got right now for swearing that you believe that Robert Doherty had an antipathy towards you is because about six years ago he caught you dressing one of his hogs. Isn't that the only reason?" The questions being objected to by the defendant's attorney, they were followed by this statement, made by the district attorney: "I want to show that the only reason that the witness had for believing as he did was because Robert Doherty caught him one time killing one of his hogs. He had testified that Robert Doherty, he believed, had an antipathy against him. We desire to explain why he had that antipathy." It is not argued here, nor could it be with any degree of seriousness, that these questions were proper, or that the fact offered to be shown was one competent for the jury to consider for any purpose in passing upon the issues involved in the case they were trying. On the contrary, it is apparent that the only object sought by this course of examination, and in the statement made to the court, was to convey to the jury a knowledge of the alleged fact that the defendant was at some prior time guilty of an offense similar to that for which he was then on trial, and that he was at that time caught under such circumstances that he could not interpose the defense of a taking by mistake,—the only defense relied upon in the present case. Such a fact, thrown before the jury, and offered to be proven by the testimony of the defendant himself, could not have failed to prejudice the case of defendant. In this case the taking by defendant of the hogs alleged to have been stolen was not disputed; but the defendant claimed that he had not observed that such hogs bore the mark of the prosecuting witness, and his whole defense depended upon whether the jury should believe his evidence on this point. Under these circumstances it was very damaging to bring before the jury, in the manner adopted by the district attorney, the fact that upon a previous occasion the defendant had been caught dressing a hog belonging to the same person who was prosecuting him for larceny in this case. In the case of Leahy v. State, (Neb.) 48 N. W. Rep. 390, the defendant was on trial for a rape alleged to have been committed upon one Lizzie Schultz, and upon the cross-examination of the defendant the prosecuting attorney asked him, among other questions, if he did not go to the residence of one B., on the day succeeding that on which he had made the assault on Miss Schultz, and there, meeting Miss B. alone, attempt to kiss her, and drag her to a lounge. An objection to the question was sustained, whereupon the prosecuting attorney said in the presence of the jury: "We intend to follow this matter up, and show that he went right over to B.'s, and there tried to hug and kiss Miss B., and drag her to the lounge." The supreme court held that this was error, and said: "It is the duty of a prosecuting officer to conduct the trial of a criminal case according to established rules. He acts in a semijudicial capacity, and is supposed to act alone from principle, and without bias or prejudice. The state has guarantied to every one a fair trial, and such trial cannot be had if the prosecution can resort to tricks to secure a conviction. If such practice was sanctioned, it would result, in many cases, in the conviction of innocent persons. The plaintiff in error was on trial for the crime charged in the information. So far as appears, he had not been charged with any other offense, and certainly was not on trial for the second. The statements of the attorney were improper, and in the highest degree prejudicial, and for those causes the judgment is reversed, and the cause remanded for a new trial." The case of People v. Cahoon, 88 Mich. 456, 50 N. W. Rep. 384, and that of People v. Ah Len, 92 Cal. 282, 28 Pac. Rep. 286, are the same in principle as the one from which I have just quoted, and I think under the rule of these cases it must be held that the substantial rights of defendant were prejudiced by the mode of examination adopted by the district attorney and by his statement of the fact which he desired to show. The court below sustained objections to the questions, but this did not, in my judgment, obviate the injury which the questions and statement must have produced.

(95 Cal. 92)

DIETZ v. MISSION TRANSFER CO. (No. 13,915.)

(*Supreme Court of California.* June 18, 1892.)

RESERVATIONS IN DEED — CONSTRUCTION — RES JUDICATA.

1. Defendant was the owner of a ranch, a portion of which had been conveyed to plaintiff by its grantors. This conveyance to plaintiff excepted oils, petroleum, etc., and reserved "the right to erect machinery, sink wells, bore, tunnel, dig for, work on, and remove the same from the premises, together with a right of way over and through any and all parts of said premises, for the purpose of going to and coming from said works, and transporting machinery, tools, implements, and supplies for said works, and of transporting said substances to market, and the right to lay pipes to conduct oil." *Held*, that defendant was not thereby authorized to use the land conveyed to plaintiff for the purpose of pumping or storing oil found in other portions of the ranch.

2. Defendant is not confined in its operations to portions of the land sold to plaintiff, where oil is found on the surface only, but is entitled to go on any portion of the land, and there use any reasonable means to develop oil.

3. Before the sale to defendant, plaintiff had leased the whole ranch for a certain period, and, to recover possession thereof from plaintiff, defendant had to bring suit. The only question determined in that suit was the right of plaintiff to retain possession under his lease. *Held*, that a judgment for defendant in that suit was no bar to a subsequent proceeding in ejectment to determine plaintiff's right to the portion of the ranch purchased by him.

4. Plaintiff conveyed to defendant all his right and title to "all the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever," situated on any portion of the ranch. *Held*, that by such conveyance not only did defendant become the owner of the property therein specifically mentioned, and property of a kindred nature, but it also acquired the right to operate them in the manner they had theretofore been operated. HARRISON and DE HAVEN, JJ., dissenting.

In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Ejectment by one Dietz against the Mission Transfer Company. Judgment for defendant. Plaintiff appeals. Reversed.

Noble Hamilton and *Joseph A. Joyce*, for appellant. *Charles Fernald*, *John J. Boyce*, and *Garber, Boalt & Bishop*, for respondent.

PATERSON, J. Ejectment. On December 20, 1881, Carpentier & Steinbach were the owners in fee of a tract of land consisting of about 20,000 acres, in Ventura county, and known as the "Ex-Mission Rancho." On that day they entered into a contract of lease with the plaintiff herein, by the terms of which plaintiff was to have the possession of the land, together with the buildings and improvements thereon, and the right to use all necessary land for the purpose of digging, boring for, developing, and taking oils, petroleum, asphaltum, and other kindred substances, and the right of way over the lands of the ranch for roads where necessary for the purpose of transporting substances to market. The lessors retained the right to pasture their cattle and sheep on the land, and to farm and cultivate all that portion of the premises not occupied for the purposes aforesaid. The lease was to continue for the term of three years from the 1st day of January, 1882. It was provided that, in case the lessors should at any time sell the premises, or the right to take oil, petroleum, and kindred substances, the contract should "*ipso facto* terminate six months from a written notice of such sale," but that the plaintiff should not in any event be required to quit and deliver up possession of the premises before the 1st day of July, 1883. Dietz was to have the option of purchasing the property and privileges leased to him for the sum of $150,000 at any time within three years from the date of the lease. While the owners reserved the right to sell the lands with or without the rights referred to, to any other person at any time within the three years, it was provided that they should first give Dietz 30 days' notice for the exercise of his option to take the property at $150,000, or any less sum which they might be willing to take. If he did not purchase within 30 days after the notice, then the owners were to have the privilege of selling to any other person. On October 25, 1882, Carpentier & Steinbach notified Dietz that they had an offer of $100,000 for the property and rights named in his lease, which offer they were willing to take, and requiring him within 30 days of the notice to exercise the option reserved to him in the lease. It does not appear whether Dietz made any reply to this notice. On November 23, 1882, Carpentier & Steinbach made, executed, and delivered to Dietz a deed, grant, bargain, and sale in form, conveying, in consideration of the sum of $2,400, about 400 acres of the 20,000-acre tract above referred to. This deed excepted from the operation of the grant "all oils, petroleum, asphaltum, and other kindred mineral substances," and contained a reservation of "the right to erect machinery, sink wells, bore, tunnel, dig for, work on, and remove the same from the said premises, together with the right of way over and through any and all parts of said premises, for the purpose of going to and coming from said works, and transporting machinery, tools, implements, and supplies for said works, and of transporting said substances to a market, and the right to lay pipes to conduct oil, and the right to dispose of said substances, and of transferring to their grantees thereof the same rights as are herein reserved to the parties of the first part; but not to destroy or injure any crops growing upon or any improvements on said premises, such as buildings, trees, vines, roads, inclosures, without making just compensation for such injury or destruction. Reserving also to the parties of the first part the right of way for a road or roads over and across said premises, for the use of tenants or vendees of adjoining and other lands of said rancho." The party referred to in the notice of October 25th, as having made an offer of $100,000, was F. J. Whaley, with whom Carpentier & Steinbach had entered into an agreement on October 21st, by the terms of which they agreed to sell to him the property and rights described in the lease to Dietz, for the sum of $100,000, "subject to the pre-emption right of Alfred C. Dietz, as contained in the indenture of lease between Horace W. Carpentier and Rudolph Steinbach, dated the 20th day of December, A. D. 1881." By the terms of this agreement the purchaser was to pay $10,000 when possession was delivered on July 1, 1883, and the balance in certain installments named; but it was provided that "the title of the said right is to be retained by the first party until performance." On November 25, 1882, Carpentier & Steinbach notified Whaley that they had given Dietz the notice required in the lease to him on October 25th; that the 30 days allowed him in which to exercise his option had expired November 24th; and that he had elected to purchase. On December 12, 1882, Dietz was notified that Carpentier & Steinbach had sold the property and rights described in his lease, and that his lease would therefore terminate on July 1, 1883, at which time they would require of him to quit and surrender up the possession of the premises. The deed from Carpentier & Steinbach to Dietz was recorded November 27, 1882. Whaley conveyed all his right, title, and interest to the defendant on October 28, 1882, and the latter has thus far complied with all the terms of the agreement with Carpentier & Steinbach.

The first matter presented for consideration is the question as to the effect of these conveyances and notices. It is claimed by respondent that "on the 24th day of October, 1882, and before the deed to Dietz of November 23, 1882, the Mission Transfer Company had acquired, through the assignment of the contract with Whaley, the general right over the entire tract to the mineral oils and asphaltum in the ground, to the right of entry upon the whole tract to mine and explore for oils and asphaltum, with the right of way over every part of it for the transportation of the oils, and every other right which was necessary to the enjoyment of the interest which they had acquired. They, therefore, had this right before the deed to Dietz was made, and whatever estate or interest in the particular 400-acre tract he obtained by that deed was subject to the rights of the Mission Transfer Company under the agreement of Carpentier & Steinbach with Whaley." We cannot agree with respondent in this contention. Under his agreement with Carpentier & Steinbach, and the notice which they gave him, Dietz had the right to purchase the property at any time before November 25, 1882. The 30 days' notice was served on him on October 25, 1882. This gave him to and including November 24th in which to exercise his option. While he was thus in possession of the land under his lease, and entitled to purchase, the owners of the land, by a deed of grant, bargain, and sale, conveyed a part of the rancho to him for the consideration of $2,400. So long as the owners of the land were willing to convey 400 acres of the entire tract nobody could be heard to complain, so far as Deitz was concerned. If Whaley or the transfer company had any ground of complaint, it was against Carpentier & Steinbach. The contract between these parties could in no way bind Dietz. He became the owner of the 400 acres before the expiration of the time within which he was required to exercise his option, and the fact that his grantors had entered into agreement for the sale of an interest in the property to Whaley could not deprive him of the benefit of his agreement and his conveyance. We do not see how the defendant can be heard to complain unless it be held that plaintiff was bound to purchase the entire tract of 20,000 acres, or none at all,—a proposition which cannot be maintained. Our conclusion, therefore, on this branch of the case, is that the defendant acquired no right by virtue of its purchase from Carpentier & Steinbach to use the land in controversy for the purpose of operating an oil plant in developing, transporting, and storing oil found on other portions of the rancho. Its right in this regard is acquired solely through the exceptions and reservations found in the deed to plaintiff, and the conveyance to it by Carpentier & Steinbach. It has the right to go upon the land in controversy, under those exceptions and reservations, for the purposes therein named; but its operations, under the terms of the deed, must be confined to the 400-acre tract. The plaintiff's grant conveyed to him the absolute title to the 400-acre tract, with the exception of the oil, asphaltum, and other kindred mineral substances therein, and the right reserved to erect machinery, sink wells, etc., on said tract.

It is contended by appellant that the exceptions and reservations in the deed to Dietz do not give the defendant the right to go upon the 400-acre tract for the purpose of developing oil, and that, as the evidence shows there is no oil on that portion of the ranch, the defendants have no right there; but the plain meaning of the language used in the deed does not support this theory. The terms "sink wells, bore, tunnel, dig for" certainly mean the right to develop. The fact, if it be a fact, that there are no oil croppings on the surface will not prevent defendant from digging, tunneling, etc., to ascertain whether any exist below the surface. How much tunneling, boring, digging, etc., may be done by the defendant for the purpose of developing oil cannot be determined in advance. "All that can be said in that regard is that they would be held to a reasonable exercise of the right to develop the [oil] water." Painter v. Water Co., 91 Cal. 86, 27 Pac. Rep. 539.

The defendant pleaded in bar of plaintiff's cause of action a judgment entered in the superior court of the city and county of San Francisco, on June 30, 1884, in an action between Steinbach, Carpentier, and the Mission Transfer Company, plaintiffs, and Dietz, Hill, and Adams, defendants. The plaintiffs in that action alleged all the facts we have stated above in relation to the transactions between the various parties, excepting the fact of the conveyance from Carpentier & Steinbach to Dietz, and claimed that Dietz had lost all rights under his lease from Carpentier & Steinbach by failure to purchase within the 30 days following the notice given, and by virtue of the provisions of the lease requiring him to quit and deliver possession on July 1, 1883; but nevertheless he was unlawfully holding, and claiming the right to hold, possession of the land for the purpose of extracting oils, etc., and, although demand had been made, he had refused to permit the respondent to enter upon the land for the purpose of exploring, developing, or extracting the oil therefrom. In his answer to this claim Dietz denied that he had lost his rights under the lease, and insisted that he was still entitled to retain possession of the lands for the purposes named therein. The court's findings of fact were confined to the matters averred in the complaint, and denied in the answer, and its conclusion of law was that "said grant or license to said Dietz, and all the rights and privileges thereunder, did actually and *ipso facto* cease and determine on the 1st day of July, 1883." It is true the court decreed that the plaintiff was entitled to judgment restraining the defendants from hindering, delaying, or preventing the transfer company "from entering into and occupying, all and singular, the lands and premises, and from erecting and constructing thereupon buildings, tanks, pipe lines, machinery, and other apparatus, and from drilling and sinking wells;" but this provision must be read in connection with the issues made, and the court's findings of fact and conclusion of law. If the plaintiffs in that action had alleged, in general terms, the ultimate fact of their right to the possession of the land for the purposes named, the contention of respondent would doubtless be sound. This they did not do, but preferred to set forth specifically the facts upon which Dietz had acquired the right to possession of the land for the purpose of exploring for oil, and the reasons why such right had ceased to exist. Deitz was not bound to, and did not in fact attempt to, go beyond the case made by the complaint. The only thing considered and determined in the case was the right of Dietz to retain possession of the land under his lease from Carpentier & Steinbach, and for the purposes therein specified. In this case another and entirely different question is presented, namely, plaintiff's right to the possession as owner in fee of a part of the tract. The question as to his right to extract oil from the land, or any part of it, is not here involved; he makes no such claim; nor does he dispute the right of the respondent to occupy any portion of the land for the purpose of taking oil therefrom, provided oil exists therein. He insists that no oil exists in this 400-acre tract owned by him, and for that reason the respondent has no right to be there at all.

On May 29, 1886, Dietz and Hill, by a deed of grant, bargain, and sale, conveyed to the respondent all their right, title, and interest in and to "all the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever," situated upon any portion of the rancho. Upon a further consideration of the terms of this instrument and the circumstances under which the deed was made, we are convinced that it conveyed to the defendant not merely pipes, tanks, derricks, buildings, etc., as personal property, but that the transfer necessarily carried with it the right to operate the same in the manner they theretofore had been operated by the defendant. That such was the intention of the parties we think is clear from the language of the deed. "Granted, bargained, sold" are words usually employed in instruments conveying real property. The instrument speaks of pipes, pipe lines, and fixtures. The term "pipe line" evidently means something different from "pipes," and conveys the idea of a line of pipe running upon or in the earth, carrying with it the right to the use of the soil in which it is placed. The use of the phrase "other personal property" does not militate against the construction we place upon the deed. Some of the things mentioned are shown to be affixed to the soil and a part of the realty. The phrase referred to covers simply personal property not previously mentioned, but of the same kind or nature. It certainly would not be contended that the words "other personal property" would include the cattle and other stock running on the rancho.

In view of what has just been said, it is unnecessary for us to consider the question of title by adverse possession. The deed referred to conveyed the plant as it existed on the 400-acre tract in 1886, and it is not claimed that any right by adverse possession to any additional property has been acquired since that time. The evidence shows that the plant which defendant now claims the right to operate is substantially the same as it was on May 29, 1886.

Our conclusions upon the whole case are: (1) That the conveyance from Carpentier & Steinbach to defendant does not invest the latter with authority to use the land in controversy for the purpose of pumping or storing oil found in other portions of the 20,000-acre tract, but that the interest acquired by plaintiff through his deed from Carpentier & Steinbach is subject to the right of the defendant on the 400-acre tract only to take and do the things named in the exceptions and reservations contained in the deed of November 23, 1882; (2) that the judgment of June 30, 1884, is not a bar to plaintiff's cause of action; (3) that by the deed of May 29, 1886, from Dietz and Hill to defendant, the latter became the owner of all the "buildings, tanks, derricks, pipes, pipe lines, fixtures," on the land in controversy, and all other personal property of a similar nature connected therewith, and the right to occupy sufficient land for the use of said property, for the purposes and in the manner it had theretofore been operated by the defendant; (4) that defendant is not confined in its operations to portions of the land in controversy where oil is found upon the surface only, but that it is entitled to go upon any portion of the land, and use any reasonable means to enjoy the exceptions and reservations named in the deed of November 23d. Upon the evidence the court properly found that plaintiff could not maintain ejectment, but the decree awards to the defendant greater rights and privileges than it is entitled to. As some of the findings, however, are not warranted by the evidence, we could not, without making new findings, direct a modification of the judgment. The judgment and order are reversed.

We concur: McFarland, J.; Sharpstein, J.; Garoutte, J.

Harrison, J. I concur in reversing the order and judgment appealed from, and I also concur in the opinion of Mr. Justice Paterson, except in that portion thereof wherein he holds that the deed to the respondent of May 29, 1886, carried with it the right to operate and use the property therein conveyed for the purpose and in the manner it had been theretofore operated by the defendant, and also the right to occupy sufficient land for the purpose of such use and operation. The instrument itself purports to be nothing more than a transfer of the interest of the plaintiff and Hill "in and to the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property" that was then or at any other time upon the 20,000-acre tract of land. There is nothing in the instrument which requires a construction to be given to it that will include more than is expressed in the words of the description, nor is there any evidence of surrounding circumstances which justifies an inference that the parties to the instrument had in their minds any other property than that which is described, or that it was their intention to transfer any right in addition to the property therein specified. With the exception of "pipe lines," the terms of description used in the instrument are peculiarly applicable to personal property, and the subsequent clause, "and all other personal property," shows that only personal property was intended. A "building" without any qualification or other term of description is essentially personal property, and in this state especially it is frequently the subject of sale and transfer as personal property. Whether, in any instance, it is other than personal property by virtue of its being attached to the soil, is a question of fact to be determined from the circumstances of that case. Miller v. Waddingham, 91 Cal. 379, 27 Pac. Rep. 750. Even if any of the buildings that were upon the land in question had been so affixed, they would have passed by the subsequent term "fixtures," which was doubtless used to obviate the possibility of any dispute concerning the character of the property transferred. Although the title to fixtures will pass under a grant of the realty, it is not the rule that the realty or a right to its use will pass under a transfer of the fixtures. In the absence of any other evidence, the use of the term "fixtures" in the instrument would be limited to the fixtures themselves, and would imply that they were to be severed and taken away. A sale of the "trees" upon a tract of land is not a transfer of the land itself, and gives to the grantee merely the permission to go upon the land for the purpose of removing the trees; and the transfer of buildings or other improvements upon land is not within the statute of frauds, and may be made by parol. The use in the instrument of the words "grant, bargain, and sell" does not vary the construction to be given to it. These terms are expressly limited therein to the "interest" of the grantors in the property described, and the other terms "transfer and set over," which are used therein instead of the word "convey," have reference exclusively to personalty.

It is held that a conveyance of a "mill" or a "wharf" or a "well" or a "bridge" will, without the use of any term expressly descriptive of real estate, pass the land connected therewith, upon the principle that in such a case the land is an essential element of the thing described, and passes by the use of a term which is sufficiently comprehensive to include it. So, too, when a conveyance is made of a "dwelling house" or a "barn," and it is shown that the parties to the transaction were negotiating in reference to the place, including the land on which the structure was situated, it is held that the land will pass. Such construction rests upon the principle that when land is occupied or improved by a structure designed for a particular purpose, which comprehends a practical enjoyment and use of the land, and in which the land is of subordinate consideration to that of the purpose, a term which is descriptive of the purpose to which the land is appropriated will be as apt for a conveyance of the land as would a description of the land itself. Johnson v. Rayner, 6 Gray, 110. There is nothing, however in the term "building," or in any of the terms used in the present instrument, which can be said to be descriptive of any purpose or use in which the land is an essential element for its enjoyment; nor does the record in the present case disclose the nature or character of the "buildings" or "fixtures" intended by the transfer, or throw any light upon the circumstances attending the transaction; and, in the absence of such evidence, there is no warrant for giving to the terms of the instrument any other than their ordinary construction. It does appear, however, from the record that Dietz had been the lessee from Carpentier & Steinbach of the entire tract of 20,000 acres, and had made improvements upon the portions outside of the 400-acre tract involved in this controversy, and it is as consistent to suppose that the terms used were intended to have reference to the improvements outside of the 400-acre tract. It also appears that, after the deed to Dietz of this 400-acre tract, the defendant had erected the improvements in question within the boundaries of that tract. Whether these structures were of such a character as to become fixtures, and thus belong to Dietz, or whether they were of a temporary character, does not appear; but the use of the term "fixtures" in the instrument of transfer, in addition to the term "buildings," would imply that the buildings themselves had not become fixtures.

It is not shown whether the pipe lines were upon the ground, or imbedded beneath its surface, nor whether or to what extent they were used as conduits for oil from without the 400-acre tract. If these pipe lines were part of a continuous conduit, or were imbedded beneath the surface of the ground, the effect of their conveyance would be to create an easement in the ground for their use, and to authorize their continuance in the same position for such use, with the right to the defendant to enter upon the land for necessary repairs; but the transfer to it of the other property named in the instrument gave to it no right to occupy the land for its use, and the plaintiff had the right to maintain this action for the purpose of removing the defendant from the land held by it for the purposes of such use.

DE HAVEN, J. I concur in the foregoing opinion of HARRISON, J.

(95 Cal. 234)

FOX v. SOUTHERN PAC. CO. (No. 14,823.)

(*Supreme Court of California.* July 8, 1892.)

ORDER GRANTING NEW TRIAL—GROUNDS—INSUFFICIENCY OF EVIDENCE.

1. An order granting a new trial on defendant's motion, for error in overruling his motions for a nonsuit made after the closing of plaintiff's case, and after the hearing of all the evidence, practically grants it on the ground of the insufficiency of the evidence to justify the verdict for plaintiff, and an appeal from such an order raises the question of whether the trial court abused its discretion by so holding.

2. A new trial granted by the trial court for error in overruling defendant's motion for a nonsuit made after the closing of plaintiff's case shows the court's belief that all the evidence was insufficient to justify the verdict for plaintiff.

Department 2. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Motion by the Southern Pacific Company against C. A Fox for a new trial. Granted. Plaintiff appeals. Affirmed.

Wm. T. Kendrick and *J. C. Rives*, for appellant. *John T. Bicknell*, for respondent.

MCFARLAND, J. The verdict and judgment were for plaintiff. On motion of defendant, the court below granted a new trial, and plaintiff appeals from the order granting said motion. The motion was made upon nearly all the statutory grounds, including insufficiency of the evidence to justify the verdict. The order granting the motion is as follows: "Defendant's motion for a new trial granted upon the following grounds, to wit: *First*, court erred in overruling motion for nonsuit made when plaintiff rested her case and before any evidence was introduced by defendant; *second*, that the court erred in overruling defendant's motion for nonsuit made after the evidence was closed, and before said cause was submitted to the jury." If the court had merely granted the new trial without stating the grounds upon which it was granted, or if "insufficiency of the evidence to justify the verdict" had been stated as one of the grounds, it is probable that this appeal would never have been taken; for, in that event, it could not have been argued with any plausibility that setting aside the verdict for want of evidence was an abuse of discretion. But, practically and substantially, the court did grant a new trial on the ground of the insufficiency of the evidence to justify the verdict, although the judgment of the court to that effect was expressed in the roundabout way of holding that the motions for nonsuit should have been granted. If the court believed that the evidence for plaintiff was insufficient to justify the verdict in her favor, and that, therefore, the first motion for a nonsuit should have been granted, it must necessarily have believed that all the evidence in the case was insufficient to justify such a verdict; for clearly what was introduced after plaintiff had closed her evidence in chief did not in any way strengthen her case. But there was a second motion for nonsuit made after all the evidence was in, and the rule with respect to such a motion is that "a court is justified in granting defendant's motion for nonsuit, after the evidence on both sides has been heard, in a case where, if the motion had been denied and a verdict found for plaintiff, it would have been set aside as not supported by, but contrary to, the evidence." Geary v. Simmons, 39 Cal. 224. Practically, therefore, the real question in the case at bar is whether or not the court abused its discretion in holding that the evidence was insufficient to support the verdict; and it is clear to us, from an examination of the evidence, that this question must be answered in the negative. The order appealed from is affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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95 Cal. 239

HILL v. BOARD OF SUP'RS OF VENTURA COUNTY. (No. 14,718.)

(*Supreme Court of California.* July 9, 1892.)

LAYING OUT HIGHWAYS—PETITION—FILING BOND—APPROVAL OF SURETIES.

1. Pol. Code, § 2682, prescribes the requirements of a petition in condemnation proceedings to lay out a public road, which do not include a statement of the width of the road. By section 2681 the road must be 40 feet wide, but the viewers are authorized to report upon the "necessity of a greater, or the practicability of a less, width of road than petitioned for." *Held*, that the failure to state the width in such a petition did not render the proceedings void.

2. A bond, not marked "Filed," to accompany a petition to lay out a public road, dated 10 days after the petition was marked "Filed," appeared by the minutes of the county board of supervisors to have been presented at the same time with the petition, and ordered filed. By a *nunc pro tunc* order, made after service of the writ in a proceeding to review the board's action, the bond was approved, and ordered filed, and the petition was acted upon by the appointment of viewers. No action was had or asked before the bond was presented. *Held*, that the bond was properly approved and filed to accompany the petition.

3. Failure by the sureties to such bond to justify as required by law is an irregularity only, which does not affect the private rights of a party applying for a review of the board's actions.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Proceeding by Aranetta Hill against the board of supervisors of the county of Ventura to review the board's action in laying out a public highway in that county. Judgment for defendant. Plaintiff appeals. Affirmed.

W. N. Wilde, for appellant. *H. L. Poplin*, for respondent.

TEMPLE, C. This appeal is from a judgment in a proceeding to review the action of the board of supervisors of the county of Ventura in laying out a public highway in that county. The affidavit or petition upon which the writ was issued is not in the record, as the statute does not make that a part of the judgment roll. From the writ we learn that the alleged want of jurisdiction on the part of the board consisted solely in that the petition asking the board to lay out the road did not state the width of the proposed road, and was not accompanied by a bond, as required by section 2683, Pol. Code, and that no bond was approved, as required by section 2683, Pol. Code. The return shows a petition and a bond, the latter not marked "Filed," but dated some 10 days after the petition was filed, the appointment of viewers, and an order approving the report, and declaring the amount of damage awarded to each nonconsenting landowner; and the amount awarded was ordered set apart from the proper road fund, as directed by the statute. As the plaintiff did not accept the award, the final order declaring the proposed road a public highway open to the public was never made. In the judgment it is adjudged that all the proceedings subsequent to the appointment of viewers "be, and the same are hereby, set aside and annulled;" and all the proceedings prior to and including the qualification of viewers "be, and the same are hereby, affirmed." The alleged defects of jurisdiction, if sustained, would seem to render the entire proceeding void. The record discloses no special attack upon the proceedings subsequent to the appointment of viewers, or any attack upon any part of the proceedings, except as above stated. It is not easy, under the circumstances, to understand the judgment. But appellant is not aggrieved by that part which is in his favor, and the defendant has not appealed. The proceedings are left still pending, with the report of the viewers made, but not acted upon. The writ did not and could not run to the action of the viewers. That could only have been set aside by taking from it its support by annulling the previous proceedings. Whether these proceedings are void is the point of the appeal. It is well to remember that this is a proceeding to condemn land. By this proceeding no one is, or can be, deprived of his property, save by his consent. It is the exercise of a legislative power, delegated to the board, though the procedure requires also action of a *quasi* judicial character. The legislature might have conferred the power without the procedure, and without requiring notice or granting a hearing to property holders. It would then have been only a power to determine whether the land to be taken was needed for public uses; and the property owner, in the proceedings to condemn, which would follow as a consequence of such determination, would have his opportunity to be heard. The procedure here prescribed leads to but the same determination as to the necessity of taking the land. It was not meant specially for the protection of the individual, but to secure to the public a fair and intelligent use of the power delegated. The mode is here, no doubt, in some sense, the measure of the power, and there must therefore be a substantial compliance with the conditions prescribed, or the action of the board will be void. Whether there has or has not been a substantial compliance must be determined with a view to the purpose of the limitations. In effect, the statute (section 2681, Pol. Code,) requires as a prerequisite to the exercise of this power on the part of the board a petition signed by at least 10 freeholders of the road district in which it is proposed to lay out the road. The next section is as follows: "2682. Petition must set forth and describe particularly the road to be abandoned, discontinued, altered, or constructed, and, if the road is to be altered, laid out, or constructed, the general route thereof, over what lands, who the owners thereof are, whether such of them as can be found consent thereto, and, if not, the probable cost of such right of way where such consent is not had, the necessity for, and the advantages of, the proposed road." When such a petition has been filed, evidently the conditions have been complied with which were required to set the power in motion, and the board may act. Appellant attempts to import into these requirements a statement as to the width of the road, because in section 2681, Pol. Code, the viewers are authorized to report upon the "necessity of a greater or the practicability of a less width of road than petitioned for;" and from the fact that there is no other direction for ascertaining the width,—and all roads must have width,—and whether this be more or less, affects the questions which the board is called upon to determine. This seems quite plausible, but we are not here dealing with a court which is confined to the facts contained in a written statement, but with a legislative body, exercising a power ample as the subject to be dealt with, only as limited by express provision as to the mode. The road must be at least 40 feet wide. Section 2681, Pol. Code. The petition was therefore for a road at least 40 feet wide, even if no width is mentioned.

The statute above shows that the board may fix upon a different width from that stated in the petition, and, after the filing of the report of the viewers, the landowners are allowed an opportunity to be heard, and may present their views upon this very subject. The statute is imperfect, and does not expressly prescribe what shall be done in case the board disagrees with the viewers as to the width, or elects to establish a road upon a different route; but still it is evident that such power is vested in the board. I think, therefore, although some provisions of the statute were evidently written under the impression that the petition would state the width of the road, yet, since the legislature has expressly declared in section 2682 what the petition must contain to set the power in motion, and does not require such fact to be stated, the failure does not render the proceedings void. The petition was marked "Filed" a few days before the date of the bond, but both seem to have been presented together. Of course no action was had or asked before the bond was presented, and, as shown by the *nunc pro tunc* order, was approved and ordered filed by the board. This order was complained of, because it was made after service of the writ herein. This was not an attempt surreptitiously to change the record so as to avoid an objection. If the recitals are true, I see nothing wrong in it. Whether it is conclusive is not involved here. The minutes before amendment showed that the bond was ordered filed, and the petition acted upon by the appointment of viewers. In Humboldt Co. v. Dinsmore, 75 Cal. 604, 17 Pac. Rep. 710, these acts seem to have been held to indicate that the bond was approved. While it must appear that the statute has been substantially complied with, courts make very liberal indulgences in favor of these records, which, although of great importance, seem nearly always very imperfect. As to the point that the bond was approved, although the sureties had not justified as required by law, it is plainly an irregularity only, and one which did not affect the private rights of the appellant. The validity of the proceedings establishing public highways cannot be made to depend upon the correctness of the judgment of the board as to whether the justification of a surety was in accordance with the statute. I think the judgment should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

64 Cal. 251

Ex parte Flood.[1]

(*Supreme Court of California.* Oct. 26, 1883.)

Superior Court of San Francisco — Criminal Jurisdiction—House of Correction.

Const. 1879, art. 22, § 1, retains Act April 1, 1877, § 3, which provides that, in certain courts, persons who might be sentenced to state prison may be sentenced to the house of correction. Const. art. 22, § 3, abolishes the courts named; and article 6 creates the superior court of San Francisco as their successor, with similar powers. *Held*, that under these provisions the superior court of San Francisco had jurisdiction to sentence a defendant to the house of correction, instead of to the state prison.

In bank. Application by James Flood, sentenced to the house of correction on conviction of grand larceny, for writ of *habeas corpus*. Writ dismissed.

John D. Whaley, for petitioner. *Alfred Clarke*, for respondent.

McKee, J. In the superior court of the city and county of San Francisco the petitioner, having been convicted of the crime of grand larceny, was sentenced to imprisonment in the house of correction of said city and county for the term of three years. The sentence was imposed under the provisions of a statute passed April 1, 1877, entitled "An act in relation to the house of correction of the city and county of San Francisco." St. 1877-78, p. 953. By section 3 of the act, it was provided that "all persons appearing for sentence in the police judge's court, the city criminal court, or the municipal criminal court of the city and county of San Francisco, who might be sentenced to imprisonment in the county jail or in the state prison, may, instead thereof, be sentenced to imprisonment in the house of correction in said city and county, subject, however, to the provisions of section 4; and no person shall be sentenced to imprisonment in the house of correction except under the provisions of this act." All the courts enumerated in the above section of this act, except the police judge's court, were abolished by the constitution of 1879, (section 3, art. 22, Const.;) and the cases in those courts, together with the records, books, and papers appertaining to them, were, by command of the constitution, transferred on January 1, 1880, to the superior court of the city and county, (article 6, § 5, Const ;) and by section 3 of an act to transfer the records, papers, and business of the courts existing on the 31st of December, 1879, to the present existing courts, passed February 4, 1880, the provisions of the constitution in that regard were carried into effect. When transferred, the superior court was authorized to "exercise jurisdiction over such cases, records, books, and papers as if they had been, in the first instance, commenced, filed, or lodged therein." The case in hand, however, was not one of that class of cases. It had not been commenced and was not pending in any of the abolished courts on or before December 31, 1879; and there were no records, papers, or books appertaining to it, transferable or transferred to the superior court. As a transferred case, the superior court had therefore no jurisdiction over it. It was commenced in the superior court, and prosecuted to the conviction of the defendant under the original jurisdiction conferred upon the court "over all criminal cases amounting to felony and cases of misdemeanor not otherwise provided for," (section 5, art. 6, Const.,) and under the provisions of the Penal Code applicable to the crime of which conviction was had, and to which was annexed as a punishment imprisonment in the state prison of not less than one nor more than ten years, (section 489, Pen. Code.) But, if the case had been in any one of the courts which were abolished by the constitution, that court would have been authorized, by the law of 1877, to punish the petitioner for the crime of which he stood convicted, by imprisonment in the house of correction instead of by imprisonment in the state prison. The abolition of those courts did not wipe out the laws which were applicable to them, nor has the law of 1877 been repealed. On the contrary, the framers of the constitution retained the law of 1877, (section 1, art. 22, Const.,) and made it applicable to the superior court, which they created as the successor of the courts that had been abolished, (sections 3, 11, art. 22;) and it results that as the law of 1877 was applicable to the superior court, and the circumstances of the case brought the case itself within the provisions of the law, the court had jurisdiction to sentence the defendant in the case to the house of correction instead of to the state prison. The judgment under which the petitioner has been committed is therefore valid, and the petitioner is lawfully held in custody. Writ dismissed, and petitioner remanded.

Thornton, Myrick, Sharpstein, McKinstry, and Ross, JJ., concurred.

64 Cal. 226

In re McKinnon's Estate.[2]

(*Supreme Court of California.* Oct. 11, 1883.)

Right to Administration —Public Administrator—Waiver of Preference.

A public administrator who applies for administration in his individual capacity as a creditor, and afterwards withdraws his petition, does not thereby waive the preference over creditors given him by Code Civil Proc. § 1365, and is not thereby estopped to make a second application in his official capacity.

Department 2. Appeal from superior court, San Diego county.

Petition by T. C. Stockton, public administrator, for letters of administration upon the estate of Michael McKinnon, deceased. Order refusing application. Petitioner appeals. Reversed.

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[1] This case, filed October 26, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed October 11, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Code Civil Proc. Cal. § 1365, provides that administration of the estate of an intestate shall be granted in the following order: "* * * (8) The public administrator; (9) the creditors. * * *"

Conklin & Hunsaker, for appellant. *F. L. Aude*, for respondent.

MYRICK, J. One Stockton presented a petition as creditor for letters of administration. Ubach and Keating also presented a petition as creditors, and thereafter said Stockton presented his petition as public administrator. After due notice given on each, all the petitions came on for hearing, when Stockton withdrew his petition as creditor. Thereupon the court made the following order, which order is appealed from: "At this time the court denies the petition of T. C. Stockton for letters of administration herein as public administrator, and grants the petition of A. D. Ubach and Michael Keating, asking that letters of administration be granted to A. D. Ubach and Michael Keating, the court holding that said Stockton waived his right as public administrator to have letters herein when he applied first for letters as a creditor, and that he was thereby estopped from a right to make the second application as public administrator, and he having dismissed his application only at the hearing, and petitioners Ubach and Keating having filed their petitions for letters after Stockton's petition for letters as a creditor, but before his petition for letters as public administrator was filed. And thereupon the court made its order in the usual form, directing that letters of administration upon the estate of said deceased be issued to said Ubach and Keating, upon their taking the oath and filing a bond according to law, in the sum of three thousand five hundred dollars." In withdrawing the petition as a creditor, and in standing on the other petition, there was no waiver of the latter, nor was Stockton estopped from urging his claim to letters as public administrator. As such officer he was entitled to letters in preference to creditors. Section 1365, Code Civil Proc. The order is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

SHARPSTEIN and THORNTON, JJ., concur.

Hearing in bank denied.

95 Cal. 420

LOS ANGELES CEMETERY ASS'N v. CITY OF LOS ANGELES. (No. 14,711.)

(*Supreme Court of California.* July 25, 1892.)

RESCISSION OF CONDITIONAL DEED — FORFEITURE.

The resolution, pursuant to which plaintiff cemetery association conveyed a strip of land to defendant city, provided that the same be "granted for a public road and highway, on the condition that the fence be removed and reset on the line of the road, said work to be done at the expense of the city, and also that the street be graded at the city's expense." Defendant accepted the grant, removed the fence, and placed the street in a condition for travel, but no grading was done. *Held*, that defendant did not forfeit the grant because it did not grade the street when required to do so by plaintiff; but when it is apparent that defendant will not grade the street at its own expense, or at all, plaintiff may demand a reconveyance.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action to quiet title by the Los Angeles Cemetery Association against the city of Los Angeles. Defendant had judgment, and plaintiff appeals. Affirmed.

M. C. Hester and *Judson & Wood*, for appellant. *C. McFarland*, for respondent.

FOOTE, C. This action was brought to quiet title to a strip of land in the city of Los Angeles. The plaintiff, a corporation formed for cemetery purposes, owned about 70 acres of land in the city aforesaid, which included that in controversy here. Its board of directors passed a resolution which ran thus: "Aug. 25, 1885. The board held a special meeting this date; all the directors, to wit, A. H. Judson, V. Ponet, I. W. Lord, Fred. Dohs, and A. E. Pomeroy, being present. It was moved and carried that a strip of land forty feet in width off and along the south line of the present Evergreen cemetery lands, and being the south line of lots one and two in block 73, Hancock's survey, be granted for a public road and highway, on the condition that the fence be removed and reset on the line of the road, said work to be done at the expense of the city, and also that the street be graded at the city's expense. On motion, meeting adjourned. Attest: A. E. POMEROY, Sec." The president of the corporation, A. H. Judson, on the 7th of September, 1885, made a conveyance of the land described in the resolution to the defendant, which, after describing the land, reads thus: "Said piece of land being for the purpose of a street or highway; and, in the event of its ceasing to be used as such public street or highway, the said land to revert to the said corporation grantor. Grantor reserving the right to remove the fence on said land at any time within six months from the date of the acceptance of this deed." The defendant, in pursuance of the resolution, removed the fence, and within a very short time after the 7th of September, 1885, the strip of land began to be and has been ever since used for public travel; and in the year 1887 the defendant, by its proper officers, changed the name of this strip of land from "Aliso Avenue Extension" to "First Street." It also appears that the property owners on the side of this strip opposite the cemetery property, from which it was taken, deeded to the city certain land which was also used as part of this public street. It further appears that the city by ordinance established the grade of this land as a public street. And that on the 30th of September, 1885, the conveyances of these lands, including that in controversy here, were presented to its "council," and referred to the board of public works, and that on recommendation they were accepted and ordered filed for record with the recorder. There has been work done many times upon this road by the city in the way of repairing, fixing, and putting it in order for travel, but it has not yet been graded. And the removal of the fence by the defendant was shortly after the 7th of September, 1885, and under the plaintiff's direction. There was also evidence that the words "at the city's expense," in the resolution of the board of directors of the plaintiff, were written some time after the meeting at which the resolution was passed, although the board had intended it in the beginning to be placed in the resolution as passed. The findings of the court were to the effect that the plaintiff was not the owner of the land in fee, and had not been such owner since the 11th of September, 1885. That the defendant at the time of the beginning of this action was and now is the owner of the strip of land described in the complaint, for the purpose of using it as a public street, and of permitting the public to use it as such, subject to the condition subsequent that it shall revert to the plaintiff in fee simple as its property, and subject to the further condition and charge that, whenever graded for street purposes, the costs and expenses of such grading shall be paid by the defendant, and not by the plaintiff. That said strip of land has been duly dedicated as a public street of said city, and has been accepted as such by the city, subject to said conditions, and has been used as such by the public ever since the year 1885, and still is used as such street." The conclusions of law are that the defendant is entitled to judgment for its costs against the plaintiff, and to a decree declaring said strip of land to be a public street subject to the conditions set out in finding 2, and that defendant holds title thereto for the purpose of causing the same to be used as a public street, etc. The judgment follows in accordance.

The plaintiff contends that the evidence is insufficient to support the findings. It may be conceded that the deed of conveyance of the president of the cemetery was defective, and not authorized in some of its recitals, and that the defendant must depend for the right of possession and use of the land in question upon the language of the resolution of the board of directors, and the acceptance by the city of the land, and the use of it as a public highway, according to the offer of dedication contained in the resolution of the board of directors. And it may further be conceded, without deciding, that some of the findings are not supported by the evidence in some of their statements. Nevertheless we are of opinion that the evidence fully sustains the fourth and last finding as to dedication of the land for street purposes, and its acceptance as such; and that finding is perfectly intelligible when construed with reference to such statements in the other findings as are entirely consistent with those of the fourth finding and supported by evidence. It makes no difference, therefore, whether the defendant had or not any right to this land except to use it as a public street, and to observe the condition, when it conveniently can do so, of grading the same at its expense. It does not seem to us that the attempted rescission of the contract by plaintiff could be accomplished until the city had declared or made apparent the fact that it would not grade the street at its expense. The main idea in the resolution seemed to be to grant the land to the city for street purposes, and to make the city remove the fence, and when it graded the street to do it at its own expense, and not at that of the plaintiff. It does not seem to be contemplated, if the city did not grade it when required to do so by the plaintiff, that it forfeited its right to use the land as a public street; but, when it is apparent that the city will not grade it at its expense or at all, then the plaintiff might demand the land back. We perceive no error in the record, and advise that the judgment and order appealed from be affirmed.

We concur: Belcher, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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95 Cal. 236

Joyce v. White. (No. 14,657.)

(*Supreme Court of California.* July 9, 1892.)

Assumpsit—Quantum Meruit—Entire Contract.

Where plaintiff contracted with defendant to do work and furnish materials, and defendant prevented his completion of the work, though the contract was entire, he may recover the value of the labor done and materials furnished and used.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Thomas F. Joyce against John E. White. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Carlton, for appellant. *R. Dunnigan*, for respondent.

Vanclief, C. The defendant having a contract with the superintendent of streets in the city of Los Angeles to construct a sewer, with manholes and flush tanks, through certain streets in that city, entered into a written contract with the plaintiff, by the terms of which the plaintiff agreed to construct all the manholes and flush tanks required in connection with the sewer, according to the specifications contained in defendant's contract with the superintendent of streets, at such time as the defendant might direct, so as not to delay the work of constructing the sewer; to furnish all the material therefor; to do the work subject to the inspection and directions of the superintendent of streets as to manner and materials, and to complete the work in such condition that it would be accepted by the superintendent of streets. The defendant agreed to pay per each manhole and flush tank $38.50, when the same should be accepted, and a sufficient amount collected from the property owners for that purpose. The plaintiff alleges in his complaint that, after constructing a certain number of manholes and flush tanks, according to the contract, and while he was proceeding to perform the contract on his part, the defendant wrongfully and without any justifiable cause prevented him from completing the same; and that the work done and materials furnished by him under the contract were reasonably worth $633.87, for which he prays judgment. The defendant admits the contract, and that plaintiff commenced the work, but denies that he prevented the plaintiff from proceeding with or from completing the work according to the contract; denies that the work done or materials furnished were of any value whatever; alleges, as a counterclaim, that plaintiff voluntarily abandoned the work, and failed and refused to perform his part of the contract, to the damage of the defendant in the sum of $1,000, for which he prays judgment. The case was tried by a jury, whose verdict was for plaintiff in the sum of $464.37, in accordance with which judgment was entered. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

Counsel for appellant contend that the evidence is insufficient to justify the verdict, in that it does not tend to prove that defendant prevented plaintiff from doing the work according to the contract. Upon this point the evidence is conflicting, but I think the evidence on the part of the plaintiff so clearly tends to prove the averments of the complaint in this respect that it is unnecessary to make a detailed statement of it here. Undoubtedly the contract is an entire contract; yet if, as alleged, the defendant, without justifiable cause, prevented the completion of the work, he was liable to plaintiff for the value of the labor done and materials furnished and used.

Four distinct instructions were given to the jury at request of plaintiff, and one at request of defendant. In respect to these, counsel for appellant merely say in their brief: "In view of the evidence the instructions of the court were clearly error." No particular error in the instructions is specified in the statement on motion for new trial, wherein it is merely said: "The court erred in giving to the jury instructions asked by plaintiff." If there is error in the instructions, counsel for appellant have failed to specify it sufficiently, either in their brief, or in their statement, to enable me to discover it. Read together, the instructions seem to have presented the case to the jury fairly. I think the judgment and order should be affirmed.

We concur: Temple, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 503)

CHILDS *et al.* v. KINCAID *et al.* (No. 14,714.)

(*Supreme Court of California.* July 11, 1892.)

APPEAL—DISMISSAL.

An appeal not taken within the time prescribed by law will be dismissed.

Department 1. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

(Not to be published in California Reports.)

Action by Childs and others against Kincaid and others. Judgment for plaintiffs, and defendants appeal. Dismissed.

Willis & Cole and *E. E. Rowell*, for appellants. *Bicknell & White* and *S. M. White*, for respondents.

PER CURIAM. The judgment in this case was entered July 19, 1890, and the order denying a new trial was made and entered March 16, 1891. On the 21st of July, 1891, the defendants filed and thereafter served a notice of appeal from said judgment and order. The respondents now move to dismiss the appeals upon the ground that neither of them was taken within the time prescribed by law. As the appeal from the judgment was not taken within a year after its entry, and the appeal from the order denying a new trial was not taken until more than 60 days after its entry, the motions must be granted; and it is so ordered.

(95 Cal. 252)

CUYAMACA GRANITE CO. v. PACIFIC PAV. CO. (No. 14,712.)

(*Supreme Court of California.* July 11, 1892.)

PARTNERSHIP—ACTION FOR ACCOUNTING—PARTIES—PLEADING.

1. Where two persons are partners with a certain company in a street-paving contract and in the profits arising therefrom, and an assignment is made by one only of the said persons to a third party of his interest, the other is still a necessary party to any complete determination of the partnership affairs, and should be brought in, therefore, under Code Civil Proc. § 389.

2. A complaint, in such a case, by the assignee, alleging that by the contract between the partners the company was to appoint a bookkeeper, who was to collect all moneys coming due, but that this had not been done, and that a large sum remained uncollected, without alleging that the company had failed to perform any of the conditions of the contract, or was neglecting or refusing to collect the unpaid money, or was insolvent, or that there was danger the money when collected would be misappropriated or lost, does not disclose a cause of action.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county.

Action by the Cuyamaca Granite Company against the Pacific Paving Company for an accounting, etc. There was a demurrer to the complaint, which was sustained, and plaintiff appeals. Affirmed.

Hunsaker, Britt & Goodrich, for appellant. *Luce & McDonald*, for respondent.

BELCHER, C. It is alleged in the complaint in this case that at all the times mentioned therein both the plaintiff and defendant were corporations, organized under the laws of this state; and that in 1889 A. Haskins and A. R. Schulenberg made and entered into a certain contract of copartnership with the defendant, a copy of which is set out, and marked "Exhibit A." This contract was to the effect that Haskins and Schulenberg would use their best endeavors to secure from the city of San Diego contracts for bituminous rock street pavements in that city, and, in the event of obtaining any such contracts, would immediately assign and transfer the same to the defendant; that, upon such contracts being secured and assigned, the work therein provided for should be done by Haskins and Schulenberg and the defendant as partners; that the defendant, at its own expense, would appoint a bookkeeper, who should keep all accounts, pay all bills, and collect all moneys belonging to the copartnership; and that the profits arising from the work should be equally divided, one half to Haskins and Schulenberg and the other half to the defendant. It is then alleged that, in pursuance of the terms of the said contract of copartnership, Schulenberg, on behalf of Haskins and himself, procured from the city of San Diego, in December, 1889, a contract for the paving and curbing of Sixth street in said city, and assigned the same to the defendant; that the work provided for was done as agreed, and was completed and accepted by the city on or about July 25, 1890, the said partnership being in effect thereby dissolved; that the total value of the work performed under the contract amounted to the sum of $51,680.72; that in January, 1891, Schulenberg assigned and transferred all his interest and claim in and to the said contract and the profits arising therefrom to the plaintiff; "that no settlement of the copartnership accounts has ever been made between plaintiff and defendant, nor between Haskins and Schulenberg and defendant, nor between said Haskins or said Schulenberg and defendant, though plaintiff has requested and demanded a final settlement of defendant with respect thereto, which defendant has refused, except on terms unjust and unfair to plaintiff, and not in accordance with said contract;" that plaintiff is informed and believes that upon a true and just settlement of said accounts a large sum of money, to wit, about $15,000, would be due from defendant to plaintiff; and that, according to plaintiff's information and belief, there is outstanding and due from various persons to said corpartnersip concern about $19,000; and that defendant, assuming that it has the sole and exclusive right to collect the outstanding claims at such times and in such manner as suits its convenience, and to postpone the settlement of the partnership accounts between it and plaintiff until said outstanding accounts are all collected, refuses to make any settlement with plaintiff, though requested so to do. And the prayer is for an accounting, for the appointment of a receiver to collect the outstanding demands, and for judgment etc. The defendant demurred to the complaint on the grounds: *First*, that there was a defect of parties plaintiff, in that A. Haskins was a necessary party to the complete determination of the several matters and things complained of; and, *second*, that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, the plaintiff declining to amend, gave judgment for the defendant, from which the plaintiff appeals.

1. It is clear, we think, that the demurrer was properly sustained upon the first ground specified therein. It appears that Haskins and Schulenberg were partners with defendant in the street-paving contract, and were jointly interested with defendant in the profits arising therefrom. The plaintiff, by the assignment, succeeded only to Schulenberg's interests in these profits, and was thereafter jointly interested in them with Haskins. No settlement of the partnership matters had ever been made between any of the parties. It is apparent, therefore, that no complete determination of the controversy could be had without the presence of Haskins. This being so, he was a necessary party, and should have been brought in. Section 389, Code Civil Proc.; Harrison v. McCormick, 69 Cal. 620, 621, 11 Pac. Rep. 456. If his consent to be joined as plaintiff could not be obtained, then he should have been made a defendant; the reason therefor being stated in the complaint. Section 382, Code Civil Proc.

2. We also think that the demurrer was properly sustained upon the second ground specified. It appears that it was expressly stipulated in the agreement made between Haskins and Schulenberg and the defendant that the defendant should appoint a bookkeeper who should collect all moneys becoming due under the contract with the city, and that the sum of about $19,000 remained uncollected when this action was commenced. It is not averred that the defendant had failed to perform any of the conditions of the agreement to be performed on its part, or that it was neglecting or refusing to collect the unpaid money, or that it was insolvent or likely to become so, or unable or unwilling to respond to any just claim or demand against it, or that there was any danger that the money, when collected by defendant, would be by it misappropriated, squandered, or lost. Under these circumstances, we fail to see how any right of action had arisen in favor of the plaintiff when this action was instituted. We advise, therefore, that the judgment be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(95 Cal. 244)

DOTY v. O'NEIL. (No. 14,851.)

(*Supreme Court of California.* July 11, 1892.)

INSTRUCTIONS—ERRORS CURED.

Where several instructions, taken together, are correct, the fact that two of them are indefinite on a certain point, and so misleading, is not cause for reversal.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Action by J. R. Doty against E. F. O'Neil. Judgment for plaintiff, and defendant appeals. Affirmed.

Graves & Graves, for appellant. *W. B. Dillard* and *Wilcoxon & Bouldin*, for respondent.

VANCLIEF, C. Action to recover the possession of personal property or the value thereof. Trial by jury. Verdict and judgment for plaintiff. Defendant appeals from the judgment, and from an order denying his motion for a new trial. The property consists of live stock—principally dairy cows—which plaintiff claims to have purchased from his father, B. F. Doty. The defendant, as sheriff of San Luis Obispo county, took the property by virtue of an execution against B. F. Doty, and his defense to the action is that the property in question was the property of B. F. Doty, and subject to the execution by virtue of which he took it.

1. Counsel for appellant claim that the evidence was insufficient to prove that the sale of the property from B. F. Doty to the plaintiff was accompanied by an immediate delivery, or followed by an actual and continued change of possession; and that it was therefore void, as against the creditors of B. F. Doty. The only evidence as to immediate delivery and change of possession is the testimony of plaintiff and B. F. Doty; and their testimony not only tends to prove, but, if true, is sufficient to prove, an immediate delivery, followed by an actual and continued change of possession. Nor is there anything in the nature of their testimony, or in the circumstances disclosed, tending to discredit these witnesses.

2. The second and fourth instructions given to the jury at the request of plaintiff are as follows: "*Second.* Every transfer of personal property, if made by the person having possession or control of the property, must be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the thing transferred, or the transfer is conclusively presumed to be fraudulent and void against those who are his creditors while he remains in possession. But a change in location of the property intended to be transferred is not in all cases essential to constitute a valid transfer. In all cases due regard must be had to the character of the property, the nature of the transaction, the position of the parties, and the intended use of the property. And if you find from the evidence that there was an immediate delivery of the actual possession and control of all the property described in the bill of sale from B. F. Doty to plaintiff, at the date thereof, and that such delivery was followed by an actual and continued change of possession and control in plaintiff from that time to the taking by defendant, you will be justified in finding that there was a proper delivery under said bill of sale." "*Fourth.* In determining what it takes to constitute a delivery and change of possession of personal property upon a sale of it, the jury should take into consideration the character of the property, and the situation of the parties at the time of

the sale; and in this case, if the jury find from the evidence that the plaintiff purchased the property in good faith, and for a valuable consideration, before the execution introduced in evidence was levied upon the property; that plaintiff had done everything which could have reasonably been done under the circumstances, by the way of taking possession of the property under the sale to him, then the property would not be liable to be taken on execution, unless you should find from the evidence that the sale was not accompanied by immediate delivery, followed by an actual and continued change of possession of the property sold, the rule of law requiring the change of possession of personal property upon the sale of it, in order that the sale be not fraudulent as against creditors, only requires such a change of possession as the articles sold will conveniently and reasonably admit of." Counsel for appellant contend that these instructions are erroneous, in that they tended to mislead the jury "to infer that constructive possession would answer the purpose." At request of defendant, the court further instructed the jury as follows: "Every transfer of personal property, and every lien thereon, other than a mortgage when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors. The word 'actual' means existing in fact, and truly and absolutely so; really acted or acting; carried out; opposed to 'potential,' 'possible,' 'virtual,' or 'theoretical.' If you find from the evidence that at the time of the transfer by B. F. Doty to the plaintiff of the property described in the complaint, the said B. F. Doty was in the actual and exclusive possession of the tract of land from which the said property was taken by the sheriff, and had been so in possession for a long time prior thereto, and that the said transfer took place upon the said tract of land, you must find for the defendant, unless you should find that the possession of the land changed with the personal property sold and delivered as I have instructed you. Neither the fact of the payment of a valuable consideration by plaintiff to B. F. Doty for the property in controversy, nor that said sale was honest, is of any consequence. If you still believe that said sale from B. F. Doty, to J. R. Doty the plaintiff, was not accompanied by an immediate delivery, and an actual and continued change of possession, you should find for the defendant." Taken together, these instructions seem to preclude any inference by the jury that merely constructive possession would be sufficient. If the two instructions objected to were not sufficiently definite as to the nature of the possession required, those given at request of defendant supplied the defect. The instructions given at request of plaintiff are not inconsistent with those given at request of defendant. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

95 Cal. 249

WADDINGHAM v. TUBBS. (No. 14,784.)

(*Supreme Court of California.* July 11, 1892.)

NEW TRIAL—MOTION—NOTICE OF DECISION.

Under Code Civil Proc. § 659, providing that "a party intending to move for a new trial must, within ten days * * * after notice of the decision of the court, * * * serve upon the adverse party a notice of his intention," a party is affected with "notice of the decision of the court" when served with a notice of intention to move for a new trial, which refers to "the decision and judgment heretofore rendered and entered herein."

Commissioners' decision. Department 1. Cross appeals from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by Emma A. Waddingham against L. E. Tubbs. From a judgment partly for plaintiff and partly for defendant, both appeal. Affirmed.

Harris & Gregg, for plaintiff. *Rolfe & Freeman*, for defendant.

VANCLIEF, C. This is an action to quiet the alleged title of plaintiff to lots numbered 7, 8, and 9, in block 42, of the town of Ontario, in the county of San Bernardino. The cause was tried by the court, and the judgment was in favor of plaintiff for lots 8 and 9, and in favor of defendant for lot numbered 7. Each party moved for a new trial upon a distinct bill of exceptions. Both motions were denied, and each party has appealed; the defendant from the judgment against him as to lots 8 and 9, and from the order denying his motion for a new trial, and the plaintiff from the judgment against her as to lot 7, and from the order denying her motion for a new trial. Both appeals are brought upon the same transcript.

1. Upon the appeal of defendant it will be necessary to consider only one question, viz., did the defendant serve his notice of intention to move for a new trial within the time prescribed by section 659 of the Code of Civil Procedure? The decision of the court was rendered on December 27, 1890. Written notice of defendant's intention to move for a new trial was not served until January 24, 1891, when defendant's attorneys admitted the service, but expressly reserved and saved their right to object to the notice on the ground that it was too late. Section 659, Code Civil Proc., requires the notice of intention to move for a new trial to be served upon the adverse party "within ten days * * * after notice of the decision of the court," and respondent (on this appeal) contends (1) that appellant had actual notice of the decision of the court on December 29, 1890, and then so acted upon such actual notice as to waive formal written notice; and (2) that respondent served written notice of the de-

cision upon appellant's attorneys on January 6, 1891. The first of these contentions is grounded upon the following facts of record: "On the 29th day of December, 1890, [two days after the decision,] counsel for defendant and counsel for plaintiff, upon notification by counsel for defendant, and defendant in person, made argument in open court, before said judge, upon the apportionment of the costs of said trial under the decision of the court; and, said judge announcing thereafter that each party should pay its own costs of trial, it was then suggested and consented by the respective parties, that the said judge might insert in the conclusions of law in said case that each party should pay his own costs." The ground of the second contention, viz., that written notice of the decision was served on January 6, 1891, is that on that day respondent served on the attorneys for defendant her written notice of intention to move for a new trial, which, among other things, stated: "The defendant will take notice that the plaintiff intends to move the court to set aside and vacate the decision and judgment heretofore rendered and entered herein, and to grant a new trial in this case upon the following grounds: "*First.* Insufficiency of the evidence to justify the findings and decision," etc. Service, by copy, of this notice on January 6, 1891, was admitted by defendant's attorneys. As to whether the actual notice to defendant of the decision of the court, and his action upon that notice, on December 29th, constituted a waiver of formal written notice of the decision, the cases seem not quite harmonious. See Biagi v. Howes, 66 Cal. 469, 6 Pac. Rep. 100; Gray v. Winder, 77 Cal. 527, 20 Pac. Rep. 47; San Fernando F. H. A. v. Porter, 58 Cal. 81; Barron v. Deleval, Id. 95; Mullally v. Benevolent Soc., 69 Cal. 559, 11 Pac. Rep. 215; Dow v. Ross, 90 Cal. 562, 27 Pac. Rep. 409. Perhaps they may be so reconciled as to sustain the position of respondent; but it is unnecessary to decide this question, since I think that, under the circumstances, plaintiff's notice of intention to move for a new trial, served on defendant January 6th, contained a sufficient notice in writing that a decision of the court had theretofore been rendered in this case, although that notice also stated that plaintiff intended to move for a new trial. The notice contained the title of the cause, and the language is, "the decision and judgment heretofore rendered and entered herein," which means the decision which was heretofore rendered herein, and must have been so understood. The Code requires no particular form of notice. Nor does it require notice of what the decision was. Simple notice in writing that a decision has been rendered is all that is required. Such notice was served on defendant on January 6, 1891, yet defendant did not give notice of his intention to move for a new trial until the 24th day of that month. No point is made on defendant's appeal from the judgment.

2. On the appeal by the plaintiff from the judgment as to lot 7 no point is made; but on her appeal from the order denying her motion for a new trial her counsel contend that the finding by the court to the effect that lot 7 was conveyed to her by her husband without consideration, and for the purpose of delaying and defrauding his creditors, is not justified by the evidence. But after a careful examination I think the evidence on the part of the defendant has a substantial tendency to prove the findings in question. I think the entire judgment and both orders appealed from should be affirmed.

We concur: Belcher, C.; Haynes, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

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95 Cal. 257

Townsend v. Tufts *et al.* (No. 14,619.)

(*Supreme Court of California.* July 11, 1892.)

Land Contract—Rescission—What is.

A complaint, in an action by the vendee named in a land contract against the vendor to recover the amount paid thereon, which fails to show payment or tender of the deferred installments and demand of conveyance, or refusal or inability of defendant to convey, is bad on demurrer; the mere failure of defendant to tender conveyance and demand payment on the day named not being sufficient to operate as a rescission of the contract. Drew v. Pedlar, 25 Pac. Rep. 749, 87 Cal. 443, and White v. Buell, 27 Pac. Rep. 19, 90 Cal. 177, distinguished.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action for money had and received by Frank N. Townsend against J. Q. Tufts and A. B. Cass. Defendants had judgment on demurrer, and plaintiff appeals. Affirmed.

Jones & Carlton and *R. L. Horton*, for appellant. *Albert M. Stephens*, for respondents.

Haynes, C. Defendants demurred to the complaint, the demurrer was sustained, and, the plaintiff having declined to amend, judgment passed for defendants, from which judgment the plaintiff appeals. The facts alleged in the complaint are that on March 6, 1888, the defendants entered into a contract with one Parkovitch, whereby they agreed to sell, and said Parkovitch agreed to buy, a certain parcel of land for the sum of $2,400, of which sum one third was paid down, and the remaining two thirds was agreed to be paid down in two equal annual payments, the last of which fell due March 6, 1890; "at which time, [the complaint alleges,] by the terms of said agreement, defendants were to execute and deliver to said Parkovitch or his assigns a good and sufficient deed of grant, bargain, and sale, conveying to him or his assigns the title to said land." The complaint further alleges that time was made the essence of the contract by express terms; that on March 28, 1889, Parkovitch assigned said contract, and all sums of money paid thereon, to the plaintiff, of all which defendants had notice; that at the maturity of the contract defendants failed and refused, and ever since have failed and refused, to convey; that neither plaintiff nor Parkovitch have ever been in possession, (the lands being vacant and unoccupied,) and that defendants have not paid to plaintiff any part of the $800 so received by them. The complaint contains no allegation of the payment, nor of any tender or offer to pay either of the deferred payments, nor of any demand for a deed of conveyance, nor of any inability to convey, nor of any rescission, mutual or otherwise, of the contract, unless the failure of the defendants to make and tender a deed to the plaintiff on the 6th day of March, 1890, (that being the day specified in the contract for the payment of the last installment of the purchase money and for the conveyance of the land,) should be held to operate as a rescission or termination of the contract; and this is the sole ground upon which appellant seeks to reverse the judgment. The appellant contends that by the failure of defendants to tender a deed on that day the contract ceased to exist, and that thereupon he became entitled to recover back the money paid, and cites Cleary v. Folger, 84 Cal. 316, 24 Pac. Rep. 280; Drew v. Pedlar, 87 Cal. 443, 25 Pac. Rep. 749; and White v. Buell, 90 Cal. 177, 27 Pac. Rep. 19. The last two cases cited are clearly distinguishable from the case under consideration. In Drew v. Pedlar the plaintiff paid $1,000 upon the execution of the agreement, but failed to pay the $7,500 when the same became due, and never offered to pay the same until about 10 months after maturity, when he tendered full payment, and demanded a deed for the land. The defendants then refused to accept payment or to execute a deed, and also refused to refund the $1,000 paid, and elected to rescind the agreement. Thereupon the plaintiff brought suit to recover the $1,000, and alleged in his complaint the facts above stated, as well as a portion of the contract which provided that upon his failure to make the deferred payment the defendants should be released from all obligation to convey, and all money paid thereon should be as liquidated damages for plaintiff's nonfulfillment of the contract. Under these circumstances this court held that the plaintiff was entitled to recover the $1,000 paid by him, less such actual damages as the defendants might have sustained by plaintiff's breach of the contract, if such damages had been pleaded, following, in this respect, Cleary v. Folger. In Drew v. Pedlar, it must be observed there was a tender by the plaintiff, a demand for a deed, and an express rescission of the contract by the defendant, as was his right under the terms of the contract, and that the plaintiff acquiesced in the rescission by bringing his suit. In the case at bar, however, there was no tender of payment or demand for a deed; and hence the defendants were not called upon to elect whether they would insist upon performance, as they might have done under the authority of Wilcoxson v. Stitt, 65 Cal. 596, 4 Pac. Rep. 629; Smith v. Mohn, 87 Cal. 489, 25 Pac. Rep. 696; and Banbury v. Arnold, 91 Cal. 606, 27 Pac. Rep. 934; and, that being true, the mere neglect of both parties to perform the contract on the day fixed for its performance could not, without anything more, operate as a rescission. The complaint, it is true, alleges that defendants "failed and refused" to execute to plaintiff a deed; but in the absence of an allegation of tender of the purchase money and demand for a deed, this allegation must be read in the light of the terms of the contract, which does not make the execution and delivery of the deed a condition precedent to the payment of the last installment of the purchase money, but does fix the time for the execution of the deed at the time fixed for such final payment. Under the well-settled authorities, the plaintiff, under the terms of this contract, must have tendered performance and alleged such tender to enable him to maintain his action, unless he could excuse his failure to make the tender by alleging his ability and readiness to pay, and that the tender was not made because of defendants' refusal to perform on their part. Besides, in the absence of an allegation that the first deferred payment had been made, the plaintiff having specified and seeking to recover only the payment made at the date of the contract, the complaint shows a breach of the contract on his part a full year before defendants were required to convey. In White v. Buell, 90 Cal. 177, 27 Pac. Rep. 19, cited by counsel, the purchaser had the right, under the contract, to terminate it by forfeiting the first payment of $1,000, his failure to pay either the first or second deferred payments operating, by the express terms of the contract, as a termination of it; the penalty therefor being the forfeiture of the payment made at the date of the contract only, and not of the subsequent payment which he was permitted to recover back. Cleary v. Folger, 84 Cal. 316, 24 Pac. Rep. 280, also cited by counsel for appellant, has been overruled, upon the point to which it is cited, in Newton v. Hull, 90 Cal. 487, 27 Pac. Rep. 429. The complaint contains four counts or causes of action, each upon a separate contract; but as all are stated in the same terms, and allege the same facts, it is not necessary to notice them further. For the reasons above given we advise that the judgment be affirmed.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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95 Cal. 279

Smith v. Whittier *et al.* (Nos. 13,833, 14,453.)

(*Supreme Court of California.* July 12, 1892.)

Stipulations between Attorneys—Negligence—Falling of Elevator—New Trial—Offer of Compromise—Damages.

1. The fact that an agreement, made by attorneys in a certain action, to allow the stenographic notes of the testimony of a witness in a previous action, brought by another plaintiff against the same defendant, in which they were also attorneys, to be used in evidence, without again calling the witness, is not filed with the clerk until after the substitution of another attorney for one of the parties, does not, after the death of the witness, bring the case within Code Civil Proc. § 283, which declares that an attorney may bind his client by an agreement so filed, "and not

otherwise," but the provision quoted has reference merely to agreements which are executory.

2. In an action for personal injuries sustained by a passenger in the falling of an elevator, evidence of advice given by one who put the elevator into place, as to how it should be handled or used, and what the effect would be if such directions were disregarded, is admissible for the purpose of showing that defendant had knowledge of what would constitute negligence.

3. Where, on a motion for a new trial, it appears that a party had prepared affidavits, but inadvertently omitted to file them within the prescribed time, the court may disregard such error or defect under Code Civil Proc. § 475, as one not affecting any substantial right, and allow them to be filed after the prescribed time.

4. A statement made by one of several defendants to his codefendants, advocating the settlement of plaintiff's claim, is not within the rule excluding offers made for the purpose of compromise, but is competent as an admission of liability. De Haven, J., dissenting.

5. A verdict for $30,000, recovered in an action brought for personal injuries occasioned by the fall of an elevator, will not be set aside as excessive where it appears that plaintiff was a man 36 years of age, in good health, and engaged in an extensive business requiring great physical activity, and that he was so affected by several bad fractures, concussion of the spine producing permanent partial paralysis, and other serious injuries, as to render him scarcely able to walk, and prevent him ever after from resuming his business, or engaging in any other active pursuit.

In bank. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by George J. Smith against W. F. Whittier and others. Judgment for plaintiff. Defendants appeal. Affirmed.

D. M. Delmas, for appellants. *Lloyd, Newlands & Wood* and *Garber & Bishop*, for respondent.

Harrison, J. Action to recover damages for personal injuries, caused by the falling of an elevator. The facts out of which the cause of action arose are the same as those which were presented in the case of Treadwell against the same defendants, reported in 80 Cal. 624, 22 Pac. Rep. 266; the plaintiff and Treadwell having both been passengers on the elevator at the time of the accident. A verdict was rendered in favor of the plaintiff for $30,000, and from the judgment entered thereon, and also from the order of the court denying a new trial, the defendants have appealed to this court.

1. The Case of Treadwell was tried in April, 1883, and a verdict rendered in favor of the plaintiff. While that cause was pending in the superior court on a motion for a new trial, the attorneys for the parties to the present action, who were also the attorneys for the respective parties in the Treadwell Case, entered into the following stipulation: "Stipulated that the testimony of D. A. Bangs, as given and taken down by the phonographic reporter on the trial of the case of John Treadwell vs. Said Defendants, W. F. Whittier et al., when written out in longhand, and certified as correct by said reporter, may be read and used in the trial, or in any proceedings in the said case of George J. Smith vs. W. F. Whittier et al., with like force and effect as if said Bangs was on the stand and testifying in open court, subject only to such objections or exceptions as might be made if said Bangs was testifying in open court in said last-named cause, and also subject to the right of defendants' attorneys to contradict or impeach said Bangs on any matter testified to by him, without first calling his attention thereto, or making preliminary proof as to such contradictory matter. San Francisco, Nov. 1, 1884. McAllister & Bergin, Attorneys for Defendants. Lloyd & Wood, Attorneys for Plaintiff." Before the trial of the present case the witness Bangs left the state and died; and on the second day of the trial the plaintiff offered to read his testimony in the former case, under the foregoing stipulation. To this the defendants objected, upon the ground that the stipulation had not been filed with the clerk until after McAllister & Bergin had ceased to be the attorneys for the defendants, and therefore was not binding upon the defendants. Mr. Delmas had become the attorney for the defendants in place of McAllister & Bergin prior to the commencement of the trial, but his substitution as such attorney was not made a matter of record until after the trial had begun; and on the same day, about two hours after the filing of the order of substitution, the plaintiff caused the foregoing stipulation to be filed with the clerk.

Section 283, Code Civil Proc., provides: "An attorney and counselor shall have authority (1) to bind his client in any of the steps of an action or proceeding by his agreement, filed with the clerk, or entered upon the minutes of the court, and not otherwise." The evident object of this section is that, whenever the attorney shall enter into an agreement for the purpose of binding his client, there shall be such a record thereof as will preclude any question concerning its character or effect, and that the extent of the agreement may be ascertained by the record, if oral, that it shall be entered in the minutes, and, if written, that it shall be filed with the clerk. "It is not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise." Preston v. Hill, 50 Cal. 53. The section does not require a construction that in no instance shall an agreement which the attorney may make in behalf of his client be binding unless entered in the minutes of the court or filed with the clerk. Its provisions have reference to executory agreements, and not to those which have been wholly or in part executed, and it was with reference to oral agreements of this character that the court said in its opinion in Borkheim v. Insurance Co., 38 Cal. 628: "Of such agreements, therefore, there can be no specific performance." If under the terms of a mutual stipulation, which was only verbal, one party has received the advantage for which he entered into it, or the other party has at his instance given up some right, or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court. Himmelman v. Sullivan, 40 Cal. 125; Hawes v. Clark, 84 Cal. 272, 24 Pac. Rep. 116; People v. Stephens, 52 N. Y. 306. If the party admits that he made such verbal stipulation, it will be as binding upon him as if it had been entered in the minutes of the court. Patterson v. Ely, 19 Cal. 36; Reese v. Mahoney, 21 Cal. 306. If, however, the terms of the verbal agreement are disputed, courts refuse to settle such disputes, or to try a collateral issue for the purpose of determining whether any agreement had been made In Patterson v. Ely the verbal agreement was not entered of record until after the trial had begun, and in Hawes v. Clark, although the minutes contained no record of the agreement, the court nevertheless enforced it, notwithstanding the objection upon that ground. The same principles are applicable to the enforcement of a written agreement which has not been filed as to a verbal one which has not been entered in the minutes of the court. If the parties have acted upon such written agreement to such an extent that it would be inequitable not to recognize its binding effect, as, for example, if a party has obtained under the agreement that in consideration of which the other became bound thereby, or has been relieved of some burden which was the consideration for which it was given, or if the other party has been reasonably led thereby to forego any step which but for the agreement he would have taken, courts will not allow the agreement to be repudiated upon the ground that it had not been filed with the clerk.

The stipulation in the present case was one which was within the authority of McAllister & Bergin, as attorneys for the defendants, to make. It pertained to the conduct of the suit for which they had been employed, and, when made, was binding upon the defendants, and remained binding upon them until they should be relieved therefrom. They were not relieved from the obligation created by it by the mere fact that Mr. Delmas had been substituted as their attorney in the place of McAllister & Bergin. An attorney who is substituted for another in a cause has no greater rights than his predecessor, nor is his client's position in the case in any way changed by such substitution. He steps into the place of his predecessor, and stands, with reference to the case, and to the other party, precisely as did his predecessor, and can repudiate or be relieved from an agreement that had been made by him only to the same extent and in the same manner as could his predecessor. The natural effect of this agreement was to induce the plaintiff to forego the taking of the deposition of Bangs; and the agreement itself, in the absence of any showing in reference thereto, may, from its terms, be regarded as having been entered into for the mutual benefit and convenience of both parties, inasmuch as Bangs had been fully examined and cross-examined in the trial of the Treadwell Case by the same attorneys for the respective parties, and each was by this agreement relieved of the labor and time that would have been required in taking his deposition for the purpose of re-examining him upon the same subject. It was not necessary that the agreement should have been filed by the plaintiff immediately upon its execution, under the penalty of not being able to avail himself of it. Its execution by McAllister & Bergin was a continuing consent on their part that it might be filed at any time thereafter, unless they should in some direct and express mode signify their withdrawal of such consent; and upon the death of Bangs before such consent was withdrawn the position of the plaintiff in reference to having his testimony for use at the trial of the present case became so changed that thereafter the agreement could not have been revoked, or the consent of the attorneys to its filing withdrawn. When it was afterwards filed, the effect of such filing operated and became binding upon the defendants as from its date.

2. At the trial the defendant Ravekes was called as a witness on behalf of the plaintiff, and was asked whether he had received any directions from those who put the elevator in the building as to how it should be handled or used, and whether anything was said as to what the effect would be if he did not carry out those instructions; and answered that he had received from them instructions to start slowly at first, and always, when reaching either floor at which to leave the elevator, to decrease the speed by shutting off the water, and never allow the elevator to stop of its own accord; that otherwise the effect would be to break a portion of the machinery in the basement. These questions were objected to by the defendants upon the ground that they were "irrelevant and immaterial," and the overruling of their objection is assigned as error. The argument of the appellants upon this assignment is, however, mainly upon the ground that the evidence was incompetent, for the reason that it was hearsay. The evidence given by the witness in answer to the questions was both relevant and material. The main issue between the parties to the action was whether the defendants had been negligent in the mode in which they had run the elevator at the time of the accident, and upon that issue the plaintiff had the right to introduce any competent evidence that would tend to establish such negligence. Negligence is opposed to diligence or carefulness, and is never absolute or intrinsic, but is always relative to some circumstance of time, place, or person. The definition which is most frequently given is that formulated by Baron ALDERSON in Blyth v. Water Works Co., 11 Exch. 784, as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." "It must be determined in all cases by reference to the situation and knowledge of the parties, and all the attendant circumstances What would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and in changed circumstances." Nitro-glycerine Case, 15 Wall. 536. The Civil Code, § 1714, makes every one responsible "for an injury occa-

sioned to another by his want of ordinary care or skill in the management of his property;" and "ordinary care" is that which every person of ordinary prudence takes of his own concerns, or would employ under similar circumstances. In Hoffman v. Water Co., 10 Cal. 413, the test is stated to be "what discreet and prudent men should do, or ordinarily do, in such cases, where their own interests are to be affected, and all the risk their own."

As negligence is the violation or disregard of some duty or obligation which one owes to another, it is evident that a knowledge of the facts out of which the duty springs is an essential element in determining whether there has been any negligence. In certain relations such knowledge is conclusively presumed, while in others it devolves upon the party charging the negligence to show that the knowledge existed. Especially is such knowledge an element in determining the care to be exercised in the use of some mechanical or natural agency whose superior force demands skill in its management to prevent its getting beyond ordinary control. The amount of care requisite in such a case depends upon the extent to which the knowledge goes. The mode in which an appliance involving such agency is to be used is as material as the manner in which it is constructed, and, if one mode of its use is free from danger and another not, it is relevant and material to show whether the defendant knew how to use that mode which was free from danger, since his knowledge of the proper mode, and his failure to exercise it, would be evidence of negligence. "Facts which were known to him, or by the use of proper diligence would have been known to a prudent man in his place, come into account as part of the circumstances." Pol. Torts, 356. In the case of Hoffman v. Water Co., supra, it was held that the knowledge of the defendants respecting the character of the ground upon which the dam was constructed was an element to be considered in determining whether they had been guilty of negligence in constructing it; and the Nitro-glycerine Case went upon the proposition that the defendants were ignorant of the proper mode of handling the article. The negligence of the master in the retention of an incompetent servant, or in the use of defective machinery, is frequently shown by evidence that he had been informed of previous negligent acts on the part of the servant, or of the defects in the machinery. Malone v. Hawley, 46 Cal. 409. The negligence of the servant, or the defects in the machinery, must still be shown in the particular case; but the presumption that the master had fulfilled his obligation to select competent servants, or provide suitable machinery, is overcome by proof that such information had been communicated to him. Whenever the knowledge or information of the party charged to have been negligent is a factor in determining such question, it is proper, for the purpose of showing such knowledge or information, to show that notice was given to him, and that he was informed of the facts which would constitute negligence, and there is no better mode of showing this than by the evidence of the party himself that he had received the information. Whether, in fact, such information was or was not correct, is immaterial for the purpose of determining its admissibility, and hence it is no objection to its admission that it was not given under the sanction of an oath, or that the opposite party had no opportunity of cross-examining the informant. The truth of the information is a distinct issue, and must be established by competent evidence; but upon the theory that the information was correct the plaintiff in the present instance had the right to show that the defendants had received such information, and thus obviate any claim that might be made by them that they had exonerated themselves from liability by procuring the elevator to be constructed by a competent and reputable manufacturer.

The evidence thus introduced was not, moreover, within the rule which excludes hearsay. Hearsay is a species of derivative evidence which is offered for the purpose of establishing some specific fact in a case, and rests on the veracity and competency of some other person than the witness. Such testimony is excluded whenever it appears that a higher degree of evidence of that fact can be obtained by the production of the person from whom the evidence offered was derived; but whenever the testimony of such person is of no higher degree in establishing the fact to be shown than the evidence offered, either is original and primary evidence of that fact. If the fact sought to be established is that certain words were spoken, without reference to the truth or falsity of the words,—as, for instance, that a certain statement was made by a party to the action as an admission of a fact, or was made to him as a notice, or under such circumstances as to require action or reply from him,—the testimony of any person who heard the statement is original evidence, and not hearsay. Whart. Ev. § 254; Greenl. Ev. § 100; People v. McCrae, 32 Cal. 98; People v. Estrado, 49 Cal. 171. Such evidence is admitted for the purpose of establishing merely the utterance of the words, and not their truth; but the admission in evidence of the words spoken is not to be used in determining the issue of their truth. Necessarily the words so spoken are brought before the jury, but the jury can readily be instructed by the court that they are not to regard them as proof of the facts that are stated. People v. Estrado, 49 Cal. 173. "It sometimes happens that a declaration is evidence for a particular purpose, although it is not to be taken as evidence to prove the truth of the facts declared; for the rule seems to be that, if the declaration be evidence as a circumstance in the action for any purpose, it is to be received; and the jury are to be directed not to consider it for other purposes for which abstractly it could not have been received." Starkie, Ev. 89. Upon these principles, when Ravekes was told in what way the elevator should be run, and what would be the consequence of running it otherwise, the receiving of that instruction became a distinct fact in the case, and could be shown by any one who heard it. His own admission, whether upon the record or as a witness at the trial, that such instruction was given him, obviated the proof by any other witness, but cannot be considered as hearsay. "As matter of evidence and practice, proof of actual knowledge may be of great importance. If danger of a well-understood kind has, in fact, been expressly brought to the defendant's notice as the result of his conduct, and the express warning has been disregarded or rejected, it is above hearsay, and more convincing to prove this than to show in a general way what a prudent man in the defendant's place ought to have known." Pol. Torts, 356.

3. The court did not err in allowing the plaintiff to read certain counter affidavits upon a motion for a new trial. Spottiswood v. Weir, 80 Cal. 451, 22 Pac. Rep. 289. One of the grounds of the motion was the misconduct of the jury, and in support of this ground the defendant had filed and served certain affidavits to the effect that one of the jurymen had made inquiries about the workings of an elevator outside of the court room. Within five days after these affidavits had been filed the plaintiff caused certain affidavits which were directly responsive to them to be prepared, but they were not filed until more than ten days thereafter. Upon affidavits on the part of the plaintiff showing these facts, together with an affidavit for the purpose of showing that it was by reason of the inadvertence and excusable neglect of his attorneys that they had not been filed, the court allowed them to be filed and read. This ground of the motion for a new trial, as well as the subject-matter of the affidavits, made it essentially proper that the court should allow the plaintiff an opportunity to reply to these affidavits, if it was within its power to do so; and matters presented in support of a claim of inadvertence and excusable neglect are so greatly within the discretion of the court to which they are addressed that, unless there should appear to be an abuse of that discretion, we would not interfere with its action. The defendants were not entitled to a new trial upon this ground, unless the facts upon which it was based existed, and the time within which the plaintiff might controvert such affidavits is not made by the statute jurisdictional, or declared to be a limitation upon the exercise of such right. It is only a rule of procedure, and, in the absence of statutory limitation, is subject to the equitable control of the court; and the court should disregard any error or defect in the proceedings whenever a substantial right of a party is not affected. Code Civil Proc. § 475. Rules of procedure, whether statutory or made by the court, are intended to facilitate courts in doing justice between the parties. They are framed with a view to enable litigants to properly present their cause for determination; and courts, in the exercise of their supervisory care over them, should be inclined to take that course which will enable them to ascertain the actual facts in a cause. For the guidance of parties certain formalities are required, and certain times specified within which the several steps are to be taken, but, except in matters which are jurisdictional, these provisions are intended for the convenience of courts and litigants, and should be liberally construed.

4. Upon the cross-examination of the defendant Ravekes the defendants endeavored to show that he had taken no part in the defense of the present action; and upon his redirect examination, he was asked whether he had not advocated with his firm a settlement of the case, to which the defendants objected upon the ground that it was "incompetent and irrelevant," but did not specify the grounds upon which they claimed it to be incompetent. The court overruled their objection, and it is now contended by them that in this ruling the court violated the rule which precludes a party from giving evidence relative to offers for a compromise, which have been rejected. In the present case, however, there was no treaty for a compromise depending between the parties, and the testimony introduced did not relate to the offer of any terms of compromise, or to any dealing with the adverse party upon the subject of a compromise; and the rule which excludes offers made for the purpose of settlement is inapplicable. The statement of a party against whom a claim is made that he is willing to settle the claim is a declaration by him against his interest, sometimes called a "self-disserving" or "self-harming" statement; and section 1870 of the Code of Civil Procedure provides that upon the trial of a cause evidence may be given of "(2) the act, declaration, or omission of a party, as evidence against such party." Such declarations are classed in books on evidence under the head of "Admission." Mr. Stephen, in his treatise on Evidence, defines an admission to be "a statement, oral or written, suggesting any inference as to any fact in issue, or relevant, or deemed to be relevant, to any such fact, made by or on behalf of any party to any proceeding." Within this definition the testimony sought from the witness Ravekes was admissible. Such a declaration, in the absence of any other evidence than that he made it, would justify a jury in drawing the inference that he considered himself liable for the claim, since ordinarily men are willing to settle only those claims for which they are liable, and consequently the statement is admissible upon the same principles as would be his direct statement that he was liable for the claim. The making of such admission is a fact which is relevant to the issue upon his liability. Proof of making the admission is not, however, proof of the fact of his liability, but is only evidence in support of proving that fact; and the weight of such evidence, as well as its sufficiency for authorizing such inference, must be determined by the jury. The declaration may have so little weight in itself that the jury would not regard it as entitled to any consideration; and the party making the declaration may countervail its entire weight and sufficiency by showing

the circumstances under which it was made, or the purpose for which he made it, as, for example, that he made it under a misapprehension of the facts, or with a view to a speedy determination of the controversy, or out of a charitable regard for the claimant; but the declaration itself is admissible upon the ground that the facts implied therein are relevant to the issue in the case. Admissions are generally regarded as weak evidence for the proof of a fact, and are never conclusive of the fact stated, or of the inference to be drawn therefrom, and our statute requires the jury to be instructed on all proper occasions "that the evidence of the oral admissions of a party ought to be viewed with caution." Code Civil Proc. § 2061. (4) An exception to the admissibility of such admissions exists when they are made by way of an offer to buy peace, or with reference to negotiations with the adverse party for a compromise of the dispute. Under such circumstances, except as they are admissions of distinct facts, they are regarded as hypothetical admissions from which it is not proper to draw any inference of liability, and therefore are not to be received in evidence. The rule, however, which excludes offers made for the purpose of a compromise, does not apply to statements made by a party which are in no wise connected with any attempt at a compromise, whether these statements are made to a stranger or to his codefendant. West v. Smith, 101 U. S. 273; Ashlock v. Linder, 50 Ill. 169; Marvin v. Richmond, 3 Denio, 58; Molyneaux v. Collier, 13 Ga. 415; McLendon v. Shackelford, 32 Ga. 474; Clapp v. Foster, 34 Vt. 580; Gulzoni v. Tyler, 64 Cal. 334; Greenl. Ev. § 192; 1 Phil. Ev. (Cow. & H. notes) note 124; Whart. Ev. §§ 1077, 1090. The question asked of the witness Ravekes concerning the statements of Smith when he came up in the elevator was so clearly connected with the accident as to be relevant to the issue between the parties, and the reply was of such a nature that the defendants could not have been prejudiced thereby.

5. We cannot hold that the damages were so excessive as to appear to have been given by reason of any passion or prejudice on the part of the jury. The plaintiff, at the time of the accident, in 1878, was 36 years of age, in good health, and engaged in an extensive business, which required great physical activity. The elevator fell with him from the upper floor of the building to the basement, a distance of from 40 to 45 feet, and by the fall he was so injured as to prevent him from continuing his business, and to disable him from engaging in any active occupation. It is unnecessary to recount in detail all the various injuries which he received, or the sufferings which he endured during the time that he was under the care of the surgeon. He was confined to his bed for nearly a year, and it was three years before he could walk the distance of a block. When he was first carried to his house his limbs were completely paralyzed, his right leg broken with a comminuted fracture, and the bones of the shin protruding from his flesh and clothes, the bones of one ankle broken, and the arch of his foot so injured as to destroy the joint and deprive him of all control of the foot. His spinal column received such concussion as to produce a partial permanent paralysis in his legs. At the time of the trial, 10 years after the injury, it was shown by the testimony of the surgeons who then examined him that his right leg had only one fourth of its original vigor, and but little power of motion, and that his other leg was atrophied by reason of the injury to his spinal column, and that he would never recover any further use of his limbs; and, also, that as he grew older he would be likely to lose their use entirely. In addition to this, he received serious injury to his bladder, which remained paralyzed for many months, and caused him to suffer greatly; and also to the rectum, from which he had not become free at the time of the trial. The jury, in addition to the testimony concerning his injuries, had an opportunity to see the plaintiff himself and determine how far the testimony was corroborated by his appearance. It is not contended by the appellants that the record discloses any indication of passion or prejudice on the part of the jury in determining the amount of damages which they awarded, other than the mere fact of its amount. The judge before whom the case was tried approved the verdict, notwithstanding the objection to the amount made by the appellants, and in consideration of the character and extent of the injuries shown to have been sustained by the plaintiff, we are not inclined to disregard his action. The judgment and order are affirmed.

We concur: McFarland, J.; Garoutte, J.

De Haven, J., (*concurring.*) concur in the judgment and in the opinion of Mr. Justice Harrison, except that part which holds that the testimony of the witness Ravekes, upon his redirect examination, to the effect that while a member of the firm of Whittier, Fuller & Co., he had advocated a settlement of plaintiff's claim for damages, was competent as an admission of a fact by one of the parties in interest, and admissible as such against the other defendants. I cannot accept this as a correct rule of evidence. But still, in my opinion, the ruling of the trial court in admitting this evidence can be justified upon another ground. The witness, in his examination in chief, testified to material facts tending to show negligence on the part of the servant of defendants in his mode of operating the elevator at the time of the accident, which resulted in the injury of which plaintiff complains. The entire purpose of the cross-examination, which was conducted with great skill on the part of the attorney for the defendants, seems to have been to show that some time after the accident the witness was compelled to withdraw from the firm of which he and the defendants were members, because he had overdrawn his account with the firm without the consent of his copartners; and that they had charged him with peculation, and in consequence that their relations were unfriendly at the time of the trial. The inference, of course, sought to be drawn from this fact was that the matters testified to by the witness were not true, and that his testimony was simply the result of the subsequent trouble between himself and the defendants.

Under these circumstances, it was not improper to show by the witness that, prior to any difficulty with defendants, his advice to them was entirely consistent with his present testimony, and such as would probably have been given in view of the existence of the facts about which he testified. It is held that former consistent statements of a witness are admissible to support his testimony when it is charged to have been a recent fabrication, in which case, in order to repel such an imputation, it is proper to show that the witness made a similar statement at a time when the supposed motive for such fabrication did not exist, (Rap. Wit. 369, 370;) and the evidence under discussion comes within the spirit and reason of the rule just stated. If the defendants desired to show that this advice was not based upon the facts about which he had given testimony, but such action was simply urged upon the ground that it was wise to avoid a lawsuit, and better to pay an unfounded claim than to be involved in litigation, they should have further cross-examined the witness, and, if this had been made to appear, the evidence could have been stricken out; but, in the absence of any explanation, the evidence tended in some degree to support the original testimony of the witness, and to rebut the inference which the defendants evidently sought to draw from the circumstances under which they claimed he retired from the firm. In the examination of a witness for the purpose of showing motive, interest, or prejudice, or in rebutting an imputation of giving testimony from some unworthy motive, much is necessarily left to the discretion of the judge of the lower court, and it does not seem that in this instance there was any improper exercise of discretion in the ruling upon the question referred to.

We concur: BEATTY, C. J. SHARPSTEIN, J.

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95 Cal. 272

WOODWARD *et al.* v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO *et al.* (No. 14,945.)

(*Supreme Court of California.* July 12, 1892.)

RECEIVERS — APPOINTMENT IN PARTITION PROCEEDINGS—PROHIBITION—WHEN LIES.

1. Code Civil Proc. § 564, authorizes the appointment of a receiver in certain cases. Subdivision 6 provides that a receiver may be appointed "in all other cases where receivers have heretofore been appointed by the usages of courts of equity." *Held*, that the superior court has jurisdiction to entertain a motion for the appointment of a receiver in proceedings for partition, and, having jurisdiction of the parties and subject-matter, prohibition does not lie to determine the legality of the action on the motion. Per PATERSON and GAROUTTE, JJ. BEATTY, C. J., dissenting.

2. Where an order of sale is void on its face, prohibition does not lie to prevent its execution, since a purchaser would take no title, and could be treated as a trespasser. BEATTY, C. J., dissenting.

In bank.

Original application of one Woodward for a writ of prohibition to William T. Wallace, judge of the superior court of city and county of San Francisco. Denied.

Wilson & Wilson and *Estee, Wilson & McCutchen*, for petitioners. *Dunne & McPike*, for respondents.

PATERSON, J. This is an application for a writ of prohibition commanding the respondent to refrain from further proceedings upon an order which had been made appointing a receiver in the case of Woodward et al. v. Raum et al., and authorizing him to sell an undivided interest in the property. The petition shows that the petitioner and Mary C. Raum, Helen J. Hutchinson, and Sarah B. Melone were, on the 11th of February, 1888, the owners of certain real estate in the city of San Francisco, and known as "Woodward's Gardens," and that on said day petitioner and Mary C. Raum, Ely I. Hutchinson, and Sarah B. Melone were the owners of the personal property used in connection with said gardens, and consisting of animals, curiosities, pictures, statues, etc.; that on said 11th of February, 1888, petitioner and Sarah B. Melone commenced an action in which they prayed for a partition of said real estate, and, if a partition could not be had without great prejudice, then for a sale of the premises, and a division of the proceeds among the parties according to their rights; that thereafter the defendants therein, Mary C. Raum and George E., her husband, Helen J. Hutchinson and Ely, her husband, filed an answer in which they claimed that partition could be made without prejudice to the owners, and that a sale was unnecessary; that on March 5, 1891, after trial, the court decided that the land could be partitioned without prejudice to the owners, and adjudged that it be divided equally among them; that on September 1, 1888, said Ely Hutchinson and Mary C. Raum commenced an action against the petitioner and Sarah B. Melone for a sale of the personal property above referred to, and a division of the proceeds in accordance with the interests of the parties; that an answer was filed therein by the defendants in which they denied that said Ely Hutchinson was the owner of any interest in said personal property, and alleged that the one fourth interest claimed by him was owned by his wife, said Helen J. Hutchinson; that the latter should be made a party to the action; that there was an action pending in which the question was involved as to whether all the property, real and personal, should be sold in its entirety, and the proceeds thereof divided among the parties thereto, and that, if the personal property should be sold separately from the land comprising "Woodward's Gardens," it would bring very little money, whereas, if sold with and as a part of the gardens as a whole, the result would be greatly to the advantage of all the parties interested in the property; that on the 5th day of March the court rendered judgment in that action in favor of the plaintiffs, and decided that said Helen J. Hutchinson was not at the time of the commencement of the action the owner of the personal property, or any part thereof, and that the property was of such a character that partition *in specie* could not be had, and that it should be sold under the direction of the court, and the proceeds, after deducting expenses, be equally divided among the owners; that on the 23d day of May, 1891, the respondent, at the instance of said Sarah B. Melone and her husband, Drury Melone, and against the objections of these petitioners, appointed L. N. Daugherty receiver, with directions to take and keep possession of the property, real and personal; that a receiver was unnecessary, because it was not shown or claimed that said Sarah B. or Drury Melone had been excluded from possession of any of the property, or from any of the proceeds thereof, but that, on the contrary, petitioners had offered in writing to allow said Sarah B. and Drury Melone to take exclusive possession of all the property until final determination of the action, which offer was declined; that on the ——— day of June, 1891, the court made an interlocutory decree in the action of Woodward et al. v. Raum et al., directing a partition of the property among the parties according to their respective interests; that on the ——— day of June, 1891, a final decree was entered in the action of Hutchinson et al. v. Woodward et al., directing that the personal property described in the complaint be sold at public auction, and after payment of the costs that the proceeds be divided equally among the parties to the action; that thereafter said Sarah B. and Drury Melone moved for a new trial in each of said actions, which motions were denied, and from the orders and the interlocutory decree made in the case of Woodward et al. v. Raum et al., and from the judgment in the case of Hutchinson et al. v. Woodward et al., they appealed to this court; that in November, 1891, the receiver filed an account showing his receipts and disbursements, to the approval of which petitioners filed objections on the ground that the order appointing the receiver was in excess of jurisdiction, that the parties to the two actions were not the same, and the court had no power to adjudge that the property involved in one action was liable or chargeable for expenses incurred in preserving the property involved in the other action; and that these objections were overruled, and the court upon the evidence introduced ordered that the account stand approved; that on the 19th day of December, 1891, the court, against the objections of petitioners, made an order authorizing the receiver to borrow the sum of $494.64, the amount of indebtedness which he had incurred in caring for the property, and to issue therefor his certificate; that thereafter the receiver filed a second account, showing that the balance due him was the sum of $877.15, and this account was approved; that on the 14th day of January the receiver represented to the court that he had been unable to raise any money on the certificates authorized by the court, and that it was necessary to sell an undivided interest in all of the property to raise funds for the payment of expenses; that on the 18th day of January, 1892, the court, against the objection of petitioners, made an order authorizing the receiver to sell at public sale to the highest bidder for cash the smallest undivided interest in the real and personal property that would realize, besides expenses of sale, the sum of $8,591.71, and to give his certificate therefor. It is claimed that the order appointing the receiver, and the orders settling and allowing the receiver's account, and directing him to sell an undivided interest in the property, are all in excess of the jurisdiction of the superior court.

1. The superior court has jurisdiction to appoint a receiver in an action of partition. Section 564, Code Civil Proc., provides that a receiver may be appointed by the court "(6) in all other cases where receivers have heretofore been appointed by the usages of courts of equity." The action of partition, "though regulated to a great extent by the statute, partakes more fully, both in respect to the remedies provided and the mode of procedure, of the principles and rules of equity than those of law," (Gates v. Salmon, 35 Cal. 593; Emeric v. Alvarado, 90 Cal. 456, 27 Pac. Rep. 356;) and, whenever it appears necessary to protect the interests of all the parties during the prosecution of an action for partition, the court will, upon proper application, appoint a receiver, (17 Amer. & Eng. Enc. Law, 764; Beach, Rec. § 492; Goodale v. District Court, 56 Cal. 29.) It is claimed by the petitioners that no sufficient showing was made in the court below for the appointment of a receiver; but we think this is a matter which cannot be considered in this proceeding. The court had jurisdiction of the subject-matter and of the parties. It had the power, therefore, to hear and determine a motion for the appointment of a receiver, and its action thereon cannot be regarded as in excess of its jurisdiction. If error was committed, the law has provided an ample remedy. Wreden v. Superior Court, 55 Cal. 504; Clark v. Superior Court, Id. 199; More v. Superior Court, 64 Cal. 346, 28 Pac. Rep. 117. Where the petitioner "has a speedy and adequate remedy in due course of law, the writ cannot issue." Murphy v. Superior Court, 84 Cal. 596, 24 Pac. Rep. 310; High, Extr. Rem. § 772.

2. The order of sale is clearly void. The court had no power in the case of Woodward et al. v. Raum et al. to direct the sale of property involved in the case of Hutchinson et al. v. Woodward et al. The real estate and personal property, respectively, are owned by different parties, and were considered and disposed of by the court in two independent actions. The burden of maintaining the personal property cannot be put upon the owners of the real estate, nor could the court link the two properties together, and render the owners of the personal property answerable for any part of the expense incurred in preserving the real estate. If Mr. Hutchinson succeeded to the rights of

his wife in the personal property,—and the court found that he did,—it needs no argument to show that no order could be made charging his property with the expenses incurred by the receiver in caring for property involved in another action to which he was not a party, and in which he had no interest. But the invalidity of the order of sale appears upon the face of the proceedings. The petitioners cannot, therefore, be injured by a sale. A purchaser would take no title, and could be treated as a trespasser. This being so, no case is made for the issuance of a writ of prohibition. Ex parte Braudlacht, 2 Hill, 369. The application is denied, and the writ is discharged.

Garoutte, J. I concur.

De Haven, J.; Harrison, J.; Sharpstein, J. We concur in the judgment upon the ground last discussed in the opinion of Mr. Justice Paterson. As to the other point relating to the question of the jurisdiction of the superior court to appoint a receiver of the property in the actions referred to, we express no opinion.

Beatty, C. J. I dissent. In my opinion the writ of prohibition should be made peremptory. A sale of property under an order of court void on its face will of course confer no title upon the purchaser, and there are remedies by which the owners may ultimately secure a judicial determination of the invalidity of the purchaser's claim, but in the meantime the marketable value of the property is impaired, if not destroyed, and this injury can be prevented in no other way than by prohibition. No other remedy is fully adequate to prevent injury. But, aside from this, I think the order appointing a receiver of the real property was an excess of jurisdiction. The superior court has no power to appoint a receiver except as authorized by the statute, and the only authority claimed for the court in this case is subdivision 6 of section 564 of the Code of Civil Procedure, which reads as follows: "In all other cases where receivers have heretofore been appointed by the usages of courts of equity." There has never been any usage of courts of equity to appoint receivers in actions for the partition of lands between cotenants, unless superadded to the facts justifying a partition there were other facts of an equitable nature rendering such appointment necessary. In this case the petition shows affirmatively that no such facts existed in the action to partition the realty, and consequently there was no case for the appointment of a receiver of the realty. Without a case the power does not exist. The decision in Goodale v. District Court, 56 Cal. 26, is entirely consistent with these views.

Woodward *et al.* v. Superior Court of City and County of San Francisco *et al.* (No. 14,946.)

(*Supreme Court of California.* July 12, 1892.)

In bank.

Original application of Woodward and others for writ of prohibition to William T. Wallace, judge of the superior court of San Francisco county, and others. Denied.

Wilson & Wilson and *Estee, Wilson & McCutchen*, for petitioners. *Dunne & McPike*, for respondents.

Per Curiam. This case being in all material respects the same as Woodward v. Superior Court, 30 Pac. Rep. 535, (this day decided,) and for the reasons given in the opinion in that case, the application is denied, and the writ discharged.

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95 Cal. 268

Aliso Water Co. v. Baker *et al.* (No. 14,817.)

(*Supreme Court of California.* July 12, 1892.)

Condemnation of Water Rights—Petition.

1. Plaintiff water company averred that it owned the water rights in a creek appertaining to the riparian lands on both sides within certain defined limits, and that to supply said "farming neighborhood" with water it was necessary to condemn and take a portion of the waters of the creek. *Held*, that the averments failed to show that the condemnation was for the use of the public.

2. A complaint asking condemnation of all the water of a certain creek, except what the riparian owners had a right to use for domestic purposes, and for the irrigation of their riparian lands, is defective, as not sufficiently describing the property sought to be condemned.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by the Aliso Water Company against H. G. Baker and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James L. Baker and *Thomas McNulta*, for appellant. *Wright & Day* and *E. W. Squier*, for respondents.

Temple, C. This appeal is from a judgment against plaintiff upon demurrer. The action is to obtain, by condemnation, certain water rights and a strip of land five feet wide upon a defined line. It is alleged that plaintiff is a corporation whose object and purpose is to take water from Sycamore creek and canon, and to use and distribute the same in supplying, for domestic use and irrigation, a certain farming neighborhood composed of land riparian to said creek. That plaintiff is the owner and in possession of certain rights in the waters of Sycamore creek, said rights being all those rights appertaining to the riparian lands on both sides of said creek, within certain defined limits. It is also averred that each of the defendants, except Baker, who is said to be a mortgagee of one of the other defendants, owns a tract of land, also riparian upon both sides of said creek. That to carry out the purpose of the plaintiff to supply said farming neighborhood with water, it is necessary that plaintiff appropriate, condemn, take, and use all the waters of Sycamore creek, excepting such quantity or portion thereof as the defendants, respectively, have or may have the right, as riparian owners, to use for domestic purposes, and for irrigation of their lands bordering on and riparian to said creek; that is to say, that it is necessary for plaintiff to have the right to appropriate, condemn, take, and use every right of said defendants, respectively, in and to all the waters of said creek, whether acquired by appropriation, adverse use, and possession, or prescription as owners of riparian lands. It avers that more water flows in the creek than is necessary for the reasonable and proper use of said defendants as riparian owners for domestic purposes and the irrigation of said riparian lands; but plaintiff is unable to state the quantity of water which flows in said creek in excess of that which is required by said defendants for domestic purposes and irrigation as aforesaid, or the quantity that said defendants, respectively, may be entitled to use as riparian owners for the purposes aforesaid." The complaint does not show whether the "farming neighborhood," which it is proposed to supply with water, is inhabited, except by the use of the term, and the statement that water is to be supplied for domestic purposes. It does not appear that it is composed of more than one farm, and, in fact, since the pleading must be taken most strongly against the pleader, it must be understood that there is but one, and that the property of plaintiff, which has certain riparian rights in the stream, and the lands of the farming neighborhood are also said to be riparian. The term "neighborhood" is an indefinite phrase, and, if there are two houses upon plaintiff's farm, it would be proper to call it a "neighborhood," though it would not be a public for whose use property can be condemned. It seems to me, therefore, that the complaint not only fails to show that the use for which it is proposed to condemn the property is a public use, but that it shows affirmatively that it is not. But this point, although raised by the demurrer, is not urged by respondents here. They submit the appeal upon the proposition that the complaint is uncertain, in this: that it cannot be ascertained from it what property the plaintiff seeks to condemn,—what water rights it proposes to purchase from the defendants. As shown above, the description is all the rights of each of the defendants, whether as riparian owners or acquired by appropriation, adverse use, or prescription, except for domestic use and reasonable irrigation of their riparian lands. One reason given by appellant's counsel for the generality of the description is that they cannot know what rights defendants may claim by adverse use or otherwise, and they contend that defendants must describe what they have or claim, and have it valued; and they must necessarily contend, further, that defendants would be estopped from hereafter asserting any rights which they neglect to set out. But this proceeding cannot thus be converted into an action to quiet title.

It is an attempt to purchase property against the will of the owners, and for that purpose to have a value placed upon it by the court. There is nothing more obviously essential to plaintiff's case than a sufficient description of that which it proposes thus to acquire. If the defendants make default, the plaintiff must still have a valuation made, and tender the amount to the defendants as a consideration for property acquired through the proceeding. And the judgment, which cannot include what is not in the pleadings, constitutes its muniment of title. If it has sufficiently described what it wishes to take, it may require the defendants to set out the extent of their interest in that, but plaintiff cannot put upon the defendants the burden of determining what or how much the plaintiff requires to accomplish its purpose. What it seeks here are certain rights in property, and it should specify with exactness what they are. It appears that plaintiff's land is below the land of the defendants. If it were to divert the water at a point below the defendants' land, the excepted rights, which it does not seek to condemn, would include all riparian rights except water for stock, which is no doubt omitted from the exception by mere oversight. There would then be nothing to condemn except such rights as were held by adverse use, prescription, or appropriation; and the complaint would contain no attempted description of the property which the plaintiff seeks to purchase. The diversion contemplated seems to be at a point above the land of defendants, and it is said that the plaintiff proposes to take the riparian right to have water not needed for the excepted uses run idly by. If this were a sufficient description of that right, and I think it can be easily shown that it is not, there would be no attempted description of all other rights of the defendants, which nevertheless, in such general language, the plaintiff seeks to acquire. There is nothing upon which the judgment of the court could be invoked, or a question propounded to a witness as to value. Conceding that rights not riparian are included in the general description, it cannot be ascertained from the complaint what they are, and, as against the special demurrer, the pleading is insufficient. The defendants' lands are not included within the "farming neighborhood," which it is proposed to supply with water. Whether, by such a proceeding as is attempted here, water rights could be acquired from one set of riparian owners for the use of another under any possible pleadings, has not been argued and is not passed upon. I think the judgment should be affirmed.

We concur: FOOTE, C., BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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95 Cal. 262

BROWN v. O'NEAL, Sheriff. (No. 14,707.)

(*Supreme Court of California.* July 12, 1892.)

FRAUDULENT CONVEYANCES—UNDIVIDED INTEREST IN CHATTELS.

Civil Code, § 3440, which provides that every sale of personal property is void as to creditors unless accompanied by an immediate delivery and followed by actual continued change of possession, applies to a sale of an undivided interest by a joint tenant of a chattel in actual possession.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Action by W. J. Brown against E. F.

O'Neal, as sheriff, to recover the possession of a horse. From a judgment in favor of defendant the plaintiff appeals. Affirmed.

Wilcoxon & Bouldin, for appellant. *Graves & Graves*, for respondent.

Belcher, C. This is an action to recover possession of a horse alleged to have been wrongfully taken by the defendant from the plaintiff, or, in case delivery cannot be had, for the value of plaintiff's one-half interest in the animal, and damages for its detention. The facts of the case, as found by the court below, are substantially as follows: On February 5, 1890, R. S. Brown and W. H. Taylor were the joint owners of a stallion, each owning a half interest. Taylor was an invalid, and Brown, by agreement between them, had possession of the animal, and was to manage him during the breeding season of that year, lasting from February 1st to July 15th, and, after paying all expenses, divide equally the proceeds arising from his services. On the day named Brown sold and by bill of sale conveyed all his interest in the stallion to W. J. Brown, the plaintiff, for the sum of $650, which sum was paid by plaintiff at the time. Taylor was spoken to about the sale at the time it was made, and refused to give his consent thereto unless the seller should retain possession of the stallion. Plaintiff consented to this arrangement, and the horse remained in possession of R. S. Brown until about February 1, 1891, when Taylor, plaintiff, and R. S. Brown entered into a new agreement, whereby the latter was to have the possession, control, and management of the stallion during the breeding season of that year, and pay all expenses of his keeping, care, and management, and receive one third of the proceeds derived from his services, and the other two thirds of the proceeds were to be equally divided between Taylor and the plaintiff. On March 15, 1891, R. S. Brown and P. W. Murphy jointly executed their promissory note to the Bank of San Luis Obispo for the sum of $1,057.30, due one day after date. On April 7, 1891, the note not being paid, the bank commenced an action thereon in the superior court of San Luis Obispo county, and took out a writ of attachment. The writ was placed in the hands of the defendant, who was then the sheriff of the county, and under it he, as such sheriff, levied upon, seized, and took into his possession the said stallion. The value of the stallion was $3,000, and the levy of the attachment upon him, as aforesaid, constitutes the taking alleged in the complaint. The plaintiff demanded the return of the animal to himself, and, his demand being refused, he commenced this action on April 10, 1891. Upon these facts the court below gave judgment for the defendant, and the plaintiff appeals on the judgment roll.

The first question presented for decision is, was the sale void, as against the creditors of the seller, under the provisions of section 3440 of the Civil Code? That section is as follows: "Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors, while he remains in possession," etc. Appellant contends that this section has no application to the case, for the reason that "the property sold—an undivided interest in a stallion—was not capable of delivery," and, as the other joint owner objected and refused to consent to a change of possession of the animal, no actual change was necessary. "In other words," he says, "his position is that the possession of Taylor was the possession of plaintiff, and that from the time of the sale the property was in Taylor's possession, and, the possession of one joint tenant being the possession of the other, that plaintiff at all times after the transfer was in possession of the horse." If Taylor had sold his interest in the horse, and one of his creditors had afterwards taken it under attachment, the rule invoked would have been applicable, but it is not applicable to the facts shown here. The law on this subject is stated in Freeman on Cotenancy, § 167, as follows: "If A. and B. together own personal property of which A. is in actual possession, and B. sell his moiety to C., the possession of A. immediately becomes the possession of C. also. Therefore, being at once, by presumption and construction of law, put in possession as tenant in common with A., it is not necessary that C. should take actual possession with A. to make his purchase good under the statute of frauds as against the creditors of B. If A., the cotenant in possession, had sold his interest, then the sale should have been followed by an actual change of possession, because there was no cotenant whose actual possession could have operated for the benefit of A.'s vendee." And again, in his work on Executions, § 153, the same author says: "If the cotenant selling is in the sole possession, he ought to give possession to his vendee; but if the other cotenants are in possession, the vendor has no right to take it from them. He may therefore, from necessity, make a valid sale, without placing the property in the custody of his vendee." And see Brown v. Graham, 24 Ill. 630, and Newell v. Desmond, 63 Cal. 242. The law being as above stated, it is clear that judgment was properly entered against the appellant, unless his second contention can be sustained. That contention is that the Bank of San Luis Obispo was not a creditor of Brown until more than a year after the sale, and consequently was not in a position to attack the sale. And it is said: "The statute, we think, visits no such penalty upon a *bona fide* purchaser as to declare a transfer void as to subsequent creditors." The obvious answer to this position is that the statute (section 3440, Civil Code) "denounces the transfer as fraudulent and void, as against the claims of a creditor who is such creditor during any of the time that the person who made the transfer remains in possession, after a transfer which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession. Such a transfer being void as to the creditor, he may cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor." Watson v. Rodgers, 53 Cal. 401. The law is so written, and, though it may sometimes seem to work a hardship, the courts cannot evade its force and effect by an inquiry into the consideration paid by the purchaser, or the good faith of the transaction. Woods v. Bugby, 29 Cal. 467. It results that the judgment should be affirmed, and we so advise.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

95 Cal. 304

JOHNSON v. SWEENEY. (No. 14,672.)

(*Supreme Court of California.* July 14, 1892.)

OPENING DEFAULT—STIPULATION OF COUNSEL.

Though, as a general rule, a stipulation of counsel cannot be enforced unless put in writing or entered on the court minutes, yet, where the making of an oral agreement for an extension of time to answer or demur is not denied, and was relied on by defendant, a judgment of default taken against him in violation of such agreement will be set aside.

Department 1. Appeal from superior court, Solano county.

Action by Cassius J. Johnson against Owen Sweeney. Judgment for plaintiff by default. From an order refusing to set aside the judgment, defendant appeals. Reversed.

Raleigh Barcar, for appellant. *A. J. Dobbins*, for respondent.

PATERSON, J. The defendant moved in the court below for an order setting aside a judgment taken against him by default, entered in open court on an *ex parte* application of plaintiff on April 28th, and in support of his motion filed an affidavit made by his attorney, showing, among other things, the following facts: The summons was served upon defendant in the county where the action was commenced on April 17, 1891. The defendant had, therefore, to and including the 27th day of April, 1891, to appear and answer or demur. His counsel was engaged in the trial of a case in the superior court on the last day for answering, and in the evening after adjournment, while riding to Vacaville with the plaintiff's attorney, he asked the latter if he would accept service of a general demurrer, waive copy, and give him more time in which to prepare and serve a special demurrer, saying that he would like until Saturday, May 2d. Thereupon the attorney for plaintiff said he could have until Saturday, or longer, if he desired it, in which to file a special demurrer, and that he would accept service of a general demurrer that evening. When the demurrer was presented to the attorney for the plaintiff in the evening, he indorsed upon it his acceptance of service, qualified, however, by the words, "reserving all rights in the premises regarding default in the within entitled action." The attorney for defendant did not notice the fact that plaintiff's attorney had qualified his acceptance of service of the demurrer until a late hour that night. On the following morning the demurrer, with proof of service, was filed in the clerk's office, before default was entered. The affidavit states that the affiant relied on the conversation with the attorney for the plaintiff as an agreement to give the defendant until Saturday to prepare a special demurrer. No counter affidavits were filed. We think that upon this showing the motion ought to have been granted. It is a general rule that a stipulation of counsel cannot be enforced unless put in writing, or entered in the minutes of the court; but where an oral agreement for an extension of time to answer or demur is admitted, and has been relied on by the defendant, a judgment by default taken against him in violation of the terms of the stipulation will be set aside. If the party against whom a verbal stipulation is invoked denies that such a stipulation was made, the court will not hear the parties for the purpose of settling the dispute; but where the facts relied upon by the moving party are not controverted there is no reason for the application of the rule, and it is too late to repudiate the stipulation after it has been executed. People v. Stephens, 52 N. Y. 310. In Huart v. Goyeneche, 56 Cal. 429, it was held that the defendant was not guilty of negligence in relying upon an oral promise for an extension of time to answer; and an order refusing to set aside a judgment taken against him by default while relying upon such promise was reversed. In Woodward v. Backus, 20 Cal. 137, the court held that the court below did not abuse its discretion in setting aside a judgment by default, although the affidavits of the plaintiff denied that an oral extension of time had been granted. It is true, the question as to the necessity for a written stipulation was not considered by the court in either of the last two cases cited, although it was discussed by counsel in Woodward v. Backus; but the weight of authority is against the application of the general rule to cases of default judgments, and no case has been cited in which a party has been permitted to retract and take advantage of his adversary's acts or omissions, based on reliance upon his oral promise or stipulation. In the brief, counsel for respondent states that at the hearing of the motion to set aside the default in the court below, he offered to make and file an affidavit to the effect that he had at no time agreed or stipulated with defendant's attorney that the time for filing an answer or demurrer should be extended, but that the court held it could take no notice or cognizance of an oral agreement or stipulation made between attorneys out of court; but the fact does not appear in the transcript, and we are guided only by the record made in the court below and certified to us. Judgment reversed, and cause remanded, with instructions to set aside the default, and permit the defendant to answer.

We concur: HARRISON, J.; GAROUTTE, J.

95 Cal. 308

CORKER *et al.* v. CORKER. (No. 14,691.)

(*Supreme Court of California.* July 14, 1892.)

DEED—DELIVERY—EVIDENCE.

1. In an action by the widow of a grantor to cancel a deed on the ground of nondelivery, the evidence showed that some months prior to the grantor's death he made the deed conveying land to defendant, his son; that the day prior to his death the grantor delivered the instrument to one W., who took it to the register, stating that the grantor wished the same recorded, and then sent to defendant, which was done. *Held,* that the evidence failed to show a nondelivery.

2. Delivery of a deed cannot be disproved by the testimony of a third person, with whom the grantor left it, that, if he had afterwards called for it, he would have given it to him, since such testimony does not tend to show the grantor's intention.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Aurelia J. Corker and others against John Frederick Corker to cancel a deed. Defendant had judgment, and plaintiffs appeal. Affirmed.

Edwin Baxter, for appellants. *J. L. Murphey,* for respondent.

GAROUTTE, J. Some months prior to his death, John R. Corker made and acknowledged his deed to certain real estate, situate in the county of Los Angeles, wherein his son, residing in the territory of Utah, was named as grantee. The day prior to his death he delivered the deed to one White, who carried it to E. F. Spence, stating that Corker, the grantor, desired him to record the same, and then deliver it to the grantee, John Frederick Corker. Upon the following day the grantor died, and subsequently the deed was recorded by Spence, and delivered in pursuance of his instructions. This action was brought, and the appeal is prosecuted by the widow and the remaining heirs at law of the deceased against the grantee in said deed, asking that the deed be canceled, and the realty therein described be declared the community property of the estate of said deceased, upon the ground that said deed was never delivered to the grantee, and for the further reason that it was made in fraud of the rights of the wife to the community property. Plaintiffs were nonsuited, and the evidence heretofore quoted is substantially all that is found in the record. The judgment should be affirmed, as evidence to support the complaint is lacking in many respects. An issue is created as to whether the realty is separate or community property, but plaintiff offered no evidence to support the allegations of the complaint in this regard. Again, conceding the realty to be community property, a deed of gift by the husband of community property, in order to be a fraud upon the wife, must be made with a fraudulent intent. "A deed of gift of a portion of the common property by the husband is not void *per se.*" Lord v. Hough, 43 Cal. 585. In this case neither the complaint nor the evidence indicates any attempt to defraud the wife of her rights; and, as far as the record discloses, the realty transferred to the son may have been a just and proper advancement, leaving an abundant residue for the widow and remaining heirs.

An objection was sustained to the following question asked the witness Spence: "If, after you received this deed from Mr. White at that time, John R. Corker had called for it, or sent for it, would you have delivered it back to him?" The ruling of the court was correct, and is directly supported by Dean v. Parker, 88 Cal. 288, 26 Pac. Rep. 91, where the question addressed to the witness was: "Supposing the father had come in a year after he had left the deed with you, or in two or three weeks afterwards, and asked you for the deed again, would you have given it to him." As to this interrogatory the court said: "The objection to this question should have been sustained, as the evidence sought by it was irrelevant. The matter to be determined was, what was the intention of plaintiff's father in leaving this deed with the witness? and for the purpose of arriving at this intention evidence of any declarations made or conversations had in relation to that subject by the said John Dean, at that or any subsequent time, would have been competent; but what the witness would have done if the deed had afterwards been called for can have no tendency to show whether the father did or did not intend, in what he did, to make a delivery of the deed for the benefit of his son." The evidence is entirely lacking to prove a nondelivery of the deed to the grantee. Conceding the law to be as appellant claims it, still it is not shown but that the deed was delivered to Spence in pursuance of a prior mutual understanding and agreement between the parties. There is nothing in the record to indicate but that every act of the grantor pertaining to the transfer of the realty was done with the consent and assent of the grantee. It is not even shown that White was authorized to deliver the deed to Spence for any purpose, or under any instructions from the grantor. The burden of proof was upon the plaintiff, and the allegations of the complaint in many respects stand without support in the evidence. Let the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

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95 Cal. 301

SHAW v. MAYER. (No. 14,724.)

(*Supreme Court of California.* July 14, 1892.)

LANDLORD AND TENANT — RENTING ON SHARES— VOLUNTEER CROP.

In consideration of "one fifth of the crop, delivered clear of expense," plaintiff agreed to furnish defendant "140 acres of land, more or less, to sow in wheat." Defendant sowed but 19 acres, and on the balance of the land grew a volunteer crop of wheat. *Held,* that defendant was not entitled to harvest any portion of the volunteer crop.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Action by D. W. Shaw against Rudolph Mayer to recover a quantity of wheat. Plaintiff had judgment and defendant appeals. Affirmed.

W. H. Spencer, for appellant. *Graves & Graves,* for appellee.

FOOTE, C. It appears from the record here that the defendant, Mayer, entered into a written contract with one Pond, which is as follows: "Articles of agreement entered into this 18th day of October, 1889, between J. H. Pond and Rudolph Mayer. I, J. H. Pond, party of the first part, hereby agree to furnish to R. Mayer 140 acres of land, more or less, to sow in wheat the coming season. In consideration I shall receive one fifth (1-5) of the crop delivered in Paso Robles, clear of all expenses pertaining thereto. I, Rudolph Mayer, party of the second part, agree to plow and put in wheat the above-mentioned land in good, farm-like style, and in due time for the season of 1889 and 1890 to furnish seed and all expenses appertaining thereto. In witness we have attached our signatures. J. H. POND. RUDOLPH MAYER." Pond, the admitted owner of this land when the above contract was made, sold it to the plaintiff, Shaw, by proper conveyance in February, 1890. Shaw also at that date obtained from Pond an assignment of the agreement between the latter and the defendant. Mayer only sowed in wheat 19 acres of the land included in the contract, and upon 95 aces of it there grew a volunteer crop of that grain. Before any of the crops were harvested, the plaintiff notified the defendant not to cut any of the volunteer crop of grain. But this notice was disregarded, and the defendant harvested and threshed all of the grain,—that sowed by him, and the volunteer crop as well. In the aggregate there were 372 sacks of wheat and 21 sacks of screenings. It appears that the volunteer crop was about the same per acre as the sown crop. The plaintiff brought an action of claim and delivery for the 372 sacks of wheat and the screenings. The jury who tried the case found under the instructions of the court that he was the owner of and entitled to recover 250 sacks of wheat and six sacks of screenings, and that they were of the value of $250. In pursuance of the statute in such cases, an alternative judgment for plaintiff following the verdict was entered. From that and an order denying a new trial this appeal is taken.

The argument for appellant is that the contract was a lease of 140 acres of land, and that the defendant was entitled to his share of all that grew on the whole tract, whether sowed in wheat or not; and that, being a tenant in common with the plaintiff, the latter could not maintain this action. And because the court below refused to grant a nonsuit on the motion of the defendant, and gave instructions to the jury not in accord with the theory of the defendant, it is claimed that the judgment and order should be reversed, and a new trial granted. The whole question involved is one, we think, to be determined from the language of the written contract between Pond and Mayer. As we construe that instrument, whether it be called a "lease" or a "cropping contract," the defendant has no right in any of the land, except that which he sowed in wheat. As to the land which he did not sow, he was not entitled to anything which grew upon or was harvested therefrom. The whole idea pervading the contract is that, as to so much of the 140 acres as the defendant sowed in wheat, he was to have a certain fixed portion of the crop grown thereon, and the owner of the land, who furnished it to be sown in wheat, the balance. As to the other part of the land, not sown in wheat by the defendant, he had no interest in it or what grew upon it. Having harvested, threshed, and taken into his possession the wheat that voluntarily grew on the land of the plaintiff, the defendant was liable in the action brought against him, and the recovery had against him should be upheld. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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95 Cal. 334

MERRILL v. MERRILL. (No. 14,799.)

(*Supreme Court of California.* July 15, 1892.)

RECOVERY BY VENDEE OF PURCHASE MONEY.

Plaintiff bought property of defendant, paying part of the price in cash, and agreeing to pay the balance at stated times, and defendant's deed to the property was placed in escrow till the balance should be paid. *Held* that, in an action to recover money paid on the contract of sale, averments in the complaint that defendant "reclaimed" the escrow deed from the holder, and denied plaintiff's right to purchase under the contract with intent to rescind the contract, showed a sufficient excuse for plaintiff's failure to tender the unpaid balance of the purchase money and to demand the deed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Mattie H. Merrill against F. H. Merrill to recover money paid under a contract of sale. From judgment on an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Brousseau, Hatch & Thomas and *Waldo W. York*, for appellant. *J. M. Voss* and *R. Dunnigan*, for respondent.

VANCLIEF, C. On August 29, 1887, a written contract was executed by and between F. H. Merrill, Otto Froelich, and C. T. Hopkins, by the terms of which Merrill agreed to sell to Froelich an undivided one-sixth part in the S. ½ of the N. E. ¼ and the S. E. ¼ of section 21, township 2 S., range 13, W., San Bernardino base and meridian, known as the "Merrill and Hancock Tract," and "being the interest to which said Merrill is entitled under the will of his late father, Ed. Merrill, deceased, for the sum of $12,500, to be paid as follows:" $1,500 on the execution of the agreement, the receipt of which is acknowledged; $1,500 in 60 days from date of agreement; $4,750 in 6 months, and $4,750 in 9 months, from date. The agreement then proceeds as follows: "The deed of said lands from said Merrill to said Froelich is placed herewith in escrow, with said Hopkins, * * * to be held by said Hopkins until the final payments are made to said Merrill as above stated. In case of the default in the payment of the sums of money paid as herein named, * * * then said sums of money are to be considered forfeited by said Froelich to said Merrill, and said Hopkins hereby agrees to return and deliver said deed to said Merrill. In the event of the payment of the sums of money to said Merrill as herein specified, then said Hopkins is to deliver said deed to said Froelich, and said Hopkins hereby agrees so to do. The proceedings now pending for distribution of said property to said Merrill in the superior court of Los Angeles county, state of California, are hereby held in abeyance, and continue so till default shall be made in this agreement, when said Merrill shall be at liberty to revive said proceedings for such distribution; but, in case this contract is fulfilled according to the terms above mentioned, then said proceedings for distribution are to be dismissed."

It is averred in the complaint that in making this agreement Froelich acted solely as agent for the plaintiff, and that it was made for her benefit alone, of which defendant had notice at the time it was made; and that plaintiff paid to defendant the first two installments with her own money according to the agreement, of which defendant also had notice at the times those payments were made. The complaint then proceeds as follows: "(5) That at the ——— of the execution of the said contract the said F. H. Merrill had no right or title in or to said lands described in said contract; that the said Froelich and said plaintiff did not know that the said defendant had no right or title to said lands; and the said Froelich and the said plaintiff believed that the said F. H. Merrill had the right and title to a one-sixth undivided interest in and to said lands. (6) That on or about the 1st day of March, 1889, the said defendant reclaimed the deed mentioned in the said contract, which he had theretofore, in accordance with the terms of said contract, executed and placed in the hands of said Hopkins in escrow, and rescinded the said contract, and denied the right of said Froelich and the said plaintiff to purchase the same under and by virtue of said contract; that the said defendant gave plaintiff no notice of his intention to rescind said contract, and did not at any time demand of plaintiff the balance due thereon, or any payment or payments thereon, and did not at any time tender to her, or offer to deliver to her, the said deed on the payment of the said balance due, and did not notify her that he had rescinded said contract, and plaintiff had no knowledge that defendant had rescinded said contract or taken back said deed until after the 1st day of March, 1889. (7) That on the 27th day of March, 1888, the said F. H. Merrill acquired a one-sixth undivided interest in and to the tract of land described in said contract, and has been ever since that time and now is the owner thereof. (8) That the said defendant, notwithstanding the facts aforesaid, has not repaid to plaintiff or the said Froelich the said sum of $3,000, or any part thereof, but claims and asserts that the said $3,000 has been forfeited to him, the said defendant, by the said plaintiff, and refuses to pay her or said Froelich the same or any part thereof. (9) That, since the said surrender of said deed by said Hopkins to said defendant, the said Froelich, by an instrument in writing, duly assigned, transferred, and set over to said plaintiff whatever claim he, the said Froelich, had for the recovery of said $3,000, and all causes of action he might have against said defendant, relating thereto, or arising from or under said contract." The prayer is that plaintiff have judgment against the defendant for $3,000 and interest; that the judgment be declared a lien upon the land; and that the land be sold, etc. The defendant demurred to this complaint on the ground that it does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, as plaintiff elected to stand upon her complaint without amendment, gave judgment for defendant. The appeal is from the judgment upon the judgment roll, and presents the question whether, as against a general demurrer, the complaint is sufficient to entitle the plaintiff to any relief whatever.

Some parts of the complaint are indefinite and uncertain, and apparently inconsistent with each other, but, exclusive of these, I think the complaint states a cause of action for the recovery of the purchase money paid by plaintiff. The only ground upon which respondent's counsel undertake to justify the judgment is that it is not averred in the complaint that plaintiff ever tendered payment of either of the last two installments of the purchase money; and no doubt this point should be sustained, unless the complaint shows a sufficient excuse for having omitted to make such tender. In the leading case on this point, (Englander v. Rogers, 41 Cal. 420,) the court, by CROCKETT, J., said: "The covenants of the vendor and vendee were mutual and dependent, and neither could put the other in default, except by tendering a performance on his own part, unless the other party either waived the tender, or by his conduct rendered it unnecessary. To entitle the plaintiff to maintain the action on the contract set out in the complaint, he should have averred a tender of the unpaid portion of the purchase money, or some sufficient excuse for the omission to tender it." There is nothing in conflict with this in the case of Dennis v. Strassburger, 89 Cal. 583, 26 Pac. Rep. 1070, cited by respondent. See, also, Drew v. Pedlar, 87 Cal. 443, 25 Pac. Rep. 749; and Newton v. Hull, 90 Cal. 487.[1] I think, as against a general demurrer, the sixth paragraph of the complaint shows a sufficient excuse for the omission of plaintiff to tender the purchase money and demand a deed before the commencement of this action. The facts substantially alleged that defendant "reclaimed" (withdrew) the escrow deed from Hopkins, and denied the right of plaintiff to purchase under the contract, with intent to rescind the contract, show that a tender of the purchase money and demand for the deed would have been of no avail. Dowd v. Clarke, 54 Cal. 48. In Wood v.

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[1] 27 Pac. Rep. 429.

McDonald, 66 Cal. 547, 6 Pac. Rep. 452, the court, by Mr. Justice McKinstry, said: "Proof of any circumstance which would satisfy a jury that a demand would be unavailing—as a refusal by the defendant to listen to one, or a statement in advance that he will not deliver—will be sufficient to excuse proof of a demand." I think the judgment should be reversed, with leave to defendant to answer; and also with leave to plaintiff to amend her complaint, if so advised.

We concur: Belcher, C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, with leave to defendant to answer; and also with leave to plaintiff to amend her complaint, if so advised.

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95 Cal. 329

Green v. Fresno County. (No. 14,684.)

(*Supreme Court of California.* July 15, 1892.)

Officers—Compensation—How Ascertained.

1. Under Const. art. 11, § 5, requiring the compensation of officers to be "in proportion to their duties," what compensation satisfies this requirement is a question of fact to be determined by the legislature, and not by the court.

2. In an action by a constable against a county for fees, where the agreed statement of facts shows that part of the claim was rejected by the board of supervisors, but does not show the ground of rejection, such action will be presumed to have been correct unless the agreed statement shows it to have been erroneous.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by J. W. Green against Fresno county on a claim for official services as constable. Judgment for defendant, and plaintiff appeals. Affirmed.

Newman Jones and *W. R. Jacobs*, for appellant. *W. D. Tupper*, Dist. Atty., and *H. H. Welsh*, for respondent.

Vancliff, C. This case was submitted to the trial court upon an agreed statement of facts, substantially as follows: In May, 1891, the plaintiff presented to the board of supervisors of the county of Fresno, in due form, his claim for official services as constable of township No. 1, rendered in criminal cases, and for money expended during the month of March of that year, amounting to $412.40. This claim was allowed for all items of money expended, amounting to $32.80, and for $125 for services, but was rejected as to the balance of $254.60 claimed for services. In April, 1891, C. W. Fraser, as constable of township No. 3 of that county, duly presented to the board of supervisors his claim for $332.90 for official services in criminal cases, rendered during the same month, (March, 1891,) which was allowed for $125, but rejected for the balance of $207.90. The fees charged for services in each case were such as are allowed by law. Neither plaintiff nor Fraser accepted the sum allowed him. Fraser assigned his entire claim to plaintiff, who, upon the stipulated facts, seeks to recover the full amount of both claims. Prior to March 31, 1891, Fresno county was a county of the twenty-sixth class, according to the classification made by the county government act of March 14, 1883; but by the revision of that act, approved March 31, 1891, it became a county of the eighth class. Since January 1, 1891, there have been 14 constables in said county, 9 of whom have not earned or presented claims for more than $125 for any one month since January 1, 1891, on account of services in criminal cases, "but each of said nine constables has, during each of the months since January 1, 1891, earned in such cases, * * * and presented claims for the same, various sums less than the $125 per month, all of which last-mentioned claims have been allowed and paid in full." The judgment was for defendant, and the plaintiff appeals therefrom upon the judgment roll, which wholly consists of the stipulated statement of facts and the judgment.

During the month in which the services were performed, section 188 of the county government act, as amended March 16, 1889, (St. 1889, p. 279,) was in force; and, so far as applicable to constables, was as follows: "Sec. 188. In counties of the tweny-sixth class, the county and township officers thereof shall receive as compensation for the services required of them by law or by virtue of their office the salaries as follows, to wit: * * * (14) Constables. Such fees as are now or may be allowed by law: provided, that no constable shall receive more than $1,500 per annum for all services rendered by him in criminal cases, or in actions or proceedings to which the people of the state of California are or may be parties; and no claim of any such constable in excess of the sum last named shall be allowed or paid, but all fees collected by such constable in criminal cases in excess of one thousand five hundred dollars shall belong to and be the property of the county in which said constable acts. * * * The provisions hereof shall not affect the present incumbents." By the act of March 31, 1891, (St. 1891, p. 345,) the above section was amended and re-enacted as "section 170." As thus re-enacted, section 170 of the act of 1891 not only limits the compensation of constables in Fresno county, now ranked in the eighth class, for services in criminal cases, to $1,500 per annum, but requires it to be paid in monthly installments not to exceed $125 in any one month. Section 234 of the same act—March 31, 1891, (St. p. 421)—is as follows: "Sec. 234. The provisions of this act, unless otherwise herein provided, so far as it relates to the fees and salaries of all officers named, except justices of the peace and constables, shall not affect the present incumbents: provided, that when the salary of any such officer, or fees in lieu of such salary, is not now fixed by law, the same shall, as to such officer, take effect immediately."

1. Counsel for appellant contend that each of the above-quoted sections is unconstitutional. But the record raises no question as to the constitutionality of sections 170 and 234 as enacted March 31, 1891. There is nothing in the act purporting to give either of these sections any retroactive effect. Nor is there anything

in the record indicating that the trial court applied them to this case.

2. It is insisted, however, that section 188, as amended March 16, 1889, does not regulate the compensation of constables "in proportion to duties," and therefore is repugnant to section 5, art. 11, of the constitution. What compensation of an officer should be deemed in proportion to his duties is matter of fact to be ascertained and determined by the legislature, and not by the courts. Longan v. County of Solano, 65 Cal. 122, 3 Pac. Rep. 463. In the class of counties to which the defendant county belonged when the services in question were performed, the legislature determined that certain fees allowed by law for services in civil cases, and also the fees allowed by law for services in criminal cases, not exceeding $1,500 per annum, would be in proportion to the duties of constables in that class of counties. Had the legislature given to each constable a salary of $1,500 per annum, it would not be pretended that the courts could interfere on the ground that such salary is not in proportion to the duties of each constable; yet the mode adopted by the legislature by which to regulate the compensation of constables effects a nearer approach to a just proportion between the compensation and duty of each constable of the class than would a fixed salary common to all. Dougherty v. Austin, (Cal.) 29 Pac. Rep. 1092.

3. The agreed statement of facts shows that the board of supervisors rejected portions of each claim for fees, but does not show upon what ground they were rejected. Upon this statement alone the superior court was asked to review and reverse or modify the action of the tribunal having original jurisdiction of the subject-matter. Under these circumstances the superior court was justified in presuming that the action of the board of supervisors was correct, unless the agreed statement affirmatively showed it to have been erroneous. If the claims may have been properly rejected by that board, upon any ground not negatived by the statement, the superior court may have presumed that they were properly rejected upon that ground. For aught that appears, that portion of each claim that was rejected may have been wholly in excess of $1,500 already allowed to each claimant for services rendered in criminal cases during the year 1891. This not being negatived, the presumption here must be that the superior court did not err in giving judgment for defendant. The obligation of the defendant to pay more than was allowed by its board of supervisors is not a necessary consequence of the stipulated statement of facts. The conclusion of law from the facts stated is merely that the plaintiff is entitled to recover such portion of his demands as will not effect a transgression of the $1,500 limit fixed by section 188, above quoted. But whether or not the effect of a recovery of any sum would be to exceed that limit does not appear. The defect of the statement is not merely a failure to state the breach of an obligation, but also consists of a failure to show that defendant was ever under any obligation to pay the claims disallowed by the board of supervisors. The fact that an allowance of the claim in question would not have transgressed the statutory limit of $1,500 was necessary to constitute the obligation, and therefore the insertion of it in the agreed statement could not have been regarded as a reply to an anticipated defense. Both an obligation and a breach of it must have been stated before any defense was necessary. The averment that the claims in question had not been paid, without showing an obligation to pay them, is of no consequence. As this case was submitted upon an agreed statement of facts under section 1138 of the Code of Civil Procedure, "the consideration of the court was restricted to the facts admitted, and its judgment could not be based upon any other facts which it may have supposed the plaintiff could establish." Crandall v. Amador Co., 20 Cal. 73. I think the judgment should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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95 Cal. 317

LATTIN v. GILLETTE *et al.* (No. 14,608.)

(*Supreme Court of California.* July 15, 1892.)

ABSTRACTORS OF TITLES—WRONG CERTIFICATES—LIMITATION OF ACTIONS.

1. A cause of action against an abstractor of titles for giving a wrong certificate of title accrues at the date of the delivery, and not at the time the negligence is discovered or consequential damages arise.

2. A written certificate of title, given by an abstractor, is not an "instrument of writing" within the meaning of Code Civil Proc. § 339, which provides that an action on a contract, obligation, or liability not founded on an instrument of writing must be commenced within two years.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by B. C. Lattin against J. W. Gillette and F. A. Gibson, abstractor of title, for giving a wrong certificate of title. Judgment for defendants. Plaintiff appeals. Affirmed.

J. D. Bethune and *A. W. Hutton*, for appellant. *Chapman & Hendrick*, for respondents.

HARRISON, J. In June, 1886, the plaintiff employed the defendants, who were engaged at Los Angeles in the business of searching public records and examining titles to real estate, to examine the title of one Birnbaum to a tract of land in Los Angeles county, for which he had made a contract of purchase, and ascertain if his title was good, and paid them $1,000 for their services. The defendants, under said employment therein, made a report to the plaintiff, and gave him a certificate in writing, on the 12th day of June, 1886, that the title to the land was vested in Birnbaum free of all incumbrances. Thereupon the plaintiff purchased and paid for the land. Afterwards, and within two years prior to the commencement of this action, a suit was brought in the superior court of Los Angeles county in reference to the title to said land, which the plaintiff was subjected to the cost and expense of defending, and in which a judgment was rendered to the effect that at the date of said certificate an undivided one half of said land was vested in the heirs of one Smith; and the plaintiff herein was thereupon deprived of the said half of the land. In May, 1890, he commenced this action against the defendants for damages resulting from their negligence in the examination and report upon the condition of the title. Defendants demurred to the complaint upon the ground, among others, that the suit was not brought until more than two years after the cause of action had accrued, and was therefore barred by the statute of limitations. The court sustained the demurrer to the complaint, and judgment was rendered against the plaintiff, from which he has appealed.

Section 339, Code Civil Proc., provides that an action upon a "contract, obligation, or liability, not founded upon an instrument in writing," must be brought within two years after the cause of action shall have accrued. This provision was declared in Piller v. Railroad Co., 52 Cal. 44, to be "applicable to all actions at law not specifically mentioned in other portions of the statute." The word "liability" is the most comprehensive of the several terms used in this section, and includes both of the others, inasmuch as it is the condition in which an individual is placed after a breach of his contract or a violation of any obligation resting upon him. It is defined by Bouvier to be: "Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts, either express or implied, or in consequence of torts committed;" and this definition was approved in Wood v. Currey, 57 Cal. 209. The statute of limitations begins to run against a cause of action as soon as the right of action has accrued. Upon the breach of any special contract the contract begins to run at the date of the breach, and a right of action growing out of the negligence of another accrues whenever the act of negligence is complete. "When misconduct or negligence constitutes a cause of action, the statute of limitations begins to run from the time when the defendant had been guilty of such misconduct or negligence." Wood v. Currey, supra. Whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty, is immaterial. In either case the liability arises immediately upon such breach of contract or disregard of duty, and an action to recover the damages which are the measure of such liability may be immediately maintained. The right to maintain the action is distinguished from the measure of damages, and, although the entire damage resulting from such negligence may not have been sustained, or the fact that the negligence occurred may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged.

In the present case the obligation assumed by the defendants arose out of their agreement that they would examine the title of the property, and ascertain if the same was good in Birnbaum, and report the same to the plaintiff. Having held themselves out as examiners of titles, they were bound to exercise skill and care in making such examination, and became liable in damages for a failure to exercise such skill and care; and the breach of their agreement for which they became liable is alleged in the complaint to have been that they "negligently and unskillfully conducted such examination, and did not truthfully report the condition of the title to the plaintiff," but reported on the 12th of June, 1886, that the title was vested in Birnbaum free of all incumbrances; whereas in fact at the date of said certificate he was the owner of only an undivided one half thereof, and the same "appeared of record on the public records of said county." The giving of this certificate was the breach of their agreement, and constituted the negligence for which they became liable. No further or subsequent act was done or contemplated to be done by them under their employment. Their liability for this negligence, if any existed, arose immediately, and an action therefor could have been immediately commenced against them, and, unless commenced within two years thereafter, was barred by the statute of limitations. The running of the statute was not suspended by the fact that the plaintiff did not ascertain the error in the certificate, or by the fact that the existence of the error was not determined by the superior court until more than two years had expired. The judgment of the court did not constitute the negligence of the defendants, but was only evidence that they had been guilty of negligence, and the eviction of the plaintiff under such judgment was not the cause of action against the defendants, but was merely an element in determining the amount of damages that he had sustained by reason of their negligence. "Where an attorney is sued for malpractice the cause of action arises from the time when such malpractice occurred, and that without any reference to the circumstance whether the client then knew the fact or not." Wood, Lim. § 122. In cases of damages resulting from malfeasance or misfeasance, "the cause of action arises immediately on the happening of the default, and is not postponed to the damage thereby occasioned." Ang. Lim. § 136. "In actions for official or professional negligence the cause of action is founded on the breach of duty which actually injured the plaintiff, and not on consequential damage. Thus, in an action against an attorney for neglect of professional duty, it has been held that the statute of limitations begins to run from the time when the breach of duty was committed, and not from the time when the consequential damage accrued." 2 Greenl. Ev. 433. In Troup v. Smith, 20 Johns. 33, a surveyor had been employed to survey a tract of land into lots suitable for sale, but did his work so unskillfully as to cause damage to the plaintiff, for which he brought suit, and to a plea of the statute of limitations replied that the error was not discovered by him for some years after the survey had been completed; but it was held by the court that this fact did not impair the effect of the plea; that the cause of action accrued at the completion of the survey, and not at the time of the discovery of its character, and was barred by the lapse of six years. In Argall v. Bryant, 1 Sandf. 98, an action was brought against the publishers of the Evening Post for the erroneous publication therein of a legal notice, whereby the plaintiff sustained damage. The publication was made in 1835, but the error was not discovered until 1842, and the damage resulting therefrom in a judgment recovered against the plaintiff was not sustained until 1846, upon the payment of which suit was immediately brought for the negligence. It was held that the foundation of the action was the implied promise of the defendant to perform with care and diligence the publication which he undertook, and that this implied promise was broken in 1835, when the error was committed, and that, as an action could have been then maintained, the statute of limitations began to run, and was not affected by the fact that he did not discover the error until a later date, or that he subsequently sustained additional damages. In Wilcox v. Plummer's Ex'rs, 4 Pet. 172, an attorney who had been employed to collect a promissory note was guilty of such negligence in bringing the suit that the indorser was discharged. It was held that the ground of action against the attorney was the breach of his contract to act diligently and skillfully, and arose at the time he committed the blunder in issuing the writ, and not at the determination of the suit. See, also, Howell v. Young, 5 Barn. & C. 259; Short v. McCarthy, 3 Barn. & Ald. 626; Kerns v. Schoonmaker, 4 Ohio, 331; Northrop v. Hill, 57 N. Y. 356; Moore v. Juvenal, 92 Pa. St. 484; Crawford v. Gaulden, 33 Ga. 174; Lilly v. Boyd, 72 Ga. 83.

The written certificate of title given to the plaintiff by the defendants, although an instrument in writing, is not an instrument upon which their liability is founded. In Chipman v. Morrill, 20 Cal. 131, it was held that this provision of the section by its language "refers to contracts, obligations, or liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities." The contract which is the basis of the plaintiff's cause of action herein does not "rest in" or "grow out" of this certificate, nor does the certificate contain any obligation or contract that can be enforced, or which is susceptible of a violation on the part of the defendants, or under which any liability can accrue against them. The obligation assumed by them was that created at the time of their acceptance of the employment by the plaintiff, and antedated the making of the certificate. The certificate is not the evidence of this obligation, but is merely evidence of the act done by them in purported satisfaction of the obligation assumed by them in accepting their employment. Instead of establishing the contract made between them and the plaintiff, it is the evidence relied upon by him to establish the breach of that contract, and necessarily presumes that the contract was complete before it was given, as in the case of an erroneous deed drawn by an attorney, or a defective plat made by a surveyor, or a wrong prescription given by a physician, it is only evidence in support of the averment that the implied contract for the exercise of skill and care was violated, and is not the contract itself. That was created by the oral agreement of employment, and was broken by the giving of the faulty writing. The judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

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95 Cal. 323

DIMMICK v. DIMMICK. (No. 14,635.)

(*Supreme Court of California.* July 15, 1892.)

COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND TO WIFE.

1. Property acquired by purchase during marriage, whether the title be taken in the name of the husband or of the wife or of both, is presumed to be community property.

2. Where separate property has undergone mutations, and assumed other conditions, it must be clearly traced and located to retain its character of separate property.

3. The delivery of a deed by a husband to his wife is not defective because, at his request, she refrained from recording it till after his death; his intention being, if she died before him, to destroy or conceal it so as to reinvest title in himself.

Department 1. Appeal from Superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by Delos M. Dimmick, administrator, against Sarah Smith Dimmick. From a judgment for defendant, and order denying a new trial, plaintiff appeals. Affirmed.

Wells, Monroe & Lee, for appellant. *Horace Bell* and *Frederick Stanford*, for respondent.

GAROUTTE, J. This is an equitable action to cancel and set aside a deed of certain realty, executed by Elmer D. Dimmick to the defendant, and asking that said property be decreed to be the property of the estate of Julia A. Dimmick, deceased. Said Julia was the first wife of Elmer D. Dimmick, and it is contended by plaintiff that at the time this property was conveyed to defendant it was the property of the estate of said deceased wife, Julia, by virtue of its being her separate property at the date of her death. It is further contended that the deed to the defendant was never delivered, and hence no title passed to her. Judgment went for the defendant, and this appeal is prosecuted from that judgment and the order denying a motion for a new trial. The deed sought to be set aside is a deed of gift made to the defendant, Sarah Smith Dimmick, the second wife of Elmer D. Dimmick, and dated February 2, 1889. The finding of the court, that the realty described in this deed was not the separate property of Julia A. Dimmick, deceased, is fully supported by the evidence. It appears that she and Elmer D. Dimmick were married in Pennsylvania, nearly 50 years ago; that subsequently he received a gift of a small tract of land from his father, and that later she received some money from the estate of her father. He also obtained a loan of the sum of $1,360 from his father-in-law, which he invested in land. This indebtedness was afterwards canceled upon the understanding that it should be deemed as an advancement to them from her father's estate. It is not necessary to an affirmance of the judgment in this case that we examine in detail the *status* of the real estate purchased by the husband with the above-mentioned funds, although it would seem that the wife's separate estate would consist of the indebtedness due to her father from the husband rather than the real estate previously purchased with the funds which created the indebtedness. As described by one of the witnesses, the husband was an "industrious, thrifty, economical, and intelligent farmer and blacksmith." He also traded in real estate, and whatever money his wife received, by inheritance or otherwise, passed into the common fund, and its identity forever lost in the purchase of numerous tracts of real estate, the titles to which were all taken in his name. It is unnecessary to follow in detail the migrations of these parties to Iowa, and from thence to California; it appears that the husband always had the complete and entire control and conduct of the property, selling and buying where and when he chose. While the evidence discloses that the proceeds of the realty owned in Pennsylvania were brought to Iowa, there is no evidence that any money was brought by them to California. It further appears that they made a deed of gift of quite a valuable tract of land to a son, and that the husband was the recipient of a gift of $1,500 from his brother. In addition to all these facts, there is no evidence whatever as to the source of the particular funds which paid for the land involved in this litigation.

The principle of law is established beyond question that real estate acquired by purchase during the existence of the married relation, no matter whether the deed be taken in the name of the husband or wife or both, creates the presumption that such property is common property. While this presumption is not conclusive, the burden of proof rests upon the party affirming the fact to be to the contrary, and such fact must be established by clear and convincing evidence. Ramsdell v. Fuller, 28 Cal. 42; Morgan v. Lones, 78 Cal. 62, 20 Pac. Rep. 248. In order that property may maintain its *status* as separate property, it is not necessary that it should be preserved *in specie* or in kind; yet, when it has undergone mutations and assumed other conditions, it is absolutely necessary, in order to maintain its character as separate property, that it be clearly traced and located. Chapman v. Allen, 15 Tex. 283; Rose v. Houston, 11 Tex. 326; Schmeltz v. Garey, 49 Tex. 60. The money expended in the purchase of the realty involved here should have been traced back to the separate estate of Julia A. Dimmick, not by way of surmises and probabilities, but by plain and connected channels. While the wife had some separate property very many years ago, at that time it passed into the hands and commingled with the funds of her husband, an active business man engaged in numerous speculations in land, so numerous and so varied that at the date of this recent transfer it is impossible to say that one dollar of the money which she received from her father's estate, or its proceeds, passed into this tract of land. The burden was upon the plaintiff to make the proof, and thus overcome the presumption which is indulged in by the law. He has failed to do so; hence the finding of the court cannot be disturbed.

The evidence fully supports the finding that the deed was delivered by the grantor to the defendant. It was clearly his intention to vest the title of the realty in her, and the fact that he requested her to refrain from recording the instrument until after his death was entirely immaterial. Conceding he believed that if she should die first he could conceal or destroy the deed, and thereby reinvest the title in himself, still such fact does not militate against the sufficiency of the delivery at the date of the conveyance, or destroy his clear intention to part with the title and vest the same in her. Let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

DIMMICK v. DIMMICK. (No. 14,634.)

(*Supreme Court of California.* July 15, 1892.)

Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by Delos M. Dimmick, administrator, against Sarah Smith Dimmick. From a judgment for defendant, and order denying a new trial, plaintiff appeals. Affirmed.

Wells, Monroe & Lee, for appellant. *Horace Bell* and *Frederick Stanford*, for respondent.

PER CURIAM. Upon the authority of Dimmick v. Dimmick, 30 Pac. Rep. 547, (decided of even date herewith,) the judgment and order are affirmed.

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95 Cal. 339

POOLE v. WILBER. (No. 14,673.)

(*Supreme Court of California.* July 15, 1892.)

DIVORCE—ALIMONY.

In a suit to annul a marriage on the ground that defendant had a husband living at the time of marriage, defendant answered, alleging a subsequent valid marriage with plaintiff, and also filed a cross bill praying that such marriage be declared legal, stating that plaintiff had deserted her, and asking alimony. *Held*, that under Civil Code, § 137, providing that the wife may, in case of desertion, maintain an action for permanent support without applying for divorce, and in such action the court may, in its discretion, require the husband to pay alimony and expenses during the litigation, the court had power to order plaintiff to pay counsel fees and an allowance *pendente lite* to the wife.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. TORRANCE, Judge.

Action by C. H. Poole against Alice S. Wilber, otherwise known as Alice S. Poole, to annul the marriage of plaintiff and defendant. From an order granting defendant alimony *pendente lite* and counsel fees, plaintiff appeals. Affirmed.

Hunsaker, Britt & Goodrich, for appellant. *Works, Gibson & Titus*, for respondent.

HAYNES, C. This appeal is from an order granting repondent alimony *pendente lite* and counsel fees, upon her motion for that purpose. The complaint alleges a marriage with the defendant in 1881, that at the time of the marriage defendant had a husband living from whom she had not been divorced, and on that ground plaintiff seeks to annul his said marriage. Defendant's answer admits her marriage to plaintiff and her former marriage; alleges that her marriage to plaintiff was in good faith, believing she had been divorced; that they lived together as husband and wife from that time until April, 1891, when plaintiff deserted her; and, further, that a divorce was obtained by her former husband March 31, 1882; and alleges "that in the month of February, 1888, they removed to the city of San Diego, state of California, from which time they mutually consented to and did marry." Defendant also filed a cross complaint, praying that the said marriage be declared legal, and for alimony. Demurrers to the answer and cross complaint were interposed by plaintiff, which were overruled, and upon defendant's motion alimony in the sum of $45 per month and $100 counsel fees were ordered to be paid her by plaintiff. A bill of exceptions was taken by plaintiff, setting out the pleadings and the affidavits of the parties for and against the motion. The affidavits are long, and except as to the former marriage of defendant, and its existence at the date of her marriage to appellant, are irreconcilably conflicting. Appellant contends that his marriage to defendant was void; that mere living together does not constitute a marriage; and that proof of living together is not proof of marriage. These questions are not before us. The superior court could not have determined them, and entered a judgment in the case upon the affidavits used upon the hearing of the motion. To decide these questions would be to exercise an original jurisdiction this court does not possess. By overruling plaintiff's demurrers the court below has decided that there is an issue between the parties, and the correctness of that ruling cannot be considered on this appeal. Appellant's further contention that, where the marriage is a nullity, alimony and court expenses cannot be allowed, is met by the issue raised as to a subsequent marriage after the disability was removed; and whether that issue is sustained by the affidavits used on the hearing of the motion we need not consider. Appellant further contends that alimony and counsel fees can only be allowed under section 137 of the Civil Code in actions for divorce. In Galland v. Galland, 38 Cal. 265, it was held that the provision for alimony, made in the statute concerning divorces, was not intended to be a prohibition of the granting of alimony in other cases; that such powers fall within the general jurisdiction of a court of equity, and exist independently of statutory authority. This case arose before the Code was enacted; but section 137, Civil Code, provides, among other things, that the wife may, in case of desertion, maintain an action for permanent support without applying for divorce; and in such action the court may, in its discretion, require the husband to pay alimony during the pendency of the suit and money necessary for the prosecution of the action. Respondent's cross complaint is made under this provision, and entitles her to the relief granted by the order, even if the court had no power to grant it had she rested on her answer to appellant's complaint. The affidavits show that the only property belonging to the parties, or to either of them, is a house and lot in the city of San Diego, to the procurement of which both parties contributed, the title to which is in respondent, and which has been occupied by her since the alleged desertion of her by appellant, but that it produces no income, that respondent has no means of support; and that appellant's income is about $145 per month. We think the court did not abuse its discretion in making the order. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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95 Cal. 343

DIEFENDORFF v. HOPKINS. (No. 13,017.)

(*Supreme Court of California.* July 20, 1892.)

CONVERSION—VERDICT — PLEADING — OBJECTIONS WAIVED—WIFE'S SEPARATE PROPERTY.

1. Where the verdict in an action for the conversion of goods is for defendant, there need be no finding as to value or damage. 28 Pac. Rep. 265, affirmed.

2. An objection to a plea on the ground of insufficiency will not be considered on appeal, when not raised in the court below. 28 Pac. Rep. 265, affirmed.

3. Where a married woman, with her own funds, establishes a boarding house, and with the proceeds thereof mingles a monthly allowance from her husband, and it is not apparent whether the furniture, etc., of the house is purchased with her own money or with that furnished by her husband, but her husband has nothing to do with the business, and by their actions and declarations both show that they considered the business hers alone, and no question is raised as to the rights of the husband's creditors, the furniture of such house must be deemed to be her separate property. 28 Pac. Rep. 265, affirmed.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action by C. J. Diefendorff against Peter Hopkins for the conversion of property. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Crittenden, Thornton, F. H. Merzback, and *Geo. A. Blanchard*, for appellant. *Freeman, Bates & Rankin*, for respondent.

PER CURIAM. Upon further consideration of this case we are satisfied with the conclusion reached in department 1, on the former hearing, and with the opinion then filed, (28 Pac. Rep. 265,) and for the reasons stated in that opinion the judgment and order are affirmed.

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95 Cal. 311

AMESTOY *v.* ELECTRIC RAPID TRANSIT CO.

(No. 14,695.)

(*Supreme Court of California.* July 15, 1892.)

PLEADING ORDINANCES—VALIDITY OF CONTRACT—PUBLIC POLICY.

1. Where certain private ordinances are referred to in a declaration as constituting ground for the action, though they are not set out *in haec verba*, or pleaded as provided by Code Civil Proc. § 459, allowing them to be referred to in the pleading by their title and the days of their passage, their existence will be conceded as against a general demurrer.

2. Where it does not appear that a person would sustain special damage by the illegal obstruction of a street by another, and could therefore prevent it only by instituting a public prosecution, his agreement to take no steps to prevent such obstruction is void as against public policy, and will not support a promise to pay money.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action by D. Amestoy against the Electric Rapid Transit Company on an alleged agreement for the payment of money. From a judgment for defendant entered on demurrer, plaintiff appeals. Affirmed.

J. L. Murphy, for appellant. *John Haynes*, for respondent.

TEMPLE, C. This appeal is from a judgment entered upon demurrer. From the complaint it appears that plaintiff owns a lot in the city of Los Angeles, on the west side of Los Angeles street, fronting 83.07 feet on that street. In 1886 the city granted to certain named parties a franchise for a street railroad, extending through Los Angeles and other streets. The road was only partly constructed, and of course was operated only for a portion of the distance for which the franchise was granted. The franchise was granted upon consideration that the grantees would pave and keep in repair the street between the tracks and for two feet on each side; the same to be paved whenever ordered paved by the city council, or when the street was paved by owners of frontage. In 1888 the city council by resolution required that portion of Los Angeles street to be paved, and authorized the paving to be done by private contract. The work was done by owners of frontage and was accepted by the city. The owners of the franchise did not pave between the tracks or for two feet on each side, although they were required to do so by the ordinance of the city, but refused so to do. Thereupon the city council directed its street superintendent to remove its rails and track from that street, and the track, rails, and ties were so removed. The city council claimed that the franchise had been forfeited for various reasons, which are not set out in the complaint, and the former owners of the franchise, as plaintiff believes, acquiesced in the claim. Plaintiff and other owners of frontage, finding the street impassible, and believing that the franchise had been forfeited and abandoned, completed the pavement on the street, doing the work which the owners of the franchise had undertaken to do at a cost to plaintiff of $215. In the mean time the company which had owned the franchise had become insolvent, and all its property, including its claim to the franchise, were sold to the defendant. Afterwards, about April, 1890, defendant desired to lay its track upon the street in front of plaintiff's property and west of the center of the street, but plaintiff and other owners of frontage objected. It is averred that defendant's assignors had forfeited their franchise, and defendant had obtained none; that the franchise which had been granted had been used for a railway on which cars were propelled by electricity through an overhead system of wires resting on poles, and was therefore void; that the defendant proposed to lay its track on the street, and place wooden poles on each side thereof, and to place wires thereon for the purpose of propelling cars by electricity; that defendant knew that its franchise was void, and that it had no right to lay its track or erect its poles or propel cars by electricity without the consent of plaintiff and other owners of property. The city of Los Angeles, by a valid resolution of its council, prevented the defendant from laying its track upon the street, except upon the condition that the company should repay to property owners on the west side of the street all sums which they have paid for paving, which the former company had been required to do as a condition of its franchise. The owners of frontage intended to prevent the defendant from laying its track, whereupon the defendant promised in writing to repay to plaintiff and others, in compliance with the city ordinance; and in consideration that plaintiff would not take any step to prevent defendant from laying its track, and for other valuable considerations, did on or about October, 1890, in writing promise to pay the plaintiff $215 within a reasonable time, and to pay the other property owners the amounts expended by them for such paving. The plaintiff thereafter did not prevent defendant from laying its track, but the track was laid the whole length of the street. It is averred that defendant had no right to lay its track on the street, and plaintiff and other owners could and would have prevented it but for the promise to pay, set out. Further, that in building its railway defendant took up and carried away granite blocks belonging to plaintiff worth $15, which he says constitutes a further consideration. The demurrer is only on the general ground that the complaint does not state facts sufficient to constitute a cause of action. Though other grounds were stated, they were waived.

The point of the demurrer is that the alleged promise is without consideration. Respondent states the rule to be that only those allegations of the complaint are admitted by the demurrer which are material, and which are well pleaded. As a general proposition that is undoubtedly correct, but it must be taken in connection with the other well-established rules of pleading. A complaint which would be obnoxious to a general demurrer would not support a judgment. When the latter question arises, courts have always discriminated between insufficient facts and an insufficient statement of facts, and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the judgment will be sustained. Reason requires that this same rule shall be applied in the case of a general demurrer. Therefore, although the various ordinances are not set out *in hæc verba*, or pleaded as authorized by section 459 of the Code of Civil Procedure,[1] still, as against a general demurrer, their existence must be conceded. The same reasoning would dispose of the objection that there is no specific allegation that the written promise had been delivered, although as to that I think the averment sufficient.

Does the complaint show a sufficient consideration to sustain the promise? Or, rather, does the complaint show affirmatively the want of a consideration? for, as the writing itself imports a sufficient consideration, such must be the conclusion, unless this presumption has been overcome by the facts stated. The recitals as to the former railroad company would seem to cut no figure, except to show that the defendant claims to be acting under a franchise which plaintiff avers and shows is void. The ordinance providing that defendant shall not lay its tracks, unless upon the condition that it pay for the paving, is also averred and shown to be void, so far as it may be claimed to recognize the existence of a franchise. At that time the city council had no authority to grant a franchise for a street railway on which cars were to be propelled by electricity. We are not called upon therefore to determine whether the council, which must exercise its powers solely in the interest of the public, could grant a franchise on condition that the grantee pay a sum of money to a private individual. Being void, it would constitute no consideration for the promise. As the track was to be laid and the poles erected in the street without authority, they would constitute an illegal obstruction; in other words, a public nuisance. No fact is averred to show special injury from the proposed nuisance to plaintiff. It is averred that defendant had no franchise, and plaintiff and others intended to prevent defendant from laying its track in the street. "Whereupon the defendant company promised in writing to repay plaintiff and the other property owners along said street, in compliance with the said order of said city council; and also for the further consideration that the plaintiff would not take any steps to prevent the said defendant from laying its track on the said street in front of the said property, and for other good and valuable considerations, the said company did on or about the 1st day of October, 1890, in writing, promise and agree with plaintiff and the said other property owners along said street that it would pay to plaintiff," etc. As it does not appear that plaintiff would sustain special damage by the obstruction, he could not prevent it except by instituting a public prosecution. The agreement not to do so would be against public policy and void. It would not, therefore, constitute a valid consideration for the promise sued on. The owners of frontage, singly or combined, could not confer upon defendant the right to the use of the street. It is difficult to see how, therefore, under the circumstances alleged there could have been any other good or valuable consideration for the promise. Had the original franchise been valid, and the defendant the assignee of it, the question would have been different; but, as its so-called franchise was void, no rights were derived from it by defendant. It does not appear that the granite blocks were sold to defendant by plaintiff, or that they were taken by his consent; much less that he consented in consideration of defendant's promise to pay for the paving. The blocks were apparently the property of the city. I think the judgment should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

95 Cal. 364

WALL v. HEALD. (No. 14,671.)

(*Supreme Court of California.* July 22, 1892.)

PRACTICE—FILING ANSWER—OVERRULING DEMURRER—WAIVER OF NOTICE—DEFAULT—JUDGMENT ENTERED BY CLERK.

1. Where the attorney of a party demurring to a pleading is present in court when a ruling on the demurrer is announced, and knows of the order, and acts on it, written notice of the decision, as required by Code Civil Proc. §§ 476, 1010, will be deemed waived.

2. Where defendant is in default for failure to answer within the time granted by the court, of which he has knowledge, the clerk has authority to enter judgment for amount prayed in complaint. Bailey v. Sloan, 4 Pac. Rep. 349, 65 Cal. 387, followed.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by Peter Wall against F. H. Heald to recover amount due on a promissory note. From an order setting aside a default and judgment in favor of plaintiff the plaintiff appeals. Reversed.

W. T. McNealy, Trippett & Neale, and *L. Gill*, for appellant. *E. W. Hendrick, D. M. & N. S. Hammack*, and *S. V. Landt*, for respondent.

BELCHER, C. On the 13th day of January, 1891, this action was commenced in the superior court of San Diego county to recover the amount due on a promissory note. On the 30th day of the same month a general demurrer to the complaint was filed, signed "E. W. Hendrick, attorney for defendant." On the 27th of February the demurrer was overruled, the minute entry of the order being as follows: "Parties being present by their respective attorneys, the demurrer of defendant to plaintiff's complaint is at this time overruled for want of oral presentation, and ten days given defendant in which to answer." No written notice of this order was ever given to or served on the defendant or his attorney. On the 10th of March, no answer having been filed, the clerk of the court entered the default of the defendant, and a judgment against him, as prayed for in the complaint. On the 9th of June an execution was issued on the judgment and levied on the property of defendant. On the 24th of July the defendant moved the court to set aside the default and judgment, and to recall the execution, on the ground that the default and judgment were entered and the execution issued without authority, and in violation of law, because no notice of the order overruling his demurrer had been served on him or his attorney, or waived by him or his attorney, and because, when a demurrer has been overruled, and time given to answer, the clerk has no authority to enter a default or judgment without an order of court directing him to do so. In support of his motion the defendant offered and read in evidence the judgment roll in the case, and in opposition thereto the plaintiff offered and read from the minutes of the court the order overruling the demurrer, and an affidavit made by one Harry J. Neale. In this affidavit the affiant stated that he was one of the attorneys for the plaintiff in this case, and was present in court on the 27th day of February, 1891, which was the regular day for the call of the court's law and motion calendar, and that this case was upon the said calendar, pending upon the defendant's demurrer to the complaint: "That E. W. Hendrick, Esq., was, and still is, the attorney of record for the defendant herein, and was present in court upon said day at the call of said calendar. That when said demurrer was called affiant answered the same, 'Ready.' That when the said demurrer was called for argument the said E. W. Hendrick stated to the court that he did not desire to argue the same, whereupon the court announced that the said demurrer was overruled for want of oral presentation. That said Hendrick then stated that the defendant would take the usual time to answer, or words to that effect, to which the court assented." There was no attempt on the part of the defendant to deny any of the statements made in the affidavit, and, after argument, the matter was submitted to the court for decision. The court thereupon made and entered its order vacating and setting aside the default and judgment and recalling the execution, and from that order the plaintiff appeals.

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[1] Code Civil Proc. § 459, provides that in pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage.

Section 476 of the Code of Civil Procedure provides that "when a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order;" and section 1010 of the same Code provides that "notices must be in writing." Respondent contends that under these sections the time allowed to answer does not begin to run until written notice of the order is given or waived, and that to constitute a waiver it must be evidenced by stipulation in writing, or entry in the minutes of the court. The answer to this contention is that this court has held otherwise. In Barron v. Deleval, 58 Cal. 95, a demurrer to the complaint was overruled, and five days allowed to answer. No notice in writing of the order was given. Eight days later, no answer having been filed, judgment by default was entered against the defendant. From that judgment the defendant appealed, and the only point made on the appeal was as to the necessity of written notice. It was shown by the bill of exceptions that "the defendant was present in court by his attorney of record upon argument and ruling on the demurrer, and, upon the same being overruled, requested of the court time to answer, and five days' time to answer was granted." It was held that written notice was waived, and that judgment by default was rightly entered after the expiration of the time allowed. The court said: "The objects of the notice, and the only purpose it can subserve, is to bring home to the attorney knowledge of a fact upon which he is called upon to act. But the right to a written notice, like any other civil right, may be waived, and we think it was waived in this case. Section 3513 of the Civil Code provides that 'any one may waive the advantage of a law intended for his benefit.' Section 3528 of the same Code provides that 'the law respects form less than substance,' and section 3532 declares that 'the law neither does nor requires idle acts.' * * * What purpose would a written notice of a fact of which the attorney had direct and positive knowledge have subserved? Would it not have been a vain and idle ceremony to have given him a written notice under the circumstances disclosed in this case? * * * To hold that the party and his attorney were not bound by this proceeding, had in open court, would be trifling with justice, and also subversive of sound principles of law and morals." And see Mullally v. Society, 69 Cal. 559, 11 Pac. Rep. 215; Gray v. Winder, 77 Cal. 525, 20 Pac. Rep. 47; and Dow v. Ross, 90 Cal. 562, 27 Pac. Rep. 409. It is shown by the order of the court, and by the uncontradicted affidavit of plaintiff's attorney, that the defendant was present in court by his attorney when his demurrer was overruled, and knew of and acted upon the order. He must therefore be held, under the decision above cited, to have waived written notice of the order. As to the point that the clerk had no authority to enter the default and judgment without an order of court, a sufficient answer is found in Bailey v. Sloan, 65 Cal. 387, 4 Pac. Rep. 349, where it is said: "No answer was filed, and, the time within which the defendant was granted leave to answer having expired, the clerk was authorized to enter his default, and a judgment for the amount specified in the summons." It follows, in our opinion, that the order appealed from should be reversed.

We concur: VANCLIEF, [illegible], HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

95 Cal. 369

CHILDS v. LANTERMAN *et al.* (No. 14,714.)

(*Supreme Court of California.* July 22, 1892.)

REVIEW ON APPEAL—FINDINGS OF COURT—NEW TRIAL.

1. Where the evidence is conflicting, the findings of the trial court will not be disturbed.

2. A new trial, asked on the ground of newly-discovered evidence, is properly refused, where it is unlikely that such evidence would change the result.

Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Barbara Childs against F. D. Lanterman and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Stephen M. White, for appellants. *Gould & Stafford*, for respondent.

DE HAVEN, J. Action to quiet title, and the defendants appeal from a judgment in favor of plaintiff, and from an order denying their motion for a new trial. The real question in issue between the parties is one of boundary, the appellants claiming that the land described in the complaint lies within the boundaries of the Rancho La Canada, while the respondent contends that it does not. The evidence upon the point was conflicting, and, this being so, we cannot, under the rule which is well settled in this court, disturb the finding of the trial court.

But it is urged by appellants that their motion for a new trial should have been granted on the ground of newly-discovered evidence. The nature of this new evidence is made to appear by the affidavit of one Coronel, who assisted in making the survey of the Rancho La Canada, and who was not a witness upon the trial. In his affidavit, as we understand it, he states, in substance, that stations 87 and 88 of that survey were in point of fact located further north than as found by the court, and so as to include within said rancho the whole or a portion of the premises in controversy, and that station 87 is marked by a rock mound now in place, on the east bank of an arroyo referred to in the field notes of said survey. The field notes of the survey, however, state that the station is on the west bank of the arroyo. A motion for a new trial, upon the ground of newly-discovered evidence, is one which is addressed to the sound discretion of the trial court; and we cannot say, upon the record before us, that the court did not properly exercise its discretion in denying the motion of appellants; as it cannot be said that, if a new trial were had, and the testimony of this witness produced, the result would be different. To accept his statement as to the location of station 87, the court would have to so far disregard the field notes of the survey upon which the patent for the Rancho La Canada is based as to place that station on the east instead of the west side of a deep arroyo, which is a permanent landmark referred to in such field notes. Considering the long time which has elapsed since the making of the survey, and the other evidence given upon the trial tending to show the true location of the lines of that survey, as well as the counter affidavits used on the hearing of the motion, it cannot be said that the court in passing on the motion for a new trial erred in accepting the field notes of such survey as the best evidence in determining whether the station was located on the east or west bank of the arroyo mentioned in such field notes; and if the court disregarded the affidavit of Coronel, as to the location of station 87, it might well have concluded not to accept his statement in regard to the location of station 88.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

95 Cal. 359

CRESWELL *et al.* v. WELCHMAN *et al.*
(No. 14, 625.)

(*Supreme Court of California.* July 22, 1892.)

CANCELLATION OF DEED—CONSIDERATION—AGREEMENT AS TO CARE AND ATTENTION.

A deed, made by an elderly woman voluntarily and without undue influence, conveying to her nephew and his wife all her realty with the exception of a life estate, in consideration of an agreement on their part to make their home with her, repair and improve her house, and care for her during life, will not be set aside, where it appears that the deed was understandingly made, and that the grantees had expended several hundred dollars in coming from their home in a distant state, and several hundred more in repairing the house, and were ready to perform further when interrupted by the grantor.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Action by Charlotte Creswell and John E. Creswell, her husband, against William H. Welchman and Mary Welchman, to have set aside a certain deed. Judgment for defendants. Plaintiffs appeal. Affirmed.

Blackstock & Shepard, for appellants. *Orr & Hall*, for respondents.

BELCHER, C. In August, 1888, the plaintiff Charlotte Creswell, then Charlotte Bath, was left a widow by the death of her husband, Joseph Bath. She was then nearly 70 years of age, and had no children and no relatives in this state. She owned 37 acres of farming land in the county of Ventura, on which she was living, and a lot in the town of Santa Paula, the whole being of the value of about $4,000. At her request the defendant William H. Welchman, who was her nephew, and was then residing in the state of New Jersey with his wife, the other defendant, came to this state to live with and take care of her. They arrived at her home about the 1st of February, 1889, and on the 12th of that month she, for the expressed consideration of one dollar and other good and lawful considerations, executed and delivered to them a bargain and sale deed of all her real property, but "reserving and excepting unto the grantor herein, for her own use and benefit, a life estate in the whole of said lands hereby granted for and during the natural life of said grantor, with the right to use, occupy, and control absolutely the said lands and tenements, and to receive, take, and have the rents, issues, and profits thereof so long as she, the said Charlotte Bath, grantor, may live." The defendants continued to live with plaintiff until January, 1890, when they left her house and went away, claiming that they were compelled by her to do so. On the day defendants left, John E. Creswell, a stranger to plaintiff, called at her house and wanted work. She took him in and kept him till March 12th, when she married him. On May 6, 1890, this action was commenced by Mrs. Creswell and her new husband to have the deed executed by her to defendants set aside and canceled on the grounds that it "was signed by plaintiff at the solicitations of defendants and under undue influence exercised by them upon plaintiff, and with the intent and purpose on their part of cheating and defrauding plaintiff;" that the consideration for the conveyance had failed; "that said conveyance was made by plaintiff when of the age of seventy years, and when in feeble state of health, and when in great mental distress, and at a time when she did not know fully what she was doing, nor realize the effect upon her of the act, to wit, the execution of said deed;" and that the deed was fraudulent and void, and operated only as a cloud on her title.

The court below found that when the deed was made the plaintiff was "competent and had sufficient capacity to convey her estate; that she signed, executed, and delivered the said deed voluntarily, of her own will, without solicitation and free from undue influence; that no fraud was committed or attempted upon her by defendants, or either of them, to obtain said deed; that the consideration for the deed was the relationship between the parties and the coming of defendants from their home in the state of New Jersey to the home of plaintiff in California, "and the agreement on the part of said defendants, entered into with good faith by them to make their home with said plaintiff, care for her, improve, repair, and make more comfortable and convenient her home, and attend to her business and affairs, and give her their companionship and society during the remainder of her lifetime;" that defendants came to California at an expense to themselves of $200, and, under plaintiff's direction, "took full charge of her business and affairs, repaired and improved the dwelling house, the home of plaintiff, on said tract of land, by building three new rooms thereto at an expense to themselves of $400, and made their home with said plaintiff, provided and cared for her, gave her their companionship and society, and did fully pay, yield, and render the consideration for said deed for the space of about eleven months, when they were compelled to leave said premises, and remove therefrom, and give up the possession thereof, and to cease living with said plaintiff, caring for, or in any manner providing for or protecting, her or attending to her affairs by the acts and directions of said plaintiff herself; that plaintiff at said time refused to allow them to do anything for her, or to receive any aid from them, and demanded and received sole possession of said premises described in the complaint in this action by virtue of the estate reserved unto herself in the said deed to the defendants;" that after defendants moved away, and before the commencement of this action, "they offered to return to the said home of plaintiff, or to send her money, if she so desired, all of which offers of defendants said plaintiff rejected and refused to accept; that defendants provided said plaintiff, during the whole of the time that she permitted them to reside with and care for her, with a good and comfortable home, and did in good faith in all things pay, yield, and render the consideration agreed upon for said deed, except as prevented by the acts of said plaintiff." And, as a conclusion of law, the court found that the deed was valid and operated as a conveyance to the grantees in fee of the remainder, after the life estate reserved to the grantor, of all the lands and premises described in the deed, and that they were the owners thereof. Judgment was accordingly entered that the plaintiffs take nothing by their action. From that judgment and an order denying a new trial the plaintiffs have appealed.

The only specifications found in the statement are that some of the findings were not justified by the evidence. But, after carefully reading all of the evidence found in the transcript, we are of the opinion that it was amply sufficient to justify each of the findings. It is true that when the deed was made the grantor was an old lady and alone in the world. She wanted company and care, and had solicited the defendants to come and live with her, offering to give them all that she had after her death. So far as appears, she was then of sound mind and able to transact her business understandingly. She went to a lawyer to have him draw the deed, and presumably it was drawn at her dictation and as she wanted it. The defendants came to this state at an expense of $200, and afterwards expended $400 in repairing and enlarging the house. No offer was made to return any of this money to them. They appear to have acted in good faith, and to have intended to live with and take care of the old lady as long as she should live. That they were unable to do this was not their fault. They left because she had changed her mind, and would not permit them to remain. She had reserved a life estate in the property, with a right to its possession, and they could only occupy it with her consent. The deed to them was absolute, and without any conditions, but they could exercise no control over the property during her lifetime. After they left they offered to send her money if she needed it, or to return and rent the farm, and she replied that she had rented the farm and herself with it,—she had got married,—and they need not trouble themselves about sending her any money. They seem, therefore, to have been fully justified in going and remaining away. And, speaking of this action, it was proved that she had said she didn't care which party won it. "All she wanted was the property during her lifetime, and she had that." Upon the facts shown, we think the court below was right in entering judgment as it did, and we advise that the judgment and order be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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95 Cal. 353

KLAUBER *et al.* v. SAN DIEGO ST. CAR CO.

(No. 14,665.)

(*Supreme Court of California.* July 22, 1892.)

SPECIFIC PERFORMANCE—DEFENSE—OPERATION OF LAW—WHAT IS.

In consideration of the performance of certain agreements on the part of plaintiff, defendant street car company agreed to construct and operate for 10 years a certain extension of its road, and in default thereof forfeit the extension to plaintiff. Plaintiff performed the agreements on his part, but before the 10 years expired the receiver appointed at the suit of defendant's mortgagee to take charge of all of defendant's property refused to operate the extension. *Held*, that the appointment of the receiver was not such a prevention "by operation of law," within the meaning of Civil Code, § 1511, as would excuse performance on the part of defendant, and plaintiff was entitled to specific performance.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action by A. Klauber and others against the San Diego Street Car Company to enforce a contract specifically. Defendant had judgment, and plaintiffs appeal. Reversed.

Parrish, Mossholder & Lewis and *Luce, & McDonald*, for appellants. *Works, Gibson & Titus*, for respondent.

TEMPLE, C. This appeal is upon the judgment roll, and was taken by plaintiffs. The findings show that defendant owned and was operating a street railway in San Diego, and plaintiffs were the owners of certain lands to which they desired to have the street railway extended. On September 30, 1887, they therefore agreed with defendant, in consideration that it would build and operate the road in a specific way, that they would procure the right of way between certain named points, and the franchise from the city permitting the use of the streets and a grant of the right of way over the city lands, and pay defendant $6,000 per mile of such extension, and also pay for all material and labor necessary to construct all of the bridges, trestles, and culverts along the line of the road. That plaintiffs performed their part of the contract, procuring and turning over to defendant franchises and rights of way worth $10,000, and paid for building all the bridges, trestles, and culverts, $22,000, and the further sum of $41,695.88, being $6,000 per mile for each mile of such extension. That the railway and franchises were worth only $25,000, and plaintiffs have been benefited by its construction and operation in the sum of $5,000 only. That it was provided in the contracts that after the construction and equipment of the road, if the defendant refused or failed to operate it, as provided, and run over it three regular trains each and every day, for a period of ten years, that upon such failure defendant should forfeit to plaintiffs the entire extension, including the franchises, rights of way, ties, rails, roadbed, bridges, trestles, and culverts, and the same should revert to and become the property of plaintiffs, and that the said defendant should convey all of said roads, including the franchises, rights of way, ties, rails, roadbed, bridges, trestles, and culverts, to plaintiffs, and should execute and give a sufficient deed of conveyance to plaintiffs for all defendant's right, title, and interest therein. That defendant constructed and operated the road, according to the terms of the contract, until on or about February 19, 1889, at which time a suit was commenced by a certain bank to foreclose a mortgage upon the property, real and personal, of defendant, in the circuit court of the United States. That the mortgage was executed by defendant to the bank to secure the sum of $250,000. That such suit was pending when this action was commenced, and is still pending. That on the 19th day of February, 1889, the said circuit court, by its order duly made, appointed a receiver of all the goods, property, estate, and effects of defendant, who duly qualified, and on that day took possession of all the property last mentioned, and has ever since maintained such possession. That all the property in question here was included in the property so taken. That the defendant did not fail to perform its contracts with the plaintiffs in any particular until the receiver took possession, but that the receiver failed and ceased to operate the road on the 25th of February, 1889. That by the order of said circuit court, defendant, its agents and servants, and all persons whomsoever, were restrained and enjoined from in any way interfering with the possession or control of the property, or from selling, transfering, conveying, leasing, or otherwise disposing of or incumbering any of said property. That due demand, before suit, was made for the conveyance, etc., which was refused. On these facts, were plaintiffs entitled to judgment? The trial court held that they were not, apparently for two reasons, both of which are urged here in support of the judgment: *First*, want of performance is excused because it was prevented by operation of law, (section 1511, Civil Code;) and, *second*, the conveyance sought would interfere with the possession of the receiver and of the federal court. No case has been cited in which it has been held that interference by a writ, sued out by a private litigant, will excuse performance of a contract, although it may deprive the contractor of the means of performance. It is not prevention by operation of law. It is the act of an individual, and not of the government. In a certain sense, the property so taken may be in the custody of the law, and yet the seizure may be wrongful, and the suitor held responsible, as for a trespass, in damages. The law recognizes the fact that these private remedies may be wrongfully, that is, illegally, used, and the litigant is required to give security for any damage that may be caused if it should be finally decided that the writ was improperly issued. This cannot be called the "operation of law," within the meaning of the Civil Code. The obligor contracts that he can and will control the acts of third parties, so far as necessary to enable him to perform his contract. People v. Bartlett, 3 Hill, 570. Nor would it be a defense that the law has rendered it difficult or very expensive to perform. The rule is, if performance is in itself possible, there is a breach, although the obligor himself may have become wholly unable to perform. The suit to foreclose the mortgage against the property of defendant did not render performance impossible; defendant could have paid the claim or given security, and have had the receiver discharged. "To warrant the application of the principle, the impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it; or, as it is sometimes termed, be an *impossibilitas rei*, as distinguished from an *impossibilitas facti*. If the thing could be accomplished by any one with proper means and the requisite skill and knowledge, the promisor was not less answerable because it was impossible to him." Hare, Cont. 639. "The principle deducible from the authorities is that, if what is agreed to be done is possible or lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance." The Harriman, 9 Wall. 172. But it seems to me the very fact that the thing can be done, although it may be very expensive, to wit, it may require the defendant to liquidate and pay an unjust claim, shows that performance is not prevented by operation of law. It is not the law operating upon the facts which creates the difficulty, but the use of a judicial writ by a private litigant. Suppose the receiver had been appointed after decree in favor of the mortgagee; it would be obvious the defendant could continue to operate the road by paying its debt. So far as there is anything in the second point which is not included in the first, it is enough to say that a conveyance, such as is sought here, could not disturb the possession of the receiver, or embarrass him in the discharge of his duties. Bank v. Schermerhorn, 9 Paige, 372. Even should it necessitate bringing in new parties in the foreclosure suit, or place the assignees in a position to intervene, there could be no objection on that ground; much less would it constitute a contempt of the mandate of the circuit court. I think judgment should be reversed, and a specific performance decreed on the findings.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the superior court directed to enter a judgment upon the findings in favor of plaintiff in accordance with the prayer of the complaint.

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95 Cal. 386

HIGH v. BANK OF COMMERCE. (No. 14,642.)

(Supreme Court of California. July 23, 1892.)

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — SUPPLEMENTAL PROCEEDINGS IN GARNISHMENT—COMPLAINT IN—SUFFICIENCY.

1. Code Civil Proc. § 720, which authorizes a judge by order to permit the judgment creditor to institute supplemental proceedings on a judgment against a debtor of the judgment debtor, is not unconstitutional as taking property without due process of law, though it does not provide for notice of such proceedings to the judgment debtor.

2. The complaint in such supplemental proceedings sufficiently shows that judgment was rendered in the principal case, where it alleges that plaintiff "recovered a judgment, * * * which judgment was duly entered," etc.

3. In such case, on a general demurrer, the allegation that the order allowing the proceedings was "duly made" is sufficient, even if the specific facts set out are defective.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by John E. High against the Bank of Commerce. Defendant had judgment on demurrer, and plaintiff appeals. Reversed.

D. L. Withington, for appellant. *Luce & McDonald*, for respondent.

FOOTE, C. The plaintiff became the assignee of a judgment obtained by one Keturah White against N. A. Comstock and Carl Trotsche and W. E. High. He brought this action against the defendant here, as garnishee of Comstock and Trotsche, in proceedings supplemental to execution, under the provisions of the Code of Civil Procedure contained in sections 716 to 720, inclusive. A demurrer to the complaint was filed by the defendant, to the effect that the pleading in question did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, plaintiff declining to amend the complaint, judgment was rendered for the defendant, from which the plaintiff prosecutes this appeal.

The first contention of the respondent, which we will notice, is that in which he asserts that section 720 of the Code of Civil Procedure is unconstitutional. He bases this view of the matter upon a decision of the appellate court in Bryant v. Bank, (Cal.) 8 Pac. Rep. 644, where it is said by Mr. Justice MYRICK: "Inasmuch as no notice to the judgment debtor of the proceeding authorized by section 720 of the Code of Civil Procedure is provided for, we are of opinion that that section which purports to authorize the judge, by order, to permit the judgment creditor to institute and maintain an action against the alleged debtor of the judgment debtor, is unconstitutional and void. This not only for the protection of the rights of the judgment debtor, but also for the protection of those of his alleged debtor who might otherwise be compelled to pay twice." It has been held in Hexter v. Clifford, 5 Colo. 168, in reference to a statute similar to that of California, that no such notice is required; and this seems to be the view entertained in New York to the qualification that notice may be given in the discretion of the judge. 4 Wait, Pr. 131. Jurisdiction having been once acquired over the judgment debtor in the original action, that action is still pending until the judgment is satisfied. Proceedings to compel the application of money or property in the hands of other parties to the satisfaction of the judgment are proceedings in that action. 4 Wait, Pr. (*b*) p. 128. So far as the judgment debtor is concerned, he cannot complain. He is a party to the judgment, and is fully aware of the legal effect of it, viz., that what his debtors owe him can be applied, by proper proceedings in the action which is still pending, to the satisfaction of his judgment debts; and due process of law has been had to make him aware of that fact. If, then, anything is due from his debtor, he is not injured if it is so applied. If nothing is due him from such debtor, then the matter is of no concern to him. The debtor of the judgment debtor is not to be permitted to say that he cannot protect himself against paying the debt twice, first to the creditor of the judgment debtor in this proceeding, and then to the judgment debtor, who has no notice of the proceeding; the reason for this being that the debtor of the judgment debtor is not without a remedy to prevent this result in the proceeding itself, in that all he is required to do to accomplish that result is that he suggest that his creditor, the judgment debtor, be made a party to the proceeding; and, since he can protect himself, it is idle to say he may be compelled to pay his debt twice. The statute in question must be held to contemplate this, and not that any such thing could be accomplished as that the debtor of a judgment debtor might, under its provisions, be made to pay a debt twice. We therefore see no force in the suggestion that the statute is unconstitutional, in that the judgment debtor has under it no notice of the supplementary proceeding after judgment affecting his rights of property. And the contention is equally without force that such has been the decision binding on the appellate court in Bryant v. Bank, supra. In Collins v. Angell, 72 Cal. 513, 14 Pac. Rep. 135, Mr. Justice McFARLAND, speaking for the court, virtually declares that no constitutional question was decided in the case first mentioned. And it appears from 7 Pac. Rep. 128, where the case on which the respondent relies was first determined in department, and in 8 Pac. Rep. 644, where the same case was heard in bank, that at the most only three of the judges took the view contended for by respondent.

But the respondent contends further that the complaint does not show that the judgment made the basis for this proceeding is valid, and that it is not shown by that pleading that a valid order was made authorizing the proceeding to be commenced. The allegation in question relative to the judgment is "that, upon the 2d day of March, 1891, Keturah White recovered a judgment in this superior court, * * * which judgment was duly entered," etc. The respondent says that this is not a sufficient statement to show that the judgment "was duly given." In McCutcheon v. Weston, 65 Cal. 39, 2 Pac. Rep. 727, it was held that an averment that a judgment was "recovered, entered, and docketed" was sufficient. As this docketing is only to fix a lien of the judgment already entered in the judgment book on the real property of the debtor, (Code Civil Proc. § 671,) we do not think it essential to aver such docketing to show that the judgment was "duly given," if it is already averred that it was "recovered" and "entered." As to the insufficiency of the averments with reference to the order authorizing suit, it seems that, as against a general demurrer, the allegation that it was "duly made" is sufficient, even if the specific facts set out are defective, which we do not decide. Dore v. Thornburgh, 90 Cal. 66, 27 Pac. Rep. 30; Bull v. Houghton, 65 Cal. 422, 4 Pac. Rep. 529. We therefore conclude that the demurrer was improperly sustained, and that the judgment appealed from should be reversed, and so advise.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is reversed.

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95 Cal. 415

WATT *et al.* v. BRADLEY. (No. 14,660.)

(*Supreme Court of California.* July 23, 1892.)

AFFIDAVIT OF DEFENSE—FILING PAPERS—OMITTING TITLE OF ACTION.

1. An affidavit which is not entitled, but which refers "to the above-entitled action," and is annexed to and filed with papers which are duly entitled, must be understood to refer to the title stated in those papers, and is sufficient, under Code Civil Proc. § 1046, providing that "an affidavit, notice, or other paper, without the title of the action, * * * is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action."

2. Where an affidavit of defense states that defendant is advised by counsel that he has a good, substantial, and complete defense, a statement that he believes such advice is unnecessary.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; J. H. BUDD, Judge.

Action by Robert Watt and others, directors of the Stockton State Insane Asylum, against Charles Bradley, administrator of Paul Bradley, deceased, to recover for services rendered the wife of defendant's intestate. From an order changing the place of trial, plaintiffs appeal. Affirmed.

Carter & Smith, for appellants. *B. F. Thomas*, for respondent.

VANCLIEF, C. This action was commenced in the county of San Joaquin to recover $3,175.35 for medical attention, nursing, support, etc., alleged to have been furnished to the wife of defendant's intestate in said asylum, situate in said county, at the request of said intestate. On motion of defendant the court ordered a change of the place of trial from the county of San Joaquin to the county of Santa Barbara, on the alleged ground that defendant was a resident of the latter county. The plaintiffs appeal from this order and contend that the affidavit of defendant upon which the order was made is insufficient. The following is a copy of the affidavit: "In the superior court of the county of San Joaquin, state of California. Robert Watt, Arthur Thornton, H. T. Dorrance, Obed Harvey, and R. S. Johnson, as the board of directors of the Stockton State Insane Asylum, Plaintiffs. State of California, county of Santa Barbara—ss.: Charles Bradley, being first duly sworn, deposes and says that he is the defendant in the above-entitled action. That he now is, and at the time the above-entitled action was commenced, and for twenty years prior thereto, had been, a resident of the county of Santa Barbara, state of California, and was such resident when the summons in said action was served on him, which service was in said Santa Barbara county. That I have fully and fairly stated the case in this action, and fully and fairly stated all the facts relating to such action, to my counsel and attorney in said action, B. F. Thomas, an attorney at law residing in the city and county of Santa Barbara, state of California, and after such statement to my said attorney, I am advised by him that I have a good, substantial, and complete defense on the merits of said action. CHARLES BRADLEY."

1. It is contended that the affidavit does not intelligibly refer to this action, because the title of this action is not fully stated in the affidavit. The bill of exceptions shows that the notice of the motion "stated that said motion would be made upon the affidavit and demand of defendant to change the place of trial, annexed and served with said notice, and upon said notice and all of the papers and pleadings on file in said action." Both the notice and demand "were duly entitled in the action," and the affidavit was filed with the notice. Therefore the reference in the affidavit to the "above-entitled action" must have been understood to refer to the title of the action stated in the demand and in the notice to which the affidavit was annexed, and with which it was served. This was sufficient, under section 1046 of the Code of Civil Procedure, which provides that "an affidavit, notice, or other paper, without the title of the action, * * * or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action."

2. The only other objection to the affidavit is that it fails to state that the affiant believes the advice of his counsel that he had "a good, substantial, and complete defense on the merits of said action." It is enough that he fairly and fully stated the facts of his case to his attorney at law, and that upon that statement his attorney advised him, as matter of law, that those facts constituted a meritorious defense to the action. He was entitled to act upon the advice of his attorney as to what was the law applicable to those facts, unless it appear that he had reason to believe the advice was not given in good faith; for the presumption is that the advice was asked and given in good faith, and that the defendant confided in it, if nothing appear to the contrary. What is the law applicable to a given state of facts is rather a matter of opinion than of belief, as to which the opinion of the nonprofessional client is of so little consequence that a court would not act upon it for any purpose. I find nothing in any of the cases cited by counsel opposed to these views, and therefore think the order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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95 Cal. 418

WIEBOLD *et al.* v. RAUER *et al.* (No. 14,926.)

(*Supreme Court of California.* July 23, 1892.)

APPEAL BOND—DEPOSIT IN LIEU—SUBSTITUTION OF UNDERTAKING.

Where one, in lieu of giving an undertaking on appeal, has made a deposit of money under the provision of Code Civil Proc. § 948, the supreme court will not, in the absence of statutory authority, allow the substitution of an undertaking for the money deposit.

In bank.

Action by one Wiebold and others against one Rauer and others. Judgment for plaintiffs, and defendants appeal. Defendants apply for an order permitting them to substitute an undertaking for money deposited in lieu of appeal bond. Motion denied.

G. H. Perry, for appellants. *W. C. Kennedy*, for respondents.

PATERSON, J. This is an application for an order permitting appellants to substitute undertakings in place of the money deposited in the court below, in lieu of undertakings on appeal. Undertakings were filed in the court below in due time after notice of appeal, but exception was taken by respondents to the sufficiency of the sureties therein. On the day fixed for the justification of the sureties the latter failed to appear before the judge of the court below. Thereafter, and in due time, the appellants deposited the amount of the judgment appealed from, and $300 in addition thereto, which, under section 948, Code Civil Proc., was equivalent to the giving of sufficient undertakings. The petitioner has presented to this court undertakings in due form, and asks to have the same approved and filed, and to be allowed to withdraw the money deposited in the court below. The statute gives an appellant the right to perfect his appeal and secure a stay of proceedings on the judgment, either by giving certain undertakings, or by depositing in the court below the amount of the judgment appealed from, and $300 in addition thereto. The appellant chose the latter proceeding, and, by depositing in the court below the sum required by the statute, perfected his appeal. There is no statutory authority for the order which he now requests the court to make, but, assuming that the court has the discretion to allow him to withdraw his deposit and give a new undertaking, we have no disposition to exercise that discretion in his favor. The court is already heavily burdened with multifarious original proceedings, not usually imposed upon appellate courts, and we have no desire to increase them by establishing a precedent for another, and especially one a denial of which affects no substantial right of either party to the appeal. If the motion were granted, and a new undertaking were filed here, the respondent might be compelled to again examine into the question of the sufficiency of the sureties on the undertaking, give notice of exception, and to appear before the judge at the time and place of justification. This would be manifestly unjust to him. The appellant has made his choice of procedure, and, having had the benefit of it, should not now be allowed to retract and file undertakings. The only prejudice he can suffer by a denial of this motion is being deprived of the use of the money until the appeal is determined. Motion denied.

We concur: BEATTY, C. J.; DE HAVEN, J.; McFARLAND, J.; HARRISON, J.; SHARPSTEIN, J.

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95 Cal. 409

SIEGEL v. HIS CREDITORS. (No. 14,861.)

(*Supreme Court of California.* July 23, 1892.)

INSOLVENCY—DISCHARGE OF DEBTOR—FRAUD—FAILURE TO KEEP BOOKS.

1. The insolvent act of 1880, § 49, providing that no discharge shall be granted to an insolvent debtor if he has been guilty of fraud, refers to frauds which affect the mass of his creditors, and the fact that one debt was created by fraud is not ground for refusing a discharge as to other debts.

2. Under the insolvent act of 1880, § 49, providing that an insolvent shall not be discharged "if, being a merchant or tradesman, he has not kept proper books of account," a discharge should not be refused because the insolvent did not keep an account of small sums borrowed, which it does not appear were used in his regular business, which were in each case repaid in two days, and the items of cash used in the payment of which appear on the bank account in the books used in his business.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Application by Myer Siegel for his discharge as an insolvent debtor. The application was granted, and certain creditors appeal. Affirmed.

Graff & Latham, for appellants. *Roberts & Robinson*, for respondent.

BELCHER, C. The respondent filed his petition in insolvency on the 21st day of May, 1890, and was thereupon adjudged to be an insolvent debtor. In due time he applied to the court for a discharge from his debts, and two of his creditors, Walter M. Patrick and Jacoby Bros., opposed the discharge. The specifications of the grounds of opposition, so far as they need be stated, were that the respondent had been guilty of fraud, contrary to the true intent of the insolvent act, in that, on the 5th of April, 1890, he, by false and fraudulent representations as to his financial standing, induced Patrick Bros., the assignors of said Walter M. Patrick, to sell him certain goods of the value of $95, on a four-months credit, which had not expired when he filed his petition in insolvency, and that he knew said representations to be false, and made them with the intent to deceive and defraud said Patrick Bros.; and also that respondent for 18 months prior to the filing of his petition in insolvency was a retail dealer in boots and shoes, and did not during that time keep proper books of account. After trial, the court found upon the issues raised by the pleadings, among other things, that the respondent obtained from Patrick Bros. goods of the value of $95, on a four-months credit, as alleged, but that it was not such a fraud as would prevent the granting him a discharge from his other debts; and also that respondent was a retail dealer in boots and shoes for the period of 18 months immediately preceding the filing of his petition in insolvency, and that during that period from time to time he borrowed from one Nathan Siegel sums of money, in the aggregate amounting to $1,205; that no one of the sums so borrowed amounted to more than $75, and that each of the said sums was borrowed for a short time, and was repaid within two days; that no account of the said loans was kept on his books in the name of Nathan Siegel, "nor any account thereof, except that the items of cash paid out to the said Nathan Siegel in payment of said loans were entered in the bank account kept by said Myer Siegel on his books of said business;" that otherwise respondent kept proper books of account, and that his failure to enter on his books, to the particular account of Nathan Siegel, the said temporary loans, was not such a failure to keep proper books of account as would authorize the withholding the discharge. A decree was accordingly entered discharging the respondent from all his debts which under the insolvent law of this state were provable against his estate, and which existed on the 21st day of May, 1890, except the said debt of $95, due to Patrick Bros. From this decree the opposing creditors appealed, and have brought the case here for review on the findings. Section 49 of the insolvent act provides that no discharge shall be granted to an insolvent debtor if he has done or failed to do certain specified things, and, among others, if he "has been guilty of fraud contrary to the true intent of this act;" and section 52 provides that "no debt created by fraud or embezzlement of the debtor * * * shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." Upon the authority of these sections and the decisions of the courts in regard to similar provisions found in the federal bankrupt act, it was decided by this court in the case of In re McEachran, 82 Cal. 219, 23 Pac. Rep. 46, that the fact that a particular debt was created by fraud was not ground for refusing a discharge from other debts; and the same doctrine was again declared in the case of Dyer v. Bradley, 89 Cal. 557, 26 Pac. Rep. 1103. The fraud of which the respondent here was found guilty is not included in any of the grounds specified in section 49 for withholding a discharge, unless it is included in the clause quoted. Appellants, however, contend that that clause was intended to cover a case like this; that it was not in the bankrupt act; and that it must have been overlooked in making the decisions above referred to; and hence that those decisions should be reconsidered and overruled. We do not think this contention should be sustained. It is true that the clause quoted is not found in the bankrupt act, but, in our opinion, it was not intended by it to change the rule many times declared by the bankruptcy courts in cases like this. It seems rather to refer to frauds which affect the mass of the creditors, and not some individual creditor alone. Nor was this clause overlooked when the opinions in the cases criticised were written. Those decisions were mainly rested upon section 52, which seems plainly to imply that a discharge may be granted notwithstanding there may be some debt which should be excepted from its operation, because it was fraudulently contracted. Appellants also contend that the discharge should have been denied because respondent had failed to keep proper books of account; but the only fault found with his books is that he did not keep in them, in the name of Nathan Siegel, an account of certain small sums of money borrowed from him, from time to time, during a period of 18 months. It does not appear that there were ever any other business transactions between the parties, and the court finds that the small loans were paid back within two days, and the payments were entered in the bank account kept by respondent in his books. One of the grounds specified in section 49 for refusing a discharge is: "If, being a merchant or tradesman, he [the debtor] has not kept proper books of account." The evident purpose of this provision was to require every merchant or tradesman to so keep his books that any competent person, by an examination of them, could ascertain and determine the real condition of his affairs; and if they be so kept, though imperfect, inartistic, and inaccurate in unimportant particulars, they will be treated as "proper books of account." Undoubtedly a trader should be held to the utmost good faith and reasonable care in keeping accounts of his business as such, but he is not required to enter in his books accounts of outside matters. In re Good, 78 Cal. 399, 20 Pac. Rep. 860. The question, then, as to whether books are "proper" or not is one to be determined in each particular case by the facts and circumstances there shown. Here the testimony is not brought up in the record, and we have only the findings to look to. The presumption is that every decision of a trial court is correct, unless error clearly appears. Looking, then, at the findings, does it clearly appear that the court below erroneously reached the conclusion that respondent's books were not so improperly kept as to warrant the withholding his discharge? We think not. So far as we can see, the small sums of money borrowed from time to time may have been for purposes wholly outside the boot and shoe business; and, if not, the books, notwithstanding the failure to enter those items, may have sufficiently shown the real condition of respondent's business affairs as a trader. In the case of In re Good, supra, cited by appellants, it appeared that the insolvents borrowed $10,000 to enable them to commence and continue their business, and that the money so borrowed constituted their capital stock. No account of this borrowed capital was entered in the books. As kept, the books showed that the firm was in good condition, when in fact it was utterly insolvent. Under these circumstances, it was held that "proper" books were not kept, and that a discharge was properly denied by the trial court. That case is not in point here. In our opinion, the decree or order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(3 Cal. Unrep. 504)

DE PENA v. TRUJILLO. (No. 14,440.)

(*Supreme Court of California.* July 23, 1892.)

APPEAL WITHOUT MERIT—DAMAGES AS COSTS.

Defendant in ejectment, after pleading the general issue and possession for the statutory period, filed a disclaimer of any interest, but from a judgment for plaintiff, after a trial by the court, findings of fact being waived, he appealed. The record, however, contained no bill of exceptions or other showing of error, and defendant filed no brief or points and authorities. *Held* that, the appeal being manifestly without merit, $100 damages would be directed for plaintiff as part of the costs on appeal.

In bank. Appeal from superior court, San Bernardino county; J. L. CAMPBELL, Judge.

Ejectment by Jertrudes de Pena against Juan Trujillo. Judgment for plaintiff. Defendant appeals. Affirmed.

Ezra Crossman and *Goodcell & Leonard*, for appellant. *Byron Waters*, for respondent.

PER CURIAM. The complaint herein is the ordinary form of a complaint in ejectment. The defendant pleaded a general denial, together with an averment that he had been in the quiet possession of the premises described in the complaint for more than five years immediately preceding the filing of the complaint. Prior to the trial the defendant filed a disclaimer of any interest in the land sued for. The cause was tried by the court without a jury, findings of fact were waived, and judgment rendered in favor of the plaintiff. From this judgment the defendant appealed directly to this court. The record contains no bill of exceptions or other showing of any error in the court below, and the appellant has not filed any brief or points and authorities in support of his appeal. The appeal is manifestly without merit, and the judgment is affirmed, and the superior court is directed to allow to the respondent $100 damages as a part of the costs on appeal.

95 Cal. 374

Ex parte GORDAN. (No. 20,916.)

(*Supreme Court of California.* July 23, 1892.)

DIVORCE—CUSTODY OF CHILDREN—SUPPORT OF MINOR BY FATHER—CONTEMPT.

1. Under Civil Code, § 138, providing that in an action of divorce the court may give such direction for the custody of the children as may seem necessary, such order may be given, though neither party prays for the custody of the child, nor alleges the unfitness of the other in that respect.

2. In an action for divorce, an order requiring the husband to pay a certain amount to a third person for the support of his child is not a judgment in favor of a stranger to the action, but is a valid order for the payment of money to an agent of the court charged with the duty of carrying its decree into effect.

3. Such an order is based on Civil Code, §§ 196, 197, making it primarily the husband's duty to support his minor children, and hence may be issued, though the husband is not in fault in the matters involved in the case.

4. Such an order, though it describes the child by a wrong name, is valid if it sufficiently identify it.

5. Disobedience of such an order is contempt of court, for which the court has power to imprison.

In chambers. Petition by Robert Gordan for a writ of *habeas corpus*. Writ discharged.

James G. Maguire and *Sullivan & Gallagher*, for petitioner. *Henry I. Kowalsky* and *T. J. Crowley*, for sheriff of Solano county.

BEATTY, C. J. In December, 1887, the prisoner obtained a decree of divorce from his wife, Elka Gordan, on the ground of desertion. In his complaint for a divorce he alleged that the issue of his marriage with Elka Gordan was one female child, born August, 1885. He did not state the name of the child, nor did he allege any facts showing his fitness or his wife's unfitness to have her custody. The answer of Elka Gordan admitted the marriage, but denied generally all other allegations of the complaint, including, of course, the existence of the child. Neither party prayed for her custody, though the complaint contained a prayer for general relief. The cour-t, by its judgment granting the divorce, further ordered and decreed "that the custody of the child of said marriage, to wit, Leah Gordan, aged two years, be, until the further order of this court, placed in the charge and custody of the grandmother, Sarah Patek, to be by her cared for and sustained at the expense of plaintiff, Robert Gordan, in the city and county of San Francisco, California, and shall not be removed therefrom until further order of this court, or by consent of both parties, plaintiff and defendant." It appears from the evidence that this provision of the decree was inserted in pursuance of an agreement of the parties, by which the plaintiff promised to pay for the support of the child the sum of $25 per month. This agreement he performed punctually up to the month of December, 1889, when he refused to make any further payments. In January, 1890, Sarah Patek obtained a rule from the superior court commanding the plaintiff to show cause why he should not be required to pay $40 per month for the support of the child, and on the 25th of January, 1890, upon the hearing of the rule, an order was made in the action of Gordan v. Gordan, requiring Robert Gordan to pay to Sarah Patek, at her residence in San Francisco, the sum of $30 per month for the support of said child, designated in these proceedings as Lina or Lena Gordan. This order was complied with up to January, 1891, since which time the plaintiff has refused to make any further payments. In consequence of such refusal, several proceedings have been instituted against him, one of which is reviewed in Ex parte Gordan, 92 Cal. 478, 28 Pac. Rep. 489. After the decision in that case, plaintiff was again, in February, 1892, cited to show cause why he should not be punished for contempt of court in refusing to obey the order of January 25, 1890. In response to this order he appeared by counsel, and the court, after a full hearing, adjudged him guilty of the contempt charged, and ordered him to be imprisoned in the county jail until he paid the amount due and unpaid under said order of January 25, 1890. Upon this order a warrant was issued, under which the plaintiff was imprisoned by the sheriff of Solano county, and thereupon this proceeding was instituted for the purpose of securing his discharge from custody.

Four objections are made to the validity of the complaint: *First*, that under the pleadings in Gordan v. Gordan, the court had no jurisdiction to award the custody of Leah Gordan to Sarah Patek; *second*, that the court had no jurisdiction to order the plaintiff to pay money to Sarah Patek, a stranger to the action; *third*, that the order of January 25, 1890, is to pay money for the support of Lina Gordan, a different person from Leah Gordon; *fourth*, that it is a violation of the constitution to enforce this order by imprisonment.

As to the first point, I think section 138[1] of the Civil Code gave the court jurisdiction to make a proper order for the custody of the child. Its jurisdiction did not depend upon specific allegations as to the fitness of the respective parties, or their ability or willingness, to care for their offspring, nor upon a specific prayer for the custody. The pleadings would seem to indicate that one of the parties was oblivious of the child's existence, and that both were indifferent as to what should become of her; but this did not prevent the court from taking care of her interests. On the contrary, it furnished a good ground for the order that was made. Nor is it any objection to the validity of the order that there were no proceedings under section 1747 et seq. of the Code of Civil Procedure. Those sections prescribe the proceedings for the appointment of guardians generally, and afford one means of acquiring jurisdiction to dispose of the custody of minors, but they are not exclusive. In actions for divorce the court may always make such orders for the custody and maintenance of minor children of the marriage as may seem to be necessary. Civil Code, § 138.

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[1] Civil Code, § 138, provides that "in an action for divorce the court may, before or after judgment, give such direction for the custody, care, and education of the children of the marriage as may seem necessary and proper, and may at any time vacate or modify the same."

2. The order of January 25, 1890, was not a judgment in favor of a stranger. It was an order for the payment of money to an agent or officer of the court, charged with the duty of carrying its decree into effect. The decision in Sharon v. Sharon, 75 Cal. 38, 39, 16 Pac. Rep. 345, has no application. The power to compel the father to support his minor child does not depend wholly upon section 139 of the Civil Code. Whether he is with or without fault in the matters involved in the divorce suit, it is primarily his duty to support his minor children. Civil Code, §§ 196, 197. The wife, by her fault, may forfeit her own claim to be supported by her husband, but she cannot forfeit the claims of their children.

3. The names Lena or Lina Gordan, and Leah Gordan are not the same, nor are they *idem sonans;* but it happens that the child so variously designated is sufficiently identified throughout these proceedings by other terms of description, *e. g.*, the sole issue of the marriage of Robert and Elka Gordan.

4. The last objection is the most serious of all, and, if the question were a new one, I should hesitate to decide that payment in this case can be enforced by imprisonment; but I can see no distinction in principle between orders for the payment of alimony to the wife and orders to pay money for the support of minor children; and it is settled in this state that refusal to pay alimony is a contempt of court, punishable by imprisonment, or, what is the same thing in effect, that a party found to have the ability to pay may be imprisoned until he obeys. Ex parte Perkins, 18 Cal. 60; Ex parte Cottrell, 59 Cal. 417. I see nothing unlawful in the imprisonment. The writ is discharged, and the prisoner remanded.

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95 Cal. 378

CITY OF SANTA BARBARA v. ELDRED.

(No. 14,858.)

(*Supreme Court of California.* July 23, 1892.)

MUNICIPAL CORPORATIONS—TAXES—JURISDICTION—CONSTRUCTION OF STATUTES—PLEADING AND PROOF—VARIANCE.

1. In an action to recover city taxes it appeared the police court wrongfully retained jurisdiction of the case after demand was made to transfer to the superior court, and appeal was taken from a judgment on the merits to the latter court. Parties appeared in the superior court, and trial was had on the issues. *Held* that, as the superior court had original jurisdiction of the subject-matter, such jurisdiction was not affected by the irregular manner by which it got jurisdiction of the parties.

2. Act March 10, 1874, § 10, under which plaintiff was incorporated, provides for the levy of an annual tax, not exceeding 1 per cent., for the payment of certain bonds and the interest thereon, and the current expenses of the city. Act March 15, 1876, § 3, amends section 10 "so as to read as follows: To provide for the payment of said bonds, and the interest thereon, an annual tax shall be assessed and collected not exceeding one fourth of one per cent. * * *" The general law, (Pol. Code, § 4371,) taking effect in 1873, provides: "The direct taxes imposed by a common council in any one year must not exceed two per centum of the valuation of property within the city;" and Pol. Code, § 4408, confers on common councils power to levy and collect taxes. *Held*, that Act March 10, 1874, merely suspended the operation of Pol. Code, § 4371, as to plaintiff, and that section 3, Act March 15, 1876, repealed the act of 1874, as to levy of taxes for current expenses, leaving Pol. Code, § 4371, as the only limitation on the city council of plaintiff to levy taxes, and a levy by such council of $1.50 on each $100 of taxable property was not in excess of power.

3. Where, in an action to recover city taxes, the complaint alleged the rate of the levy to be $1.50 on each $100, and it appeared from the amount of tax for which suit was brought that it was computed at such rate, and the ordinance of plaintiff in evidence showed that the levy for taxes was made on the basis of $1.40 on each $100, there was a fatal variance between the pleading and proof.

4. In such case the supreme court has no power on affidavits to correct the record by amending the copy of the ordinance so that it may conform to the allegations of the complaint.

Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by the city of Santa Barbara against A. Eldred to recover city taxes assessed against defendant's property. Judgment for plaintiff, and defendant appeals. Reversed.

B. F. Thomas, for appellant. *Thos. McNulta*, for respondent.

GAROUTTE, J. Action brought in the police court to recover city taxes assessed against the property of appellant. A demurrer to the complaint was overruled, whereupon appellant answered, setting forth, among other matters, that the common council had no power to levy the tax; that the same was illegal and void, and asking that the action be transferred to the superior court for trial, under the provisions of section 838 of the Code of Civil Procedure. The application for a transfer was denied, and the court proceeded to hear the cause upon its merits, whereupon judgment was rendered for plaintiff for the sum demanded and costs. Appellant took an appeal to the superior court from the judgment on questions of both law and fact, and judgment was again rendered in favor of respondent. A motion for a new trial, based upon a statement of the case, was denied, and this appeal is prosecuted from the judgment and order denying a new trial. If the answer of appellant, filed in the police court, did not raise an issue as to the legality of the tax sought to be recovered, it follows that the judgment of the superior court was final, and this appeal should be dismissed, but upon an examination of the pleadings it is apparent that such an issue is presented. In the case of Santa Cruz v. Railroad Co., 56 Cal. 143, it was incidentally said that there was no provision of law authorizing a transfer of a cause from a police court to a district court, but we cannot subscribe to such doctrine. Section 933 of the Code of Civil Procedure provides: "All proceedings in civil actions in police courts must, except as in this title otherwise provided, be conducted in the same manner as civil actions in justices' courts." In the case of City of Santa Barbara v. Stearns, 51 Cal. 499, the transfer of a cause from the police court to the district court was expressly approved as being authorized under the foregoing section of the Code, and there can be no doubt but that the section is sufficiently broad to furnish authority for such a course. The verified answer of appellant having disclosed facts which required a transfer of the cause to the superior court, from the time of the filing of such answer the police court was ousted of its jurisdiction to proceed further upon the merits presented by the pleadings. People v. Mier, 24 Cal. 61; City of Santa Barbara, supra. Such being the fact, the judgment of the police court was void, and, if it possessed sufficient value to entitle it to the dignity of an attack, could have been successfully assailed by defendant in various ways. But, entirely disregarding the action of the lower court upon the jurisdictional question, appellant carried the case to the superior court by appeal, upon questions of both law and fact, and proceeded to trial upon the merits. The proper procedure certainly would have been for the superior court to have set aside the judgment and ordered the police court to remand the cause in accordance with section 838, heretofore cited. Under such a course the superior court would have obtained jurisdiction of the cause in the regular and orderly way, and, upon the right to appeal to this court, there could be no question. The police court had no jurisdiction to try the cause upon the merits, and it necessarily follows that the superior court had no appellate jurisdiction to try the case at all. But the superior court had original jurisdiction of the subject-matter, and the fact that the case gained ingress to it by way other than the front door in no manner affects its jurisdiction to hear and determine the cause. Having jurisdiction over the subject-matter, the court obtained jurisdiction over the parties when, without objection, they proceeded to trial upon the main issue, and then its jurisdiction became complete. The course adopted was a serious irregularity in procedure, but not jurisdictional, and becomes entirely immaterial when we consider the case, as we shall consider it, from the standpoint of being an original action brought in the superior court. If the appellate jurisdiction from the police court, and the original jurisdiction upon matters involving the legality of a tax, etc., were not both vested in the superior court, then the course pursued in City of Santa Barbara v. Stearns would have to be followed, and the cause sent back, with instructions to remand to the proper court. But the situation here presented is entirely different, and the case is clearly before us upon its merits. In Randolph Co. v. Ralls, 18 Ill. 29, a case entirely similar in principle, the court said: "The circuit court, then, had original jurisdiction of the subject-matter, and the parties, by voluntarily appearing and consenting to a trial between them upon that subject-matter, waived all objection to jurisdiction of the parties. The suit stood, so far as the jurisdiction of the court is concerned, the same as if it had been originally commenced in the circuit court in the ordinary way, and the parties brought in by the service of process; or if they had voluntarily entered their appearance without any previous proceedings, and without objection gone to trial. In the case of Allen v. Belcher, 3 Gilman, 594, the suit was commenced before a probate justice of the peace, and appealed to the circuit court, where the parties appeared, and the cause was by consent tried; and, upon error, this court held that it was immaterial whether the probate justice had jurisdiction of the subject-matter of the suit, * * * and the parties having consented to its jurisdiction of their persons, the circuit court might adjudicate upon the subject-matter as an original cause. * * * It would be trifling with courts and the rights of parties to permit suitors, after voluntarily appearing and going to trial, to avail themselves of objection to the preliminary proceedings by which the cause of the parties were in court. These are dilatory matters, which they may waive, and they are deemed to have waived them by full appearance without objection."

It is contended that the levy of taxes at the rate of $1.50 upon each $100 of taxable property was in excess of the power of the common council. The city of Santa Barbara was incorporated under an act of the legislature approved March 10, 1874; the following sections of which act read as follows: "Section 1. The territory described in the second section of this act, and the inhabitants thereof, are hereby declared to be a municipal corporation under the Political Code of this State." "Sec. 10. To provide for the payment of the said bonds and the interest thereon, and the current expenses of the said city, an annual tax shall be assessed, and levied and collected, not exceeding one per cent.; and one third of the money resulting from the said tax shall be devoted to the payment of the annual interest of the said bonds, and constitute a sinking fund for their redemption." An amendatory act to the foregoing charter was approved March 15, 1876, of which act section 3 is as follows: "Sec. 3. Section 10 of said act is hereby amended so as to read as follows: Sec. 10. To provide for the payment of said bonds, and the interest thereon, an annual tax shall be assessed and collected not exceeding one fourth of one per cent., and the money resulting from the said tax shall be devoted to the payment of the interest of the said bonds, and constitute a sinking fund for their redemption."

Under the general law of the state pertaining to municipal corporations which took effect January 1, 1873, we find section 4371 of the Political Code, which reads:

"The direct taxes imposed by a common council in any one year must not exceed two per centum of the valuation of property within the city." Also section 4408, referring to the powers of the common council, subd. 19, "to levy and collect taxes." With this legislation before us it is apparent what the power of the common council as to the levy of taxes was at the time the levy here involved was ordered. The general power to levy and collect taxes is expressly granted to respondent by said section 4408, and, in the absence of section 10 of the act of 1874, the limitation of the power of the common council in fixing the rate of the levy would be found in section 4371 of the Political Code, already quoted. But section 10 of this act declares a different limitation, and must control and supersede the general law, as far as respondent's interests are involved. Section 3 of the act of 1876 makes a most material amendment to section 10, and as section 10 stands amended it results in the repeal of all those portions of the original section referring to the levy of a tax for current expenses of the city government, and leaves the limitation upon the power of the council with reference only to the tax to be levied and collected to pay interest upon and establish a sinking fund for the payment of certain bonds. If appellant's contention were true, that section 10 of the act of 1874 repealed section 4371 of the Political Code, then the repeal of the material portions of section 10 by the act of 1876 left the power of the council to levy a direct tax entirely without statutory control or limitation of any kind, and the validity of the levy here involved would necessarily withstand attack. But section 10 did not repeal the general law upon the subject. It is plain that a special act of the legislature, pertaining to one city, cannot repeal a general law pertaining to all cities. Neither can it properly be said to be in full effect as to other cities and repealed as to respondent. The effect of the enactment of section 10 was simply to suspend the operation of the general provision of law as to respondent, and when section 10 was repealed the suspension no longer existed, and respondent came under the operation of the general law. Again, it may be said the special provision excepted respondent from the effect of the general law, to the same extent as though it were a part of the general law, and when the provision creating the exception was repealed the operation of the general law was extended to that extent. See Smith v. Hoyt, 14 Wis. 252; Heinssen v. State, (Colo. Sup.) 23 Pac. Rep. 995. We conclude that section 4371 of the Political Code is in full force and effect as to respondent.

Appellant makes many objections to the rulings of the court upon the admissibility of evidence, but owing to the fact that the cause must be returned to the lower court for a new trial, and those matters may not again arise, we refrain from reviewing the assignments based upon such rulings. The complaint alleges that the rate of the levy made by the council was $1.50 upon each $100 of taxable property, and by calculation it is demonstrated that the amount of the tax for which suit is brought was computed at such rate. The ordinance of respondent, found in the record, shows that the levy for taxes was made upon the basis of $1.40 per each $100 of taxable property. A fatal variance is thus created between the pleading and the proof. Respondent, since the argument of the cause in this court, has presented affidavits asking us to correct the statement upon motion for a new trial, by amending the copy of the ordinance set out therein so that it shall conform to the allegations of the complaint. We have no power to adopt such a course, as has been fully decided in Hyde v. Boyle, 86 Cal. 352, 24 Pac. Rep. 1059, and In re Gates, 90 Cal. 257, 27 Pac. Rep. 195. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: PATERSON, J.; HARRISON, J.

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95 Cal. 390

REBMAN v. SAN GABRIEL VAL. LAND & WATER CO. (No. 14,708.)

(*Supreme Court of California.* July 23, 1892.)

BUILDING CONTRACT—FAILURE TO RECORD—QUANTUM MERUIT—EVIDENCE.

1. Where a written contract for furnishing materials and erecting buildings is void for failure to record it, as required by Code Civil Proc. § 1183, the party furnishing such materials and erecting such buildings may maintain an action on an implied contract for the value thereof; Code Civil Proc. § 1197, providing that nothing in the foregoing statute shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished, to maintain a personal action to recover such debt against the person liable therefor.

2. Such unrecorded contract is not conclusive evidence of the value of the labor and materials.

3. A finding by the court that a written contract was void is equivalent to finding that there was no written contract.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Action by John Rebman against the San Gabriel Valley Land & Water Company to recover for labor and materials furnished in the erection of buildings. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

A. H. Judson and *M. C. Hester*, for appellant. *J. T. Houx* and *John Haynes*, for respondent.

VANCLIEF, C. This is an appeal by defendant from a judgment of $8,263.24 against it for a balance found to be due the plaintiff for work and labor and materials furnished in building an hotel, a laundry, a gas house, and for repairing the hotel. The appeal is upon the judgment roll containing a bill of exceptions raising questions of law and fact. A distinct written contract was signed and delivered by the parties for the construction of each of the buildings above mentioned, and for the repairing of the hotel, before the work was commenced. The contract price for furnishing materials and building the hotel was $48,900. For the laundry it was $1,100. For the gas house it was $484. And for repairing the hotel it was $595. None of these contracts was ever filed or recorded in the office of the county recorder of the county in which the buildings are situated. They were made at different times, the contract for the hotel being first in order of time. The complaint consists of five counts: (1) to recover the reasonable value of the labor and material in building the hotel, alleged to be $53,602.76, less $47,000 paid thereon; (2) to recover the reasonable value of labor and materials in building the laundry, alleged to be $1,100, less $863.50 paid; (3) a special count upon the written contract for building the hotel, to recover a balance of $1,900, alleged to be unpaid; (4) a special count upon the gas house contract, to recover a balance of $104.06, alleged to be due and unpaid; and (5) a special count upon the written contract for repairing the hotel, to recover an alleged balance of $127.95. The prayer of the complaint is that plaintiff recover the sum of these several balances with interest. The complaint is not verified. The answer of defendant (1) denies each and every allegation in the complaint; (2) alleges payment in full; (3) alleges, in answer to the first count, that all the labor done and materials furnished for the hotel were done and furnished under and in pursuance of the written contract, and that defendant has fully performed its part of said contract; (4) alleges, in answer to the second count, that the labor and materials done and furnished for the laundry were done and furnished under a written contract, which defendant had fully performed on its part; (5) in further answer to the third count alleges that, by the contract therein mentioned, the plaintiff was required to complete the hotel by the 8th day of December, 1887, but failed to complete it until April, 1888, by reason whereof defendant sustained damages in the sum of $6,000, which is pleaded as a counterclaim; (6) in answer to the fourth and fifth counts, alleges full performance of the contracts therein mentioned on its part; and (7) alleges, in answer to the entire complaint, a settlement of all matters mentioned therein, and payment in full of the balance agreed upon in the settlement, which payment was accepted by plaintiff in full satisfaction of all claims against defendant on account of all matters mentioned in the complaint. The defendant also filed an unverified cross complaint, claiming damages for nonperformance of the written contract for the building of the hotel within the time limited by, or in accordance with the specifications of, that contract, which cross complaint was answered by a general denial thereof. The court found for the plaintiff upon all the issues, except those arising upon the third count of the complaint, as to which it found that the hotel contract, upon which that count was based, had not been filed in the recorder's office, and was therefore void.

1. Counsel for appellant contend that the first count of the complaint does not state facts sufficient to constitute a cause of action, because it does not show that the implied contract, upon which it rests, was filed in the recorder's office in accordance with section 1183 of the Code of Civil Procedure, although it appears that the amount agreed to be paid thereunder exceeds $1,000. But the first count does not show that any particular amount was agreed to be paid for the labor and materials expended in building the hotel, but only that such labor and materials "were reasonably worth $53,602.76." Nor does the Code provide for recording an implied contract, even conceding that it would be possible and practicable to record such a contract. But the real question intended to be presented under this head is expressed by counsel for appellant as follows: "Can parties, who have failed to put their contract in writing, avoid the force and penalty of the statute by suing a *quantum meruit* or *quantum valebat?*" Of course no party can evade the force or penalty of the statute. Counsel's question, however, assumes that the statute applies to implied contracts, and that the penalty is incurred by a failure to record an implied contract, and thus evades the only question in dispute, viz., what are the force and the penalty of the statute? The statute literally applies only to express contracts, stating the mutual obligations of the parties thereto, thereafter to be performed, and requires such contracts to be reduced to writing and filed in the recorder's office "before the work is commenced." Yet no implied contract for labor or materials is complete until after the labor is done or the materials furnished at the request of the owner of the contemplated structure. Neither the mere request of such owner for the performance of labor, or the furnishing of materials, nor the mere performance of labor or the furnishing of materials without such request, express or implied, constitutes a complete contract by implication. An implied contract arises only from the request of one party and performance by the other, though the request is often inferred from the circumstances attending the performance. It follows that the legislature could not have intended to require implied contracts for labor and materials to be written and recorded before the commencement of the work. Nor does the statute expressly, or by necessary implication, prohibit an action upon such implied contracts, to recover the value of the labor or materials, though such value may exceed $1,000. See Kiessig v. Allspaugh, 91 Cal. 234, 27 Pac. Rep. 662. On the contrary, section 1197 of the chapter on liens seems to except such contracts from the penalty of a failure to record: "Sec. 1197. Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done, or materials furnished, to maintain a personal action to recover such debt against the person liable therefor." In Holland v. Wilson, 76 Cal. 434, 18 Pac. Rep. 412, the complaint was similar to the first count of the complaint in this action; and the answer thereto alleged as a defense "that the work and materials were done and furnished in pursuance of a written agreement executed by the defendant and the plaintiff * * * before the work was commenced." The plaintiff demurred to this answer on the ground that

the written contract was void because it did not appear to have been recorded as required by section 1183, Code Civil Proc. The lower court sustained the demurrer, and gave judgment for plaintiff on the implied contract, and this court affirmed the judgment on the ground that the written contract was void because not recorded; yet, on the theory of counsel for appellant in this action, the answer to which the demurrer was sustained was a perfect defense to that action, though the written contract pleaded had not been recorded. If the theory of the appellant here is correct, the demurrer to the answer in the case cited should have been overruled, and the plaintiff therein should not have been permitted, as he was, to "avoid the force and penalty of the statute, by suing upon a *quantum valebat* count." See *dictum* in Palmer v. White, 70 Cal. 220, 11 Pac. Rep. 647.

2. The second count is like the first, and is objected to upon the same grounds, and therefore needs no additional consideration.

3. It is claimed for appellant that the third count, which is a special count upon the written contract, does not state a cause of action, because that contract was not recorded. But the trial court sustained this point, and plaintiff recovered nothing upon that count, and claims nothing upon it here.

4. Counsel for appellant contend that, conceding the hotel contract to be void because not recorded, nevertheless it should have been received as conclusive evidence of the value of the labor done and materials furnished by plaintiff in the building of the hotel; and therefore that the evidence did not justify the court in finding, as it did, that the reasonable value of such labor and materials was greater than the price stated in that contract. This means that the written contract, though not recorded, is not entirely void, but obligatory upon the parties in at least one important respect. I think this point cannot be maintained. The question involved relates merely to the construction of section 1183 of the Code of Civil Procedure, and has been expressly and specifically decided by this court adversely to the contention of appellant. Kellogg v. Howes, 81 Cal. 170, 22 Pac. Rep. 509; Lumber Co. v. Neal, 90 Cal. 214, 27 Pac. Rep. 192; Willamette S. M. Co. v. Los Angeles College Co., (Cal.) 29 Pac. Rep. 629; Holland v. Wilson, 76 Cal. 434, 18 Pac. Rep. 412. In Willamette S. M. Co. v. Los Angeles College Co., supra, it is said that the effect of failing to record a building contract "was to render the contract 'wholly void' for all purposes. It cannot be the basis of a recovery by the contractor against the owner, nor can it be looked to for the purpose of determining the amount for which the owner is liable, or when any payment is to be made. * * * If the contract is 'wholly void' there is neither a 'contract' nor an 'original contractor.' * * * Inasmuch as, by a failure to file the contract in the recorder's office, it became wholly void, it was not available as a defense for any purpose, either to determine the amount of the contract price, or to limit the liability of the appellant, or as a foundation of a right to complete the building according to its terms." And all this seems to be fairly deducible from the other cases above cited. But even conceding that the void contract is merely competent evidence, tending to prove the value of the labor and materials, but not conclusive, its effect was only to create a conflict with other evidence tending to support the finding in question, and quite sufficient to justify it, by the rule here applicable.

5. The point that there is no finding upon the issue as to whether the labor was done, and the materials furnished, under and in pursuance of the alleged written contract, is not well taken. The finding that the alleged contract—the only contract relied upon by defendant—never had been recorded, and was therefore wholly void, is equivalent to a finding that there was no written contract; from which it necessarily follows that no labor or materials could have been done or furnished under such contract, and that no defense to this action can be based upon it. This conclusion is not affected by the facts that a writing, corresponding in form to the alleged contract, had been signed and delivered by the parties, and that the labor may have been done and materials furnished in accordance with the terms of that paper. But, in this connection, it is to be observed that, if defendant's cross complaint is true, the labor was not done according to that contract.

6. The evidence is sufficient to justify the seventh finding, to the effect that the parties had no settlement of any of the matters mentioned in the complaint, and that plaintiff did not receive any sum or sums of money paid him, in full satisfaction of any of his demands.

7. The issues arising upon defendant's counterclaim and cross complaint are completely disposed of by the finding that the alleged written contract, upon breaches of which they solely depend, was void, because not filed in the recorder's office. Holland v. Wilson, 76 Cal. 434, 18 Pac. Rep. 412. Besides, the court did find that the delay in completing the work, complained of in the cross complaint, was not attributable to any default of the plaintiff. Other points are made by appellant, but those of them to which an answer may not be found under the foregoing heads require no special consideration. I think the judgment should be affirmed.

We concur: Belcher, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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95 Cal. 430

FLEMING v. FLEMING. (No. 14,644.)

(*Supreme Court of California.* July 27, 1892.)

DIVORCE—CRUELTY—MENTAL SUFFERING.

Whether certain acts cause such "grievous mental suffering" as to be a ground of divorce, within Civil Code, § 94, is a question of fact for the trial court, and is not a question of law.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Minnie L. Fleming against Samuel J. Fleming for divorce on the ground of cruelty. Decree for plaintiff, and defendant appeals. Affirmed.

Thos. J. Carran and *C. W. Pendleton*, for appellant. *John G. Rossiter*, for respondent.

PATERSON, J. This is an action for divorce on the ground of extreme cruelty. The material allegations of the complaint are as follows: "Plaintiff further alleges that on the evening of the 11th day of March, 1891, the plaintiff and defendant left their home in South Pasadena, in this county, for the purpose of attending a lecture in the city of Los Angeles; that they left their infant child at their said home in the care of their domestic, one Annie Peterson; that after said lecture the plaintiff and her sister went to the house of a friend in the said city of Los Angeles for the purpose of spending the night there; that the defendant returned to their said home and found the said Annie Peterson in bed and asleep; that defendant then and there entered the bed of said Annie Peterson, and attempted to have sexual intercourse with her; that he tried to persuade her that it would not be wrong for him and her to have sexual intercourse together; that he remained in bed with the said Annie Peterson for upwards of two hours before retiring to his own room; that this conduct on the part of defendant has received great publicity by reason of a complaint having been made by the said Annie Peterson before a magistrate in the city and county of Los Angeles, charging the defendant with having at said time and place assaulted her with intent to commit a rape upon her; that afterwards the said defendant came to plaintiff and threatened to turn her out upon the world penniless unless she would help him to keep the said Annie Peterson from prosecuting him on the said complaint; that this conduct on the part of the defendant, and the publicity which has been given to it, has caused plaintiff grievous mental suffering, thereby greatly impairing her health." The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, the demurrer was overruled, defendant offered no further defense to the action, the court upon the proofs taken found the facts alleged in the complaint to be true, and judgment was entered in favor of the plaintiff, dissolving the bonds of matrimony. From this judgment the defendant has appealed, and now insists that the demurrer ought to have been sustained, because the facts alleged are insufficient to support a finding of extreme cruelty. Our statute provides that "extreme cruelty is the infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage."[1] Courts and elementary writers have found it impossible to define with precision what acts will constitute extreme cruelty, and it would be idle for us to review the decisions cited, because they are as variant as the language of the several statutes upon which they were founded. The habits and dispositions of different married persons vary so much that it is impossible to lay down any universal rule for the determination of what indignities should be regarded as grounds of divorce under the statute. Among savages, the conduct imputed to this defendant might not be regarded as reprehensible. The legislature has necessarily employed general words, and left each case to be determined according to its own peculiar circumstances by the good sense and judgment of courts and juries. "Whether in any given case there has been inflicted this 'grievous mental suffering,' is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party." Barnes v. Barnes, 30 Pac. Rep. 298, (filed June 18, 1892.) We cannot, as matter of law, say that the conduct charged in the complaint did not inflict upon the plaintiff grievous mental suffering. The court below has found as a fact that it did, and it is the province of that court, and not our own, to determine the facts. The evidence is not in the record, and the finding is conclusive. We presume the court considered the character of the parties, and was guided by the statute and its sense of right and justice, and not by any chivalric sentiment, in awarding a decree to the plaintiff. The attorneys for appellant attempt to excuse his conduct on the ground that the acts imputed to him were not willfully or deliberately done to annoy or vex the plaintiff; that he did not suppose any publicity would be given to them, or that his wife would be told about them; but the law will not condone a violation of the marriage obligation on any such ground. His conduct being voluntary, and inconsistent with marital integrity, it is conclusively presumed that he intended the natural and ordinary effect thereof upon his wife. He, better than any one else, is supposed to know the effect a disclosure of his acts would have upon her. He took the chances of being found out, and must suffer the consequences. His threat to turn his wife out upon the world penniless, unless she assisted in saving him from a prosecution for his offense, did not indicate any contrition on his part, or that his consideration for the feelings of plaintiff would be any greater in the future than it had been in the past.

Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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95 Cal. 371

PEOPLE v. FRENCH. (No. 20,917.)

(*Supreme Court of California.* July 23, 1892.)

LARCENY—INSTRUCTIONS—ALIBI—CROSS-EXAMINATION.

1. The fact that a witness, on an indictment for the larceny of cattle, makes voluntary statements as to the acts of defendant with reference to certain other cattle, does not give defendant the right to cross-examine on such matters.

2. Where two witnesses, claiming to be *particeps criminis* with defendant in the larceny of certain cattle, testified to having taken possession of the cattle with defendant on the

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[1] Civil Code, § 94.

20th of a certain month, and other parties testify to having seen defendant in possession of the cattle a day or two later in an adjoining county, an instruction that the essence of the crime, which was charged as having been committed on or about the 20th, was the felonious stealing, and that, if this was done by defendant, although not perhaps on the day mentioned, but within a few days of that time, it was sufficient to justify conviction, is not objectionable in depriving defendant of evidence introduced for the purpose of an *alibi*, and tending to show that on the 20th, at least, he was in a town several miles from the scene of the larceny; but the evidence as to the *alibi* is still entitled to consideration.

Department 1. Appeal from superior court, Butte county; J. C. Gray, Judge.

George W. French, having been convicted of larceny, appeals. Affirmed.

McGee & Reardon, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

Garoutte, J. The appellant, French, was convicted of the crime of grand larceny, and appeals from the judgment and order denying his motion for a new trial. The court very properly sustained an objection to the question, "When was it you drove them there?" The interrogatory did not refer to the cattle which the defendant was charged with stealing, and was wholly irrelevant to the issue upon trial. The fact that the witness in his examination in chief made statements as to the acts of the defendant with reference to certain other cattle, which, as far as the record discloses, were statements volunteered by him, does not give appellant the right to enter into a cross-examination upon such matters. The subject-matter of examination was foreign to the issue, and appellant's remedy was an objection to the questions, if such were asked, and, if the statements were volunteered, then a motion to strike out would have subserved all purposes.

The court gave the jury the following instruction: "The essence of the crime charged in this information is 'feloniously stealing and driving away the cattle.' This is charged to have been done on or about the 20th of November, 1890. You will see that the precise day on which it took place is not given. 'On or about' are the words of the information; and I instruct you that if you believe from the evidence in this case, beyond a reasonable doubt, and to a moral certainty, that the defendant stole or aided in stealing the cattle named in the information, though you may not believe that it was done on the 20th day of November, but within a few days within that time, then your verdict should be 'guilty;' for the law looks to the crime committed, and not to the precise day when it was done, if done before the filing of the information, and within a reasonable time of the day named. This is the law in all cases except when time is of the essence of the crime charged, and, as I said before, time is not of the essence of the crime in this case. Appellant's defense was an *alibi*, and while, with argument, he attacks the principle embodied in the foregoing instruction, no authority is cited in his support. Two witnesses claiming to be *particeps criminis* with appellant in the commission of the larceny testified that in company with him they took possession of and drove away the cattle upon the 20th day of November. Other parties testified they saw appellant in possession of the cattle a day or two later, in an adjoining county. Appellant's evidence tended strongly to show that he was in the town of Gridley upon the 20th day of November,—a town situate several miles distant from the scene of the alleged larceny. Upon this state of facts the instruction expressed the law, and we are unable to see how the giving of it in any manner infringed upon the rights of appellant. As the court said, the exact date of the commission of the crime was immaterial. The material fact was, did the appellant commit the larceny? He was not deprived of the effect of his evidence upon the question of *alibi* by the instruction of the court. It was before the jury for all that it was worth, and no doubt was fully weighed by the jurors in arriving at a verdict. If it had sufficient force, it overthrew the statement of his cocriminals as to the date of the larceny, and overthrowing their testimony in this regard would naturally weaken it as to the main issue; but all those matters came before the jury, and were duly considered. We will suppose that appellant's evidence established beyond a doubt his presence in the town of Gridley during the entire day of November 20th. Such fact would not have authorized the court to advise the jury to acquit by reason of an *alibi*. Again, the evidence in this case may have indicated appellant's guilt to a moral certainty, and, conceding his *alibi* to have been proven as attempted, certainly his acquittal would not have followed from such conditions. A complete and perfect *alibi* establishes as a fact that a party did not commit the offense charged; but the *alibi* attempted to be shown in this case, if it had been successfully established, would have entirely failed to meet such requirement of the law. For the foregoing reasons the judgment and order are affirmed.

We concur: Paterson, J.; Harrison, J.

(95 Cal. 397)

In re LAMB'S ESTATE. (No. 14,852.)

(*Supreme Court of California*. July 23, 1892.)

Homestead—Nature of Estate—Abandonment—To whom Descends—Bill of Exceptions—Amendment.

1. A person who, before his marriage, had entered certain land as a homestead, received the patent after his marriage. The wife then filed a declaration of homestead to the land. Differences having arisen, an agreement was entered into looking to the division of the land, whereby the husband was to convey a part to the wife, and the wife to release the balance to the husband. *Held*, that the land was the separate property of the husband, and that, since Code Civil Proc. § 1474, provides merely that the homestead shall vest absolutely in the survivor, when selected from the community property or from the separate property of the person selecting or joining therein, it must be regarded, under the same section, as having been selected without the consent of the wife, and "as vesting in her heirs, subject to the power of the court to assign it for a limited period to the family of the de-

ceased." Harris v. Harris, 12 Pac. Rep. 274, 71 Cal. 314, followed.

2. An agreement between husband and wife for the division of a homestead, and deeds executed in pursuance of such agreement, none of which are recorded, do not operate as an abandonment of the homestead under Civil Code, § 1244.

3. The fact that a wife, who has selected a homestead from the separate property of the husband, afterwards acquires title to the property by deed from the husband, does not render the selection one from her separate property, within the meaning of Code Civil Proc. § 1474, so as to vest an absolute title in the husband on his survivorship.

4. Where a wife dies leaving no children, and it does not appear that the wife's father had made his home with her, or that his circumstances were such that she was under any obligation to support him, the husband may be regarded as the "family," within Code Civil Proc. § 1474, which allows the court, under certain circumstances, where the homestead has vested in the heirs, to assign it for a limited period to the family of the deceased.

5. Where no specifications are made in a bill of exceptions of the particulars in which errors are claimed, and an appeal is taken from a decision made before the settling of the said bill, it is proper to allow an amendment to the bill by inserting such specifications.

Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

In the matter of the estate of Philanda Lamb, deceased. From an order setting apart a homestead, the father of the deceased appeals. Reversed.

E. W. Hendrick and *Chapman & Hendrick*, for appellant. *Lawrence Middlecoff* and *Eugene Daney*, for respondent.

DE HAVEN, J. This is an appeal from an order setting apart to George W. Lamb, the surviving husband of deceased, upon his petition therefor, a homestead upon 160 acres of land described therein. The appeal is taken by the father of deceased. The facts, as disclosed by the record, are these: The petitioner and deceased were married September 15, 1884. Prior to this time the petitioner had filed in the proper United States land office his application to enter the land in controversy as a homestead, under the laws of the United States, and had resided thereon for four years; and one year after such marriage he made his final proof, entitling him to a patent therefor, which was issued to him on July 9, 1889. On November 17, 1887, the deceased filed in the office of the proper recorder a declaration of homestead upon the whole of said land under the laws of this state, and on February 23, 1888, the petitioner made to her a deed of this and other land. Thereafter differences arose between them, and in November, 1889, the deceased commenced an action against petitioner for a divorce and for a division of the property, and upon the 22d day of that month they made an agreement in writing, for the purpose, as stated therein, of "terminating all further controversies between them." The agreement, among other things, provided that they should live separate and apart from each other, and contained also this provision: "The said Geo. W. Lamb, in consideration of the adjustments herein referred to, and other releases of the said Philanda, his wife, does hereby convey and release all claim to the following described property, to wit,"—followed by a description of 50 acres of the land in controversy, and the said deceased agreed to release all the property to said Lamb "now owned by him." In pursuance of this agreement, the petitioner gave the deceased a deed of the 50 acres described in the agreement, and she gave to him a deed of the remaining 110 acres. The agreement referred to was not recorded in the lifetime of deceased, nor was either of the deeds which were given in pursuance thereof. In this connection the petitioner testified that after the execution of this agreement, and until her death, he and his wife continued to live together upon the land in controversy, and in a house situate upon the 50 acres which he deeded to her. The petitioner further testified, in reference to the agreement for a separation and division of the property, that it was subsequently understood betweeen them that it was to be of no effect; "we did not count that instrument worth anything; we never calculated to have it recorded." The superior court, in its decree, set apart to the petitioner as his property, and free from further administration, all of the land described in the declaration of homestead filed by the deceased.

1. The claim of respondent is that the decree of the court is justified by section 1474 of the Code of Civil Procedure. That section, so far as material to the question under consideration, is as follows: "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the decedent." It will be observed that in order to bring a homestead within the provisions of this section, so that upon the death of one of the spouses it "vests absolutely in the survivor," it must be made to appear that it was selected from the community property in the first instance, "or from the separate property of the person selecting or joining in the selection of the same;" and we are of opinion that upon the facts, as above stated, the homestead in this case did not vest absolutely in the petitioner upon the death of his wife. The land in controversy was not community property at the date when the deceased made and recorded her declaration claiming the same as a homestead, but it was the separate property of the petitioner. The petitioner had before his marriage made application to enter the land as a homestead under the laws of the United States, and, although he had not at the time of such marriage fully completed

the term for which he was to reside upon and cultivate it, so as to entitle him to receive a patent therefor from the United States, still he had fully performed all of the conditions required of him by such laws up to that date, and by his prior acts of entry, residence, and cultivation he had acquired an equitable interest in the land, which, of course, was his separate property, and to which the legal title afterwards conveyed by the patent related; and that which was before separate property, to which he had but an equitable title, was, after the issuance of such patent, still his separate property, and held by him under the legal title conveyed by such patent.

This was, in effect, so held by this court in the case of Harris v. Harris, 71 Cal. 314, 12 Pac. Rep. 274. In that case it appears that the defendant, while a widow, and in the occupation of certain land, filed in the United States land office a declaratory statement of her intention to pre-empt the same. She afterwards married the plaintiff in that action, and thereafter they both jointly occupied and farmed the premises until she made final proof of her pre-emption claim in the new name she had acquired by the marriage, and was allowed to make a final entry of the same. The court held that the property was the separate property of the wife, no matter whether the same was paid for with community funds or with money borrowed upon her own credit, and on this point the court, in its opinion by McKINSTRY, J., said: "In this action for divorce the plaintiff claims a moiety of the land patented to the defendant on the ground that the money paid for the government title belonged to the community. Even if it appeared that the money was paid out of community funds, the land would be the separate property of the wife. With full knowledge and consent of plaintiff, the land was proved up and paid for in her name, and the proof of her occupation and 'declaration' or affidavit was as necessary a prerequisite to the acquisition of the government title as was the payment of the price. The patent is a record which proves the facts which preceded its issuance, on proof of which the proper officers of the United States were authorized to issue it. For certain purposes, the possession of either spouse is the possession of both. But here the pre-emption, declaration, and exclusive occupation of the defendant preceded her marriage with the plaintiff, and constituted parts of the acts which culminated in the certificate of purchase and patent. The plaintiff ought not to be permitted to ignore her declaration and possession, (without proof of which she could not have received the benefits of pre-emption,) and treat the acquisition of the government title simply as an ordinary purchase, made after marriage, without community funds." What was there said with reference to the effect of the prior settlement and declaration of the pre-emption claimant as the basis of his right to obtain the subsequent title applies with equal force to this case; and with much greater reason can it be said that the subsequent acquisition of the legal title was not one of purchase, made with community funds, as the title thus received was more in the nature of a gift from the government, because of the performance by petitioner of the conditions prescribed by the homestead laws in relation to residence upon and cultivation of the land. The fact that during a small portion of the time he was thus required to reside upon it the deceased was also living there with him as his wife would not deprive him of the equitable right which he had acquired to such land before marriage by reason of his previous entry and settlement, and convert it into community property. The cases of Lake v. Lake, 52 Cal. 428, and Barbet v. Langlois, 5 La. Ann. 212, also sustain this conclusion.

2. The homestead selected by the deceased under the laws of this state was not abandoned by the subsequent agreement between petitioner and deceased for its division between them. This agreement was not recorded by either of the parties, and, if it should be conceded that it was otherwise sufficient as a declaration of abandonment, the failure to record it rendered it insufficient for that purpose. Civil Code, § 1244. The deed of the premises executed by petitioner to deceased February 23, 1888, operated to vest the legal title thereto in the wife as her separate property, but did not constitute an abandonment of the homestead. Burkett v. Burkett, 78 Cal. 310, 20 Pac. Rep. 715. We do not understand that there is any claim here that this deed was not executed—that is, signed and delivered—by petitioner, and, this being so, its effect was to change the ownership of the land which it purported to convey from separate property of the petitioner to separate property of his wife, subject to the homestead thereon, which then became a homestead upon the separate property of the wife. The subsequent deed, made by the deceased to the petitioner in pursuance of the agreement for a separation and division of the property, reinvested him with the title to the 110 acres described therein, while his deed, made to her at the same time, was in effect a confirmation or further assurance of title to the 50 acres which it purported to convey; so that, as a result of the execution of all the deeds mentioned, 110 acres of the land in controversy remained the separate property of the petitioner, and the other 50 acres became the separate property of his wife, and all subject to the homestead which had been placed thereon, and never abandoned.

This being so, it only remains to consider the nature of this homestead, so far as it affects the 50 acres of which the deceased was the owner. Can it be said, in view of the facts, that this homestead was selected by her, as stated, from her separate property, within the meaning of section 1474 of the Code of Civil Procedure? It is clear to us that this question must be answered in the negative. It is true the declaration of homestead was made and recorded by her, but this was at a time when all of the land in controversy was the separate property of her husband, the petitioner; and the subsequent acquisition by her of the title to 50 acres thereof as her separate property did not have the effect to change the prior declaration into a selection by her of a homestead from her separate property. When the statute speaks of the selection of a homestead "from the separate property of the person selecting or joining in the selection of the same," it has reference to the *status* of the property as separate property at the time when the selection is made; for only in such case can there be properly imputed to the person making the selection an intention to dedicate his or her property for homestead purposes, and thus to vest in the other spouse an estate therein, which, upon the contingency of survivorship, will ripen into an absolute title to the land so dedicated. It would be subversive of the object and purpose of this law to hold that the wife's subsequent acquisition of title to property, from which she selected a homestead when it belonged to her husband, could be made to relate back and give to her former act in selecting such homestead an intention and purpose which did not in fact then accompany it. It follows from these views that the court erred in setting apart to petitioner absolutely, and as his property, the 50 acres which he conveyed to his wife in her lifetime. Such property is to be treated as if the homestead thereon had been selected without her consent, and as vesting in her heirs, "subject to the power of the superior court to assign it for a limited period to the family of the deceased." Section 1474, Code Civil Proc.

3. The deceased left no children, and it is not shown that the father made his home with her, and that his circumstances were such that she was at the time of her death under any moral or legal duty to support him. This being so, the petitioner may be regarded as constituting the family of deceased, within the meaning of section 1474 of the Code of Civil Procedure. It is true that the word "family" in its ordinary signification refers to two or more persons, and, as used in the section just referred to, will include those living under the same roof as kindred or dependents, and under one head, thus constituting a family, as that term is generally understood; but this word, as used in the statute concerning probate homesteads, is not to be so restricted in its meaning as to exclude the only survivor of the family of which the deceased was a member. The object of the statute is to preserve the family home for the use and benefit of the survivor or survivors of those occupying it as such, and the right of the surviving husband or wife to retain this home for such period as the court may direct does not depend upon the fact that there are children or others who may share in its use. Upon the evidence the petitioner was entitled to a decree setting apart to him as his own property the 110 acres referred to, and it was within the discretion of the court to assign to him for such limited period as it might decree proper the 50 acres of which deceased was the owner. The right to the order assigning to him for a limited period this 50 acres is not absolute, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it.

4. In the bill of exceptions, as originally settled, there was no specification of the particulars in which it was claimed that the findings and decree of the court are not sustained by the evidence. After the appeal herein was taken, the judge of the superior court allowed the bill of exceptions to be amended by inserting such specifications. This action of the judge was proper in this case, as the appeal here is from a decision which was made before the bill of exceptions was settled, and the effect of the amendment is simply to enable this court to review the decision of the lower court, in view of all the facts which that court had before it when it made such decision. Hayne, New Trials & App. § 160; Valentine v. Stewart, 15 Cal. 396; Lencks v. Edmonson, 18 Cal. 204.

The order appealed from is reversed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

64 Cal. 3

LACOSTE v. SPLIVALO *et al.*[1]

(*Supreme Court of California.* July 27, 1883.)

ADMINISTRATORS—DEVASTAVIT—BOND FOR ADDITIONAL SECURITY—LIABILITY OF SURETIES.

1. The effect of Code Civil Proc. §§ 1397 1402, providing that, in case of the insufficiency of an administrator's bond, he may be required to give further and additional security, is to render the sureties in the new bond liable for a *devastavit* by the administrator, occurring before their obligation.

2. The facts that an administrator loaned the trust moneys, took a note therefor individually, and, on the maker's bankruptcy, presented a claim against the bankrupt estate, as his own claim, and, after the loan, rendered an account charging himself with the amount as cash, establish a *devastavit.*

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Jean F. Lacoste against Aug. D. Splivalo and others, and H. Barroilhet and Catherine B. Felton, executors of John B. Felton, deceased, upon an administrator's bond. Judgment for plaintiff. Defendants appeal. Affirmed.

Garber, Thornton & Bishop, for appellants. *Estee & Boalt,* for respondent.

ROSS, J. Action by the heir of Jean Lacoste, deceased, upon the bond of one of the administrators of his estate. The defendant Splivalo was appointed one of the administrators on the 10th day of February, 1870; gave the bond then required of him by the probate court; received his letters; and thereupon entered upon the discharge of the duties of his trust. In the course of his administration of the estate, Splivalo received large sums of money belonging thereto, and also paid out large sums on account thereof. On the 9th day of July, 1872, he was ordered by the probate judge to give, within five days from that date, "further and additional security in the sum of $50,000 gold coin of the United States, and that such additional bond be in form required by law, with sureties," to be approved by the judge. In response to this order the bond in suit was given. After the execution of the bond, and on the 12th of September, 1872, Splivalo was ordered by the probate court to file an account of all matters in relation to his administration of the estate occurring subsequent to the filing of his first account, which was in March, 1871. Pursuant to this order for an accounting, Splivalo, on the 20th of September, 1872, filed his account, which was settled by the court on the 13th of November, 1872, after a contest. In settling this account the probate court found that the estate was in a condition to be closed, and ordered the account to stand as the final account of the administrator, Splivalo. By the account as thus settled it appeared, and was so adjudged, that there then remained in the hands of Splivalo, as administrator, the sum of $36,095.53, subject, however, to the payment of the commissions of the administrators, fixed by the court at $6,421; and subject, also, to the necessary costs of distribution. Subsequently, to wit, on the 22d of November, 1872, the probate court made and entered a decree of partial distribution, whereby Splivalo was directed to pay to the plaintiff, as heir of the deceased, the sum of $20,000. This money was afterwards paid, but the administration of the estate remained pending. At length, and on July 7, 1874, Splivalo rendered an account supplemental to the account which had been settled by the court as his final account. On the credit side of this supplemental account was included the item: "By cash deposited with N. Larco, Esq., and lost by reason of said N. Larco having gone into bankruptcy,—No. 88,—$11,828.80." In the settlement of the supplemental account this item was disallowed, and in disallowing it the probate court said: "In May, 1870, Mr. Splivalo, the administrator, had a large amount of money of said estate in the hands of Belloc Freres, bankers, at San Francisco, and he claims to have loaned $10,000 thereof to N. Larco in the August following. He also claims to have loaned to N. Larco $1,828.80 more, making $11,828.80, for which last-named sum he took Larco's note, payable to himself individually, and not as administrator, without interest, to be due sixty days from date. None of this money has ever been repaid. In August, 1872, N. Larco became bankrupt, and was so adjudged. Mr. Splivalo had claims presented against Larco's estate in bankruptcy, wherein he treated the debt and transaction as his own. The money was not placed with Larco, as with a banker in the ordinary course of business for security on deposit, but was a loan. Further, the loss accrued before the rendition of the former account of the administrator, A. D. Splivalo, which was made his final account in and by the decree settling the same, dated November 13, 1872, and in that account and the settlement thereof this money, viz., said sum of $11,828.80, was treated by said administrator, A. D. Splivalo, as cash then in his hands, and was so found and settled. For the above-mentioned and other reasons, appearing sufficient to the court, the said item last above mentioned is disallowed."

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The probate court proceeded to settle the supplemental account of Splivalo, and found that, after deducting all credits to which he was entitled, there remained in his hands as administrator the sum of $9,474.08 in money, and entered an order to that effect. On the 28th of August following, that court made and entered a final decree of distribution by which Splivalo was directed to pay over to the plaintiff, as heir of the deceased, Lacoste, the aforesaid sum of $9,474.08. This he failed and refused to do, after demand, and hence the present suit on his bond; the bond executed pursuant to the order requiring him to give further and additional security. The appellants are the executors of one of the sureties on this bond, since deceased, and they contend—*First*, that the sureties are unaffected by the decree of the probate court settling the accounts of the administrator, and by the decree of distribution directing him to pay over to the party entitled thereto the money found to be in his hands; and, *secondly*, that, not being bound by these decrees, the sureties are entitled to show in the present action, and that in fact the decree of the probate court settling the supplemental account itself shows, that the *devastavit* for which they are sought to be charged occurred prior to the date of the execution of the bond on which they became sureties and on which this action is based, and that this bond bound the sureties only as to the future, and did not in any manner relate to any property of the estate that had previously come into and passed out of the hands of the administrator. Involved in this last proposition is, of course, the further one, that the facts stated in respect to the loan by Splivalo to Larco themselves establish a *devastavit* on the part of the administrator.

Entertaining the views we do, it makes no difference which of appellants' propositions is first considered, but, logically, it would seem proper first to inquire what was the undertaking of the sureties. To correctly determine this question, the law under which the bond was given, and the purpose for which it was required, must be taken into consideration. As has been observed, it was given pursuant to an order of the probate court requiring the administrator to give "further and additional" security. He had long before been appointed, had given the bond first required of him, had entered upon the discharge of the duties of his trust, had received large sums of money belonging to the estate, and then he was required by the court in which the administration of the estate was pending to give "further and additional" security. By the statute in force when the bond in suit was executed the probate court was, and indeed yet is by the Code of Civil Procedure, authorized to require the administrator to give further security in two cases: (1) Upon the petition of any one interested in the estate representing to the court, or the judge thereof, that the sureties have become, or are becoming, insolvent, or that they have removed, or are about to remove, from the state, or that from any other cause the bond is insufficient; and (2) when it comes to the knowledge of the probate judge that the bond of any executor or administrator is from any cause insufficient, he must, without any application, cause such executor or administrator to be cited to appear, and show cause why he should not give further security. Hitt Code, arts. 5776–5781; Code Civil Proc. §§ 1397–1402.

We think these provisions of the statute admit of but one interpretation, and that is that the "further security" authorized by them to be required is, and was intended to be, cumulative. The very purpose of requiring it is to strengthen, to increase, the security previously existing; and it is obvious that the purpose would fail unless both bonds relate to the same subject-matter. It is perfectly true, as argued by the learned counsel for the appellants, that sureties are entitled to stand upon the precise terms of their contract; but what was their contract? They knew that the party for whom they were becoming sureties was charged with the execution of a trust; that in its administration he was subject to the lawful orders of the probate court; that he had already given one bond as security for the faithful discharge of his duties, among which was the accounting to that court for all property of the estate coming to his hands as administrator; that the court was authorized, when satisfied that the security already given for that purpose was insufficient, to require the administrator to give further security for the same purpose, and that the court, in the exercise of the power conferred upon it by the law, had required of the administrator in question such further security; and knowing all this they were willing to become, and did become, further sureties that the administrator would faithfully execute the duties of his trust according to law. In the bond that they executed, the fact of Splivalo's appointment as administrator, the fact of the issuance of letters of administration to him, the fact that he had already given one bond for the faithful execution of the duties of his trust, and the fact that he was ordered to file an "additional bond," are expressly recited. To say that when they executed an "additional" bond they did not intend to add to, to increase, to augment, the security previously existing, is to do violence to the language the parties themselves employed, as well as to contravene the clear purpose of the law under which the order was made requiring the bond to be given. Counsel are mistaken in referring to section 1402 of the Code of Civil Procedure (which is similar to article 5782, Hitt. Code) as another instance in which "further security" may be required of the executor or administrator. That and the succeeding section provide for the obtaining by a surety of his release from responsibility on account of future acts of his principal. Upon such an application the court or judge is required to cause the executor or administrator to appear at a time and place to be specified, and to give other security; and, if new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator. So far as these sections bear upon the subject, they strengthen, rather than weaken, the view we take of the other sections referred to, and of bonds given thereunder. When the previous security appears insufficient, and something must be added, the statute requires further security to be given; when independent security is required, it speaks of other security.

There is no doubt that the general rule relating to sureties on official bonds is that they are not liable for any official delinquency or default of their principal occurring prior to the execution of the bond. Such is the purport of numerous cases cited by counsel for appellants. But the case in hand is an exception to that rule, and it is an exception because the law under which, and the purpose for which, the representative classes of bonds are given, differs. This distinction was recognized and enforced by the court of appeals of New York in the case of Scofield v. Churchill, 72 N. Y. 567, 568, which was an action upon an executor's bond, in which the sureties sought to defend, as the sureties here do, by showing that the funds for which they were sought to be charged had been lost to the estate before the bond in suit was executed. But the court there overruled the defense, and held the sureties liable. That case is a strong authority in support of the view we take of the contract of the sureties here. Holding, as we do, that the sureties on the bond in dispute became responsible for the faithful execution by the administrator of the duties of his trust, without regard to the time of the execution of the bond, it becomes unnecessary to determine any other point made for the appellants. Judgment and order affirmed.

McKEE, J., and McKINSTRY, J., concurred.

Hearing in bank denied.

64 Cal. 44

BATCHELDER *et al.* v. WILLEY, Surveyor General.[1]

(*Supreme Court of California.* July 27, 1883.)

SCHOOL LANDS — CONTEST OF APPLICATIONS—FILING DECREE—CERTIFICATE OF LOCATION.

1. Applicants for the purchase of school lands who fail to pay 20 per cent. of the purchase money 50 days after the date of a certificate of location, as required by Pol. Code, § 3494, forfeit the rights they acquired under judgment entered in their favor on contest of applications, though notices of the issuance of the certificates were improperly addressed to them, since there is no provision entitling them to such notice.

2. Pol. Code, § 3416, provides that, on contested application for school lands, the surveyor general shall issue a certificate of purchase, upon

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[1] This case, filed July 27, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

the filing with him a certified copy of the final judgment. *Held*, that the filing is the essential feature, and it is immaterial by whom made.

In bank. Application by A. J. Batchelder and others for a writ of mandate to compel H. I. Willey, surveyor general, to approve application for school lands. Application denied.

Stetson & Houghton, for petitioners. *E. C. Marshall*, Atty. Gen., and *F. E. Johnston*, for respondent.

SHARPSTEIN, J. In 1877 the petitioners filed in the office of the surveyor general of the state applications to purchase certain school lands in Mendocino county. Within 60 days thereafter other applications to purchase the same lands were filed, and the contests were certified to the district court of the twenty-second district, in which decrees were entered in favor of petitioners on the 27th of December, 1879. On the 14th of November, 1882, Pfankuch and Knox caused certified copies of said decrees to be filed in the office, and afterwards made applications to purchase said lands, which applications were filed in the office of the surveyor general on the 6th day of January, 1883. On the 2d of March, 1883, the petitioners filed in the surveyor general's office copies of said decrees, and demanded an approval of their said applications, which the respondent refused. For the purpose of procuring such approval, a writ of mandate is prayed. It does not appear that the petitioners took any steps in the premises after the entry of decrees in their favor December 27, 1879, until the 2d of March, 1883, when their petitions to purchase the lands were filed. Between these dates a period of more than three years elapsed, during which the petitioners were quiescent. In the mean time certified copies of the final judgments were filed by other parties, the petitioners' applications approved, and more than a year after such approval the parties who had caused copies of said judgments to be filed, filed applications to purchase said land. The conclusion at which we have arrived renders it unnecessary to pass upon any of the questions discussed by counsel except one, and that is whether the petitioners did not forfeit the rights which they acquired under the judgments entered in their favor by not paying 20 per cent. of the purchase money within 50 days after the issuance of certificates of location to them. Such certificates were made out and notices thereof deposited in the postoffice addressed to them at Point Arena, Mendocino county, although it was known to the surveyor general that their postoffice address was Marysville, Yuba county. The Code does not provide for the giving of notices in such cases. If it did, a compliance with its provisions might be indispensable. As it is, we attach no importance to the fact that a notice addressed to the petitioners was mailed. We do not think there was any occasion for the service of any notice upon the petitioners. They had succeeded in the contest before the district court, and were entitled, "upon filing with the surveyor general or register, as the case may be, a copy of the final judgment of the court," to have the surveys or location approved, or to have certificates of purchase or other evidences of title issued in accordance with such judgment. Pol. Code, § 3416. But they suffered more than three years to elapse before they attempted to file a certified copy of said judgments in said surveyor general's office. And it was not until two years after the entry of said judgments that any copy of them was filed in said office. The Code does not specify any time within which such a judgment must be filed, nor does it specify by whom it may be filed. And we cannot see that it would make any difference by whom it was presented for filing. As soon as it was filed in his office it became the duty of the surveyor general to approve the survey or location, or of the register to issue a certificate of purchase or other evidence of title. This was done more than a year before the applications of other parties to purchase were filed and approved. If no contest had arisen, the petitioners would have had 50 days, and no more, after the date of the certificates of their locations, within which to pay 20 per cent. of the purchase money. Pol. Code, § 3494. Not within 50 days after receiving notice of the issuance of such certificates, but within 50 days after the dates thereof. This provision applies to all applications for the purchase of such lands, and there is no reason for holding that, in case no contest arises, applicants must pay 20 per cent. within a definite period; but, in case one does arise, the successful party shall have an indefinite time to make payment in, unless he files a copy of the judgment in the office of the surveyor general, or is notified that some one else has filed such copy. Application denied.

MYRICK, ROSS, THORNTON, and MCKEE, JJ., concurred.

64 Cal. 47

SLOSS *v.* ALLMAN.[1]

(*Supreme Court of California.* July 27, 1883.)

CONTRADICTORY FINDINGS—REVERSAL ON APPEAL.

Where the findings upon which a judgment was rendered are so contradictory and uncertain as to leave the appellate court in doubt as to their meaning, the judgment will be reversed.

In bank. Appeal from superior court, Lassen county.

Action by F. A. Sloss against John Allman upon a contract of service. Judgment for plaintiff, and order refusing new trial. Defendant appeals. Reversed.

J. M. Seawell and *C. G. Kelly*, for appellant. *E. V. Spencer*, for respondent.

ROSS, J. Because of the contradictory and uncertain nature of the findings of the court below, we must reverse the judgment and remand the cause for a new trial. The suit is to recover a balance of $1,350, alleged to be due the plaintiff on a contract alleged to have been made in writing between plaintiff and defendant, on or about April 24, 1874, by the terms of which plaintiff agreed to carry the United States mail, as subcontractor under Allman, between two certain designated points, for a period of four years, for the sum of $5,400, which the complaint alleges defendant, Allman, agreed to pay plaintiff within 30 days from the time he (defendant) received his compensation from the government. The complaint also alleges performance of the service by the plaintiff, the receipt by the defendant of his compensation from the government, payment by him to the plaintiff of $4,050, and a balance due of $1,350, which defendant fails and refuses to pay. The findings are to the effect that, at the time stated in the complaint, plaintiff and defendant made a contract, a memorandum of which was reduced to writing, but not signed by either party; that its terms were as charged in the complaint, except that, for the service agreed to be rendered by the plaintiff, the defendant agreed to pay him $2,200 per year; that "in said memorandum it was further agreed that the contract aforesaid should be reduced to writing at length, and signed by plaintiff and two bondsmen, and also by defendant; that in pursuance of said agreement the contract in full was reduced to writing by defendant, Allman, with this addition: that he united the name of J. J. Hinds with his own as principal in the making and letting of said contract; that said contract was signed by plaintiff and his bondsmen; that, after plaintiff and his bondsmen had signed it, defendant, Allman, signed the name of J. J. Hinds thereto by himself as attorney in fact, but did not sign his own name thereto in any other manner," and thereupon delivered the same to the plaintiff, who entered upon the performance of his part of the agreement, and fully performed it; that Allman received his compensation from the government for the service more than 30 days before the commencement of the action, and at different times during the performance of the service paid to the plaintiff all of the contract price except $1,350, which last mentioned sum he did not pay and has not paid, but acknowledged to the plaintiff that it was due him, and promised him to pay it.

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It may be remarked here that as the court found that the contract price was $2,200 per year for four years,—that is to say, that it was $8,800,—and also found that all of the contract price was paid except $1,350, it in effect found that plaintiff was paid $7,450, which is considerably in excess of the whole contract price, according to the averments of the complaint. Yet the findings also declare that $1,350 remained due and unpaid to plaintiff for the service, and that the defendant subsequently so acknowledged and promised to pay the amount. But another difficulty in the way of affirming the judgment arises from the fact that the court below also found "that it was understood by both parties that the contract last drawn up between the parties, and signed by all of them except Allman, should supersede the memorandum of contract made by them prior to that time." We hardly know what is meant by this finding. "The contract last drawn up between the parties, and signed by all of them except Allman," would seem from the findings to have been an altogether one-sided arrangement; for Hinds seems to have been injected as principal on the one part, without the knowledge or authority of either himself or of the plaintiff; and it was the contract thus made in Hinds' name with the plaintiff that the court below found was, according to agreement between plaintiff and defendant, to supersede the memorandum of contract previously made between them. Further, as wholly inconsistent with this last statement, is the finding to the effect that the plaintiff in rendering the service, and the defendant in accepting it, treated the service as rendered under contract between plaintiff and defendant. Judgment and order reversed, and cause remanded for a new trial, with leave to the plaintiff to amend his complaint if he shall so elect.

SHARPSTEIN, MYRICK, MCKINSTRY, and THORNTON, JJ., concurred.

64 Cal. 346

DANIEL *et ux.* v. SMITH.[1]

(*Supreme Court of California.* Nov. 28, 1883.)

DONATIO CAUSA MORTIS—ACTUAL DELIVERY—EVIDENCE.

A witness testified that decedent, a few days before his death, in his last illness, requested witness to take charge of his effects, including a bank book, and, in case of his death, to give the same to his daughter; that he, witness, received the effects, and kept them till decedent's death, and then delivered them to the daughter. *Held* insufficient to establish a valid *donatio causa mortis*, for want of evidence of a manual delivery, or its equivalent, on the part of decedent to witness.

Appeal from superior court, city and county of San Francisco.

Action by John Daniel and wife against Holland Smith, administrator of Abraham Fielding, deceased. From a judgment for plaintiffs, defendant appeals. Reversed.

Nathaniel Holland and *Joseph Leggett*, for appellant. *F. J. French* and *John M. Burnett*, for respondents.

THORNTON, J. This action was brought to recover of the Hibernia Savings & Loan Society a sum of money specified in the complaint. A claim to this money was set up by Holland Smith, as the administrator of the estate of Abraham Fielding, deceased, and he was made a defendant that the validity of his claim as against the plaintiffs might be determined. Judgment was rendered for the plaintiffs, and Smith moved for a new trial, which was denied. Thereupon Smith appealed from the judgment and order denying a new trial.

The sole question to be determined is whether the money sued for was given to Emma Daniel, wife of her coplaintiff, by

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[1] This case, filed November 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Abraham Fielding, in view of death. This must be determined upon the evidence adduced on the trial of this cause. The plaintiffs proved that Fielding died on the 12th day of May, 1880, in the city of San Francisco; that a short time before the 7th day of May, 1880, he became suddenly ill, and that at the time he became ill, and on the day last named, he had a general account with the defendant, the Hibernia Savings & Loan Society, evidenced by a pass book, showing a balance due him of $522.99. The pass book was put in evidence. The plaintiffs then called David Cornfoot, who testified that on Friday morning Fielding requested him to take charge of his effects, consisting of bank books, money, and assignment of mortgages and deeds and other papers, and requested him to hold them in trust for him until he got well, and if he (Fielding) should die he requested him to transfer them to his daughter Emma for her use; that this was the condition he received them under on the 7th day of May; that he (witness) was to keep them in trust for him, and, if he lived and got well, he was to return all his property to him; that if he (Fielding) died he was to give it to his daughter; that he (Cornfoot) kept the bank book until his death, and the evening Fielding died he delivered it to his daughter, Emma Daniel. Fielding stated that he did not know whether he was going to live or die, and he wanted some one to look after him, to see that he would not want for anything, and to pay his bills, and to take general charge of him and his affairs while he lived. "That was his object in transferring his effects to me. The instructions to me [said Cornfoot] in regard to the bank book were to keep possession of it while he lived, and, in case he should require any of that money for his sickness, to draw it on his order, and pay it out as far as his sickness required it; and if he should die before any of the money should be used out of the bank book, I was to give it, as above stated, to his daughter, with instructions for her to draw the money, and to appropriate it to her own use." None of the money was used from the bank, there being sufficient without it. It was admitted that the bank book offered in evidence was the same book delivered to Cornfoot by Fielding on the 7th of May, 1880. It was also admitted that the defendant savings and loan society was at the time set forth in the complaint, and is, a corporation, and that defendant Smith was the duly-appointed administrator of the deceased, Abraham Fielding. The plaintiffs proved that before the commencement of this action they were married, and that Emma Daniel had demanded of the society aforesaid the sum sued for, with the accruing dividends, and that no part thereof had been paid. The plaintiffs rested, and the defendant Smith moved for a nonsuit on the following grounds: "*First*. There is no evidence to prove that the plaintiffs, or either of them, were the owners of or entitled to receive $522.99 in gold coin of the United States, deposited with the defendant the Hibernia Savings & Loan Society in the name of A. Fielding. *Second*. There is no evidence of any delivery of the gold coin or money or bank book, symbolic or otherwise, by the said A. Fielding to said Emma Daniel; on the contrary, the evidence shows that he retained possession, control, and ownership for his own use; that the said Emma Daniel did not have, or claim to have, any interest, control, or possession of the bank book or money in bank until after the death of said Fielding, nor did any one hold possession thereof for her." The court denied the motion, and Smith excepted. The cause was then submitted, and the judgment rendered for plaintiffs. The defendant Smith moved for a new trial, and in his statement specified wherein the evidence was insufficient to sustain the decision of the court, which specifications presented substantially the same points as are set forth in the grounds for a nonsuit.

It is contended that the foregoing, in view of death, established a gift of the money in the savings and loan society mentioned above by Fielding to Emma Daniel. Such is the question presented herein for decision. To constitute a *donatio causa mortis*, the gift must be made in contemplation of the near approach of death by the donor, to take effect absolutely only upon the death of the donor. There must be a delivery of the property, either to the donee or to some person for his use or benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time during his life to revoke the gift. Dole v. Lincoln, 31 Me. 428, 429; Curry v. Powers, 70 N. Y. 217; Hatch v. Atkinson, 56 Me. 327; Taylor v. Henry, 48 Md. 550. All the authorities agree that there must be a delivery of the property intended to be the subject of the gift. Hamor v. Moore's Adm'r, 8 Ohio St. 242; Fiero v. Fiero, 5 Thomp. & C. 151; Case v. Dennison, 9 R. I. 88; McGrath v. Reynolds, 116 Mass. 566. Is there any evidence of such delivery here, and with intent by Fielding to part with all dominion over the money? The only evidence is that of Cornfoot. He does not state any manual tradition of the pass book to him. It does not appear that this pass book was at the place where the above-stated conversation occurred between Fielding and Cornfoot. Nor is it stated that the book was locked in a trunk or drawer, and the keys delivered to Cornfoot that he might possess himself of the book. The statement of Cornfoot given above is that Fielding "requested me to take charge of his effects, consisting of bank books, money, and assignment of mortgages and deeds and other papers, and requested me to hold them in trust for him until he got well; and if he should die he requested me to transfer them to his daughter, Emma, for her use. That was the condition I received them under on the 7th of May. I was to keep them in trust for him, and if he lived and got well I was to return all his property to him, and if he died I was to give it to his daughter, Emma." We see nothing of delivery here. It may be remarked that it is afterwards stated that it was admitted that the bank book offered in evidence "was the same book delivered to said Cornfoot by said Fielding on the 7th of May, 1880," but in our judgment this language was only intended to indicate that the book offered in evidence was the same as the book which was afterwards taken possession of by Cornfoot, and by him handed over to Emma Daniel; that the word "delivered" used in stating the admission, was not used as indicating an actual tradition of the book on the 7th of May, when the conversation took place, but to identify the book as the one which came into possession of Cornfoot under the authority given him to take charge of it and hold it in trust for Fielding, and which was afterwards handed over by Cornfoot to Emma Daniel. To show how strict is the requirement of delivery to constitute a gift *causa mortis* we refer to the case of Case v. Dennison, 9 R. I. 88. In this case, a gift *causa mortis* was claimed of a sum of money deposited in a savings bank in Providence. The bank book was not in the possession of the alleged donor, a married woman, but was in the possession of another person in Providence. The donor aforesaid died at Mystic, Conn. Shortly before her death she told her son that she had not long to live, spoke of the bank book being in possession of her son-in-law, and that she wanted him (her son) to get it, settle the bills, and, if anything was left, to divide it among her three children. After her death her son (one of the defendants in the case cited) obtained possession of the book, but the bank refused to pay him the money deposited, without a bond. This was held not to be a donation *causa mortis*, for want of delivery. The court, by DURKEE, J., observed as follows as to the matter: "We think the defendant is not entitled to either the bank book or the money which it represents as a gift *mortis causa*. There was no delivery." The court said further: "It is urged that the book was in possession of Mrs. Lawton, who it is claimed was a donee, and that it was not where the intestate could get it to deliver, and that upon these grounds the gift should be sustained. But we think a delivery should not be dispensed with on such grounds." See, also, on this point the cases above cited of Fiero v. Fiero and McGrath v. Reynolds, supra. It has been held that there must be delivery, even where the subject of the gift is in possession of the donee when the gift is made. Cutting v. Gilman, 41 N. H. 147; Huntington v. Gilmore, 14 Barb. 243; Shower v. Pilck, 4 Exch. 478. In view of the strict requirements of the law as to delivery, as shown by the foregoing, we cannot hold that a delivery was established in this case. Nor does it appear that the dominion or control over the bank book or the money in the loan society ever passed from Fielding, or that any interest ever vested in the alleged donee. There was no language of gift used. On the contrary, the testimony indicates, in our judgment, the creation by Fielding of a bailment in trust or agency, which was to terminate with the death of Fielding. In our judgment, the evidence was insufficient to establish a gift *causa mortis*, and the court erred in refusing to grant the motion for a nonsuit, and in its decision in favor of the plaintiff. The judgment and order must therefore be reversed, and the cause remanded for a new trial, and it is so ordered.

McKINSTRY, ROSS, SHARPSTEIN, and McKEE, JJ., concurred.

Petition for rehearing denied.

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95 Cal. 490

ALHAMBRA ADDITION WATER CO. v. RICHARDSON *et al.* (No. 14,701.)

(*Supreme Court of California.* Aug. 5, 1892.)

WATER RIGHTS.

Where one is adjudged the owner of all of certain water and water rights, except an amount "equal to a constant flow of 2 1-3 inches of water, * * * measured under a 4-inch pressure," adjudged to belong to defendants, the latter cannot use more than such 2 1-3 inches at any time, though they afterwards seek to compensate for such excessive use by refraining from using any water whatever.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Action by the Alhambra Addition Water Company against Solomon Richardson and others. Judgment for defendants, and plaintiff appeals. Reversed.

John S. Chapman and *Smith, Howard & Smith*, for appellant. *Wells, Monroe & Lee*, for respondents.

FOOTE, C. This action was brought to prevent the defendants from maintaining a certain water gate in a pipe conveying water for irrigation and other purposes, belonging to plaintiff; and to prevent the defendants from taking from that pipe a greater quantity of water than the plaintiff claimed the defendants had a legal right to use. The court below refused to grant the relief, by injunction asked for by the plaintiff, and rendered judgment in favor of the defendants. The plaintiff moved for a new trial, which was refused, and the appeal is from the order denying its motion. It appears by a decision of the supreme court, in a case where these same parties were litigants, (72 Cal. 598, 14 Pac. Rep. 379,) that the water right of the defendants, as against the plaintiff, was determined and defined; and it is claimed by the appellant that the court below took an erroneous view of the scope of the judgment rendered therein, and by its decision in this case allowed to the defendants certain rights in taking water from the plaintiff's water pipe which were entirely inadmissible under the view of the matter taken by the appellate court in affirming the judgment on the former appeal. The former judgment, above alluded to, defined the respective rights of the plaintiff and defendants, thus: "It is ordered, adjudged, and decreed that the Alhambra Addition Water Company, plaintiff, is the owner of all the water and water rights being, arising, or flowing in or from that certain canon in the county of Los Angeles, state of California known as the 'Kewen Mill of Lake

Vineyard Canon,' and of the dams, ditches, reservoirs, and pipes used by plaintiff for the purpose of diverting said waters from said canon; and also the large iron pipe connecting with the waters of said canon, and extending down through lands of defendants, as described and alleged in the complaint filed herein; except an amount equal to a constant flow of two and one third (2⅓) inches of water flowing from said canon, measured under a four (4) inch pressure, on the premises of defendants hereinafter described, which said quantity of water, so excepted from plaintiff's ownership, is hereby adjudged to belong to defendants for irrigation, household, and domestic purposes, as appurtenant to and for use upon the following described lands, to wit: [Here follows description of lands.] Excepting also that the defendants own and are entitled to the use of the pipes, ditches, aqueducts, and reservoirs belonging to plaintiff, as hereinbefore adjudged, for the purpose of conducting, storing, and preserving the waters hereinbefore adjudged to belong to defendants, to and upon their premises as aforesaid; and it is adjudged that said defendants have the right to take said water from the pipe as now constructed, at any point upon their said land, for the purpose and in the quantity aforesaid. And it is further ordered, adjudged, and decreed that the defendants aforesaid are the owners of that certain portion and quantity of the waters described in the complaint equal to a constant flow of two and one third (2⅓) inches, measured under a four (4) inch pressure, on their said premises, and are entitled to the use of the pipes, ditches, aqueducts, and reservoirs belonging to plaintiff, and described in the complaint, for the purpose of storing, preserving, and conducting the same upon their lands hereinbefore described, for the purposes aforesaid; and that said defendants have the right to take the quantity of water aforesaid from the pipe as now constructed at any point upon said lands above particularly described."

The court below evidently took the view, which we cannot uphold, that the defendants were entitled under this decree to put into the pipe an appliance by means of which they could at one time accumulate such a head of water as to take from the pipe and irrigate their lands, and use for the other purposes mentioned in the decree, any amount of the water, even to the whole of it, which might be running or flowing in the pipe, provided that they did not thereafter use any more of the water until sufficient time had elapsed that as much water should have flowed through the pipe and past the defendants' lands as would have sufficed to equal the quantity used by them. In other words, the court below seems to have held that the defendants could use 80 inches constant flow of water—all that ran in the pipe—for one day, if they should not use any more water thereafter, and all the water in the pipe should be permitted by them to run by their lands so as to be used if required by other parties in interest for as many days and parts of days as would result from dividing 80 by 2⅓. In our view of the matter, the defendants are entitled to use any appliance to obtain from this pipe a constant flow of 2⅓ inches of water, measured under a 4-inch pressure, for the purposes mentioned in the decree above quoted, but they are not entitled to use that appliance to take from the pipe any more water than that. There must always be permitted to flow by their lands unused by them, all except the amount of water just mentioned. They are not authorized to use any appliance in such a way as to obstruct the flow of the water in the pipe to any greater extent than that, and they are not to be permitted to take from the pipe any more water than a constant flow of 2⅓ inches under a 4-inch pressure.

It is alleged by the defendants that, during the pendency of the action in which the foregoing judgment was rendered, a stipulation was entered into between the parties having reference to an enlargement of the pipes below the lands of the defendants; and the court finds that, in consequence of such enlargement, the pressure of the water was so reduced that it was drawn away from the house of the defendants and the higher portion of their premises so that they were unable to receive any water for domestic use and irrigation purposes. The court finds that these acts of the plaintiff in enlarging its pipes, whereby the pressure of the water was reduced, were "in violation of a stipulation entered into between the parties hereto;" but does not find whether the stipulation was made before or after the commencement of the former action, or what were its terms. If by the terms of such stipulation, entered into after the commencement of the former action, the defendants acquired any rights in the waters of the canon flowing through their lands in the pipes of the plaintiff other than or different from those specified in the judgment, they are entitled to be protected therein in the present action. Upon a new trial the court will find the terms of the stipulation, and render such judgment as will give to the respective parties the rights acquired thereby.

For the reason that the evidence shows that they took more water at one time than they were entitled to, and that the court below based its finding as to their right upon an erroneous construction of the former judgment, we are of opinion that it committed, in this respect, error. For these reasons we advise that the order appealed from be reversed.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is reversed.

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95 Cal. 442

Forni v. Yoell *et al.* (No. 14,959.)

(*Supreme Court of California.* July 28, 1892.)

Appeal Bond—Waiver of Defects.

A stipulation by appellee, "that the appellant has in due time given and filed a good and sufficient undertaking on appeal in said cause," if made within the time allowed for taking an appeal, is a waiver of defects in the undertaking.

In bank. Appeal from superior court, Santa Clara county; FRS. E. SPENCER, Judge.

Action by Forni against Yoell and others. Judgment for plaintiff, and defendants appeal. Motion to dismiss. Denied.

Wm. L. Gill, for appellants. *F. B. Laine* and *Jackson Hatch*, for respondent.

BEATTY, C. J. The defendants appealed from the judgment and from an order denying their motion for a new trial. The plaintiff moves to dismiss the appeal from the order, upon the ground that the undertaking on appeal makes no reference to the appeal therefrom, and consequently that, so far as the order is concerned, the appeal is ineffectual for any purpose. Code Civil Proc. § 940. It is conceded by the appellant that his undertaking as filed was in fact defective in the particular specified, and it is settled by numerous decisions of this court that in such case the appeal must be dismissed, if the respondent has not waived the defect, or done some act by which he is estopped to raise the objection. People v. Center, 61 Cal. 191; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. Rep. 815; Associates v. Wilkins, 71 Cal. 626, 12 Pac. Rep. 799; Berniaud v. Beecher, 74 Cal. 617, 16 Pac. Rep. 510; Wood v. Pendola, 77 Cal. 82, 19 Pac. Rep. 183; Schurtz v. Romer, 81 Cal. 245, 22 Pac. Rep. 657; Crew v. Diller, 86 Cal. 555, 25 Pac. Rep. 66; Paving Co. v. Bolton, 89 Cal. 155, 26 Pac. Rep. 650. But it is contended that the respondent in this case has waived the defect in the undertaking, and is thereby estopped to make the objection upon which his motion is based. The order overruling the motion for a new trial was made and entered December 21, 1891, and some time prior to January 30, 1892, the respondent stipulated in writing, among other things, "that the appellant has in due time given and filed a good and sufficient undertaking on appeal in said cause." This stipulation is contained in the original transcript filed in this court on January 30, 1892, and must therefore have been signed on or prior to that date, and before the time for appealing from the order had expired." This fact distinguishes the present case from Perkins v. Cooper, 87 Cal. 241, 25 Pac. Rep. 411. There a similar stipulation was given, but not until the time for appealing from the order had expired, and if the stipulation had been refused the appellant could not have given a new notice of appeal. But here, if the stipulation had not been given, the defendants had ample time to file and serve a new notice, and it may well be that their reliance on the stipulation prevented them from doing so. Under such circumstances, we think the respondent should not be allowed, after the time for appealing has elapsed, to contradict his former admission. Motion denied.

We concur: DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.

MEYERS v. TRUJILLO. (No. 14,439.)

(*Supreme Court of California.* July 23, 1892.)

APPEAL WITHOUT MERIT—DAMAGES.

To a complaint in the ordinary form of ejectment a general denial and the statute of limitations were pleaded. Findings of fact were waived, and judgment was rendered for plaintiff. Defendant, on appeal, furnished no bill of exception or other record of error, and filed neither brief nor points and authorities. *Held* that, the appeal being manifestly without merit, payment of $100 damages, as part of costs on appeal, would be directed for respondent.

In bank. Appeal from superior court, San Bernardino county; J. L. CAMPBELL, Judge.

Ejectment by Maria L. Meyers against Lorenzo Trujillo. Judgment for plaintiff. Defendant appeals. Affirmed.

Ezra Crossman and *Goodcell & Leonard*, for appellant. *Byron Waters*, for respondent.

PER CURIAM. The complaint herein is in the ordinary form of a complaint in ejectment. The defendant pleaded a general denial and the statute of limitations. The cause was tried by the court without a jury. Findings of fact were waived, and judgment rendered in favor of the plaintiff. From this judgment an appeal was taken directly to this court. There is no bill of exceptions or other record of any error in the court below, and the appellant has not filed any brief or points and authorities in support of his appeal. The appeal is manifestly without merit, and the judgment is affirmed, and the superior court is directed to allow to respondent $100 damages, as a part of the costs on appeal.

FLAGG v. ST. ELMO INVESTMENT CO. *et al.* (No. 14,839.)

(*Supreme Court of California.* July 25, 1892.)

MORTGAGES—FORECLOSURE — DEFICIENCY JUDGMENT—ASSOCIATIONS.

In a suit to foreclose a mortgage of land, given to secure notes of an association for the purchase money of such land, the complaint in the caption named the association and the individual members as defendants, and process was served respectively on the association and on each of its members, and a general appearance was entered by each. The complaint did not clearly indicate whether proceedings were intended merely against the association or against its members personally, and it concluded with the prayer "that plaintiff have judgment against the persons personally liable for said debt for any deficiency that may remain after such sale." The answers of defendants admitted the genuineness and due execution of the articles of association, and did not deny the existence of the partnership relationship among them. *Held*, that plaintiff was entitled to a deficiency judgment against those persons who were members of such association at the date of the execution of the notes in suit. Goodlett v. Investment Co., (Cal.) 29 Pac. Rep. 505, followed.

Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Suit by one Flagg against the St. Elmo Investment Company and others for foreclosure of mortgage. From a decree allowing a deficiency judgment against the company alone, plaintiff appeals. Reversed.

Harris & Gregg and *C. J. Perkins*, for appellant. *Willis & Cole, Barclay, Wilson & Carpenter*, and *Redick & Rose*, for respondents.

SHARPSTEIN, J. This case is not distinguishable in any material respect from Goodlett v. Investment Co., reported in 29 Pac. Rep. 505. The questions involved in this case were fully considered in that, and on the authority of that case the judgment in this case, so far as it directs the docketing of a deficiency judgment against the St. Elmo Investment Company, is reversed; in other respects it is affirmed. The cause is remanded, with directions to the superior court to find upon the evidence before it, and such further evidence as the parties may submit, who were the members of the St. Elmo Investment Company at the date of the execution of the notes in suit, and to order the docketing of a deficiency judgment accordingly.

We concur: DE HAVEN, J.; MCFARLAND, J.

STEVENS *et al.* v. ST. ELMO INVESTMENT CO. *et al.* (No. 14,840.)

(*Supreme Court of California.* July 25, 1892.)

Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Suit by Stevens and others against the St. Elmo Investment Company for foreclosure of mortgage. From a decree allowing a deficiency judgment against the company alone, plaintiffs appeal. Reversed.

Harris & Gregg and *C. J. Perkins*, for appellants. *Willis & Cole, Barclay, Wilson & Carpenter*, and *Redick & Rose*, for respondents.

SHARPSTEIN, J. The questions involved in this case are the same as in Flagg v. St. Elmo Investment Co., 30 Pac. Rep. 579, (this day filed;) and on the authority of that case the judgment in this case, so far as it directs the docketing of a deficiency judgment against the St. Elmo Investment Company, is reversed; in other respects it is affirmed. The cause is remanded, with directions to the superior court to find upon the evidence before it, and such other evidence as the parties may submit, who were the members of the St. Elmo Investment Company at the date of the execution of the notes in suit, and to order the docketing of a deficiency judgment accordingly.

We concur: DE HAVEN, J.; MCFARLAND, J.

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95 Cal. 450

WIEDWALD v. DODSON *et al.*, City Trustees. (No. 14,596.)

(*Supreme Court of California.* Aug. 1, 1892.)

MUNICIPAL CORPORATIONS—EXCLUDING TERRITORY—MANDAMUS.

1. Act March 19, 1889, (St. 1889, p. 356,) entitled "An act to provide for changing the boundaries of cities and municipal corporations, and to exclude territory therefrom," was not intended as a means by which a city might be practically disincorporated, and a petition for a special election thereunder should not be granted when the contemplated change of boundaries will exclude nearly the whole of the city's territory, nine tenths of its population, and four fifths of its trustees, and the population left will be less than one half that necessary to form a municipal corporation of the lowest class.

2. The writ of mandamus is not wholly a writ of right, but lies to a considerable extent within the sound discretion of the court, and it should not be issued to compel a technical compliance with the letter of the law when this involves a violation of its spirit.

Department 2. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Petition by F. Wiedwald for a writ of mandate to one Dodson and others, trustees of the city of San Pedro. From a judgment granting the writ the trustees appeal. Reversed.

Chapman & Hendricks and *S. M. White*, for appellants. *Wells, Monroe & Lee*, for respondent.

MCFARLAND, J. The respondent filed a petition in the superior court praying for a writ of mandate to compel the appellants, as trustees of the city of San Pedro, to call a special election and submit to the electors of said city the question of excluding therefrom certain territory described in the petition. After a trial the court rendered judgment granting the writ, and the trustees appeal from the judgment.

The respondent bases the right to maintain this proceeding upon the fact that he is an elector and taxpayer and real-estate owner within the city. The petition for a special election, involved in the case at bar, was filed March 10, 1891; and it appears from the findings that a prior similar petition had been filed on December 11, 1890, (involving exactly the same territory;) that said prior petition had been granted by the trustees, and an election under it had been held on January 12, 1891; that one Anderson had filed a petition in said superior court for a writ of mandate to compel the trustees to declare the result of such election, and to certify to the secretary of state that such result was in favor of the exclusion of such territory; and that said petition for such writ of mandate is still pending and undetermined. It further appears from the findings that the territory described in the petition to the trustees (in the case at bar) "is nearly the whole of the said city of San Pedro, and that if the said territory should be excluded it would carry with it nearly or quite nine tenths of the population of said city, and four members of the board of trustees, and that the whole number of voters left in the city of San Pedro, if the said territory should be excluded, would not exceed thirty." It appears that at the last municipal election, held in April, 1890, there were 258 votes cast, and that there are 5 trustees of said city. Passing other points made by appellants, it is clear that the judgment must be reversed upon the finding as to the extent and the proportion of the population which would be excluded from the city if the judgment were affirmed. The proceeding before the board of trustees was under the statute approved March 19, 1889, entitled "An act to provide for changing the boundaries of cities and municipal corporations, and to exclude territory therefrom." St. 1889, p. 356. (This act was re-enacted, inadvertently perhaps, on March 20, 1889,—Id. p. 433.) The act was evidently intended to provide for an ordinary, reasonable change of the boundaries of a city; but it was clearly not intended as a means by which a city might be practically disincorporated. It is based upon the theory that the city whose boundaries are to be changed shall continue its existence, and provides for many things to be done by the city after the change; as, for instance, to levy taxes upon the excluded territory. But by the election which the trustees are compelled by the judgment in the case at bar to order, if the vote should be in the affirmative, there would be excluded from the city "nearly the whole" of its territory, nine tenths of the population, and four fifths of its trustees; and the whole number of voters left would "not exceed thirty." Adding to these 30 voters as many resident nonvoters as could be reasonably estimated, there would not be nearly one half the population necessary to form a municipal corporation of the lowest class. This would be, not to change the boundaries, but to practically disincorporate the city. To interpret the statute as contemplating such result would be to violate the maxim, *que hæret in litera hæret in cortice.* Counsel for respondent say that it would be difficult to establish a line so as to distinguish the extent of territory and amount of population that may be excluded. That is, no doubt, true; but, if we imagine such line drawn with the utmost liberality, we shall still find the case at bar on the wrong side of it. In applying the principle, each case must be determined upon its own facts. The learned judge of the court below would perhaps have adopted these views if he had not felt constrained by the opinion, expressed in his conclusions of law, that "the court has no discretion to refuse to issue the writ " In this view we think that he was mistaken. We think that the correct doctrine is expressed in High on Extraordinary Legal Remedies, § 9, where, speaking of *mandamus*, it is said that "the exercise of the jurisdiction rests, to a considerable extent, in the sound discretion of the court;" and that "cases may therefore arise where the applicant for relief has an undoubted legal right, for which *mandamus* is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief." See, also, Water Works v. San Francisco, 52 Cal. 117, and Same v. Bryant, Id. 140. And in the second edition of the work, in said section 9, and notes, it is said that the writ should not issue to compel a compliance with the letter against the spirit of the law. In State v. Commissioners, 26 Kan. 419, while the facts were somewhat different from those in the case at bar, the supreme court of Kansas stated the rule as follows: "The writ of *mandamus* is not wholly a writ of right, but lies to a considerable extent within the sound judicial discretion of the court where the application is made, (citing authorities;) and no court should allow a writ of *mandamus* to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law." The case at bar comes within the principle just quoted; it is an attempt to compel a compliance with the letter of the law against its plain intent and spirit. The writ of mandate should not be used to wrongfully wrest a statute from its true purpose.

The judgment is reversed.

We concur: De Haven, J.; Sharpstein, J.

(95 Cal. 425)

People v. Vincent. (No. 20,852.)

(*Supreme Court of California.* July 25, 1892.)

Challenge to Panel — Change of Venue — Intoxication in Murder Case — Ex Post Facto Laws.

1. The fact that, after a challenge to a panel had been sustained on the ground of bias and prejudice of the deputy sheriff summoning the jurors, a few of the persons composing it were summoned on a second venire, is no ground for challenge to the second panel, but the objections should be made to the individual jurors.

2. Under Pen. Code, § 1035, providing that if the court be satisfied of the truth of the representations of defendant in a criminal case, that he cannot have a fair and impartial trial in the county where the action is pending, the motion for change of venue must be granted, refusal of a motion, based on public prejudice supported only by the affidavits on information and belief of defendant and his counsel, though opposed by no counter affidavits, cannot be said to be an abuse of discretion, the court having already witnessed the examination of a large number of jurors in the case.

3. Under Pen. Code, § 22, providing that whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any species or degree of crime, the fact of intoxication may be considered, there is no error in charging, in a homicide case, that intoxication can only be considered for the purpose of determining the degree of crime, the degrees of murder being based on intent.

4. Act March 31, 1891, amending Pen. Code, §§ 1217, 1229, relative to time and place of executing death penalty, does not apply to convictions for offenses committed prior to its enactment. People v. McNulty, 26 Pac. Rep. 597, 29 Pac. Rep. 61, and 93 Cal. 427, followed.

Department 2. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

F. O. Vincent was convicted of murder, and appeals. Affirmed.

S. R. Hart and *Henry Hogan*, for appellant. *Atty. Gen. Hart, W. D. Tupper*, and *F. H. Short*, for the People.

McFarland, J. Appellant was convicted of the crime of murder in the first degree, and appeals from the judgment and from an order denying his motion for a new trial.

1. We see no errors in the rulings of the court below in the matter of impaneling the jury. It appears that, the regular *venire* of jurors having been exhausted before the jury was completed, the court ordered a special *venire* to be summoned by the sheriff; that upon the return of the sheriff the appellant interposed a challenge to the entire panel of jurors summoned upon said special *venire*, upon the ground of the bias and prejudice of the deputy sheriff who summoned them; and that said challenge was by the court sustained. Appellant then interposed a chal-

lenge to the regular *venire* of jurors, upon the ground that they had not been drawn in the manner as prescribed in section 205, Code Civil Proc., and the court also sustained that challenge. The court then ordered a second special *venire* to be issued for 100 jurors, and upon the return of the sheriff it appeared that, of the 100 jurors summoned, several were jurors who had also been upon the first special *venire*, to which a challenge had been sustained for bias of the officer who summoned them. Appellant then interposed a challenge to the panel (of the second special *venire*) upon the ground that a part of the panel was composed of persons who were upon the first special *venire*, and for which the challenge for bias of the officer had been sustained as aforesaid; and upon the further ground (as we understand it) that, because the drawing of regular jurors for the year was invalid, therefore there could be no valid order for the summoning of special jurors by the sheriff. As to the first point, it is clear that the fact that a few persons summoned on the second *venire* had also been summoned on the first furnished no basis for a challenge to the panel. It is not made a ground for such challenge by the statute. Pen. Code, §1064. Whatever legal objections appellant may have had to those persons should have been presented as challenges to individual jurors. As to the second point, it was held in Levy v. Wilson, 69 Cal. 111, 10 Pac. Rep. 272, and other cases, that the court, under section 226 of the Code of Civil Procedure, may at any time direct the sheriff to summon jurors from the body of the county, although there be names of properly selected regular jurors in the jury-box; and when, from any cause, there are no regular jurors to be drawn from, the very case arises where the court may, without any doubt whatever, exercise the power granted by said section 226.

2. We see no abuse of discretion in the overruling of appellant's motion for a change of venue. It is true that the prosecution filed no counter affidavits, except as to the employment of assistant counsel; but the only affidavits filed by the appellant on the motion were made by himself and his counsel, which fact distinguishes the case widely from People v. Yoakum, 53 Cal. 566, upon which he relies. Moreover, as to the main point of public feeling against appellant in the county in which he was tried, the affidavits are largely upon information and belief; and upon that point, as the motion was not made until several days after the trial had commenced, the court had witnessed the examination of a large number of jurors. The Code[1] provides that, "if the court be satisfied that the representations of the appellant are true," the motion should be granted; and we certainly cannot say that in this case the court ought to have been so satisfied. It is true that the discretion of a trial court to grant or refuse a change of venue is not an arbitrary discretion,—a mere naked, irresponsible power; but when there has been fair room for the play of such discretion, and its exercise has not gone beyond legitimate and reasonable limits, it cannot be rightfully interfered with by the appellate court. People v. Elliott, 80 Cal. 296, 22 Pac. Rep. 207, and cases there cited. And we see no reason to hold that in the case at bar such discretion was improperly exercised.

3. It is contended by appellant that the court erred in instructing the jury that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution." This instruction and others stating the same principle have been frequently approved by this court in murder cases. People v. Lewis, 36 Cal. 531; People v. Williams, 43 Cal. 344; People v. Belencia, 21 Cal. 544; People v. King, 27 Cal. 507; People v. Ferris, 55 Cal. 588; People v. Jones, 63 Cal. 168. Appellant relies on the recent case of People v. Phelan, (Cal.) 28 Pac. Rep. 855, in which the said instruction above quoted was held to be erroneous. But that was a case of burglary, in which the degrees of the crime are not based at all upon the principle which distinguishes the degrees of murder. Section 22 of the Penal Code provides that, "whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Now, the degrees of murder are based upon the "intent"—the deliberation or premeditation—with which the act is done; and therefore it is not improper in trials for unlawful homicide to instruct the jury that they can consider intoxication only for the purpose of determining the degree of the crime, because that is telling them, in substance, that they may consider it in determining "the purpose, motive, and intent" with which the act was committed. But in burglary the degrees of the crime are fixed solely by the point of time at which the act was done,—if in the nighttime, of the first degree; if in the daytime, of the second degree. Therefore to tell a jury in a burglary case that they could consider intoxication only in determining the degree of the crime would be not only absurd, but to take away from them the right to consider it in determining the "purpose, motive, or intent" with which the accused did the act complained of. Burglary consists in entering a house (or one of certain other buildings mentioned in the Code) "with intent to commit grand or petit larceny, or any felony;" and it is apparent to the dullest apprehension that a drunken man might ulawfully enter a house without any intent whatever to commit larceny or felony. And it is equally apparent that a jury, in determining with what intent he entered, might well consider the fact that he was intoxicated; but the "degree" of the crime would have nothing to do with it. The court, in delivering the decision in People v. Phelan, did not consider it necessary to state that they were not dealing with a murder trial.

4. The crime of which appellant was

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[1] Pen. Code, § 1035.

convicted was committed prior to the act of March 31, 1891, amending sections 1217 and 1229 of the Penal Code, relating to the time and place for the execution of the death penalty; but it must be deemed to have been settled by the decision of this court in bank in the case of People v. McNulty, 93 Cal. 427, 26 Pac. Rep. 597, and 29 Pac. Rep. 61, that such amendments do not apply to convictions for offenses committed prior to their enactment. The transcript does not contain the evidence, and the foregoing are the only grounds relied on for a reversal. The record presents no error. Judgment and order appealed from affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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95 Cal. 435

MORE v. CALKINS *et al.* (No. 14,787.)

(*Supreme Court of California.* July 27, 1892.)

MORTGAGE WITH POWER OF SALE—ENFORCEMENT AGAINST ESTATE—CONSIDERATION.

1. Whether a conveyance is to be treated as a mortgage or a deed of trust depends on its essential character as shown by its terms, and not on whether the grantee is a creditor whose debt is to be paid out of the proceeds arising from the execution of a trust therein declared.

2. Since the death of the grantor does not revoke a power of sale contained in a deed of trust, nor limit the effect of the deed, Code Civil Proc. §§ 1493, 1502, prescribing the time within which claims against a decedent's estate must be presented, do not apply to claims secured by such a deed.

3. As the powers and trusts contained in a deed of trust continue in full force after the grantor's death, and no judicial foreclosure is required, Code Civil Proc. § 1500, allowing an action for foreclosure of a mortgage against a decedent's estate without presentation of the claim secured to the executor or administrator, only "when all recourse against any other property of the estate is expressly waived in the complaint," does not apply.

4. Where a deed of trust to secure money advanced by the grantee provides for the payment of expenses and repayment of the money advanced, "with interest thereon at the rate of ten per cent. per annum, together with the additional sum of $10,000, which the party of the first part hereby agrees to pay the party of the second part without interest," and the promise to pay this additional sum of $10,000 is founded on no additional advances to be made or services to be rendered by the grantee, but is a mere bonus for the loan of the money, such promise is without consideration, and cannot be enforced.

Department 2. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Action by Thomas R. More, administrator, against J. W. Calkins and others. Judgment for defendants, and plaintiff appeals. Reversed.

Barclay, Wilson & Carpenter, L. C. McKeeby, and *W. H. Wilde*, for appellant. *Wright & Day*, for respondents.

DE HAVEN, J. The plaintiff is the administrator of the estate of Alexander S. More, deceased, and the prayer of the complaint filed in the action is that a certain trust deed, executed by the deceased in his lifetime, be declared void, and that defendant Calkins be enjoined from selling the land, water ditch, and water rights, conveyed by said deed, under the power which is given thereby. The case was here before. The opinion upon the former appeal is reported in 85 Cal. 177, 24 Pac. Rep. 729, and the deed referred to is there set out in full. After the decision upon the former appeal the plaintiff filed a supplemental complaint, in which it is alleged that the defendant did not, within the time limited by section 1493 of the Code of Civil Procedure, present the claims secured by said deed to the plaintiff as administrator of Alexander S. More, deceased, and it is averred that the same are barred by sections 1493, 1500, 1502, Code Civil Proc. It was further alleged in the supplemental complaint that after the commencement of the action the defendant Calkins made a conveyance to one Merton B. Hull of all the property described in the deed executed by deceased, and that said Hull had notice of the pending action, and the plaintiff asked that Hull be made a party defendant, and for a judgment to the effect that the deed from defendant Calkins to said Hull be canceled, and Hull compelled to convey all of said property to the plaintiff, as administrator of the estate of the deceased, Alexander S. More, and that all of the claims mentioned in the deed of trust, executed by deceased to defendant Calkins, be declared barred, and that plaintiff be put in possession of all of the property conveyed by said deed. Hull appeared in the action, and joined with the other defendant in an answer to the supplemental complaint. The judgment of the superior court was that the deed executed by Calkins to his codefendant Hull be canceled, and it further directed that the property conveyed to defendant Calkins by the deed of trust executed by deceased be sold, and said judgment also determined the amount which the defendant Calkins, as trustee, is entitled to retain out of the proceeds of such sale, in which amount is included the sum of $10,000, which is provided for in the deed referred to. The plaintiff appeals from the judgment.

1. The instrument which the plaintiff seeks to have set aside is a trust deed. It conveyed to defendant Calkins the legal title to the property described, upon the trusts which it declares, and conferred upon him the power in execution thereof to sell the property thus conveyed, and transmit the legal title to his grantee. Koch v. Briggs, 14 Cal. 257; Bateman v. Burr, 57 Cal. 480; Thompson v. McKay, 41 Cal. 221. It is not material that in this case the conveyance was made directly to Calkins, who was a creditor, and not to a third party. Whether the conveyance is to be treated as a mortgage or as a deed of trust must depend upon its essential character, as shown by its terms, and not whether the grantee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared. In Thompson v. McKay, 41 Cal. 221, the deed was upon a trust to sell or lease the premises conveyed, and, after making certain deductions, to apply the proceeds to the payment of a promissory note executed by

the grantor in favor of the grantee, and the court said, in declaring the legal effect of this deed: "That the deed from Gowen to Hill conveyed the fee, and that Hill had the power, in execution of the trust, to transmit the legal title to a purchaser is too plain for debate." The death of the grantor did not operate as a revocation of the power of sale contained in the deed under consideration, or in any manner limit the effect of the deed, and, this being so, the failure to present to the administrator of deceased the claims secured by it furnishes no ground for a court of equity to cancel the deed. Whitmore v. Savings Union, 50 Cal. 146. As the deed made by plaintiff's intestate requires no judicial foreclosure, and the powers and trusts therein declared are in full force, it follows that sections 1493 and 1502 of the Code of Civil Procedure, prescribing the time within which claims must be presented against the estate of a deceased person, and section 1500 of the same Code, allowing an action for foreclosure of a mortgage, without presentation of such claim, only "when all recourse against any other property of the estate is expressly waived in the complaint," have no application to the case before us, and the right of the defendant to execute the powers conferred by the deed, and apply the proceeds arising therefrom to the payment of the debts and charges named in the deed, is not dependent upon a compliance with these sections.

2. The deed provides that out of the proceeds of the sale of the property thereby conveyed the defendant Calkins shall pay: "(1) The reasonable expenses of the management of said lands and property, and of the execution of these trusts; (2) to the said J. W. Calkins the sum of fifteen thousand dollars, with interest thereon at the rate of ten per cent. per annum, together with the additional sum of ten thousand dollars, which the party of the first part hereby agrees to pay the party of the second part without interest," etc. The court below, in its decree, allowed to the defendant this last-named sum of $10,000, without interest, and its action in this respect is assigned as error. The provision of the deed just quoted was under consideration by this court upon the former appeal, and was construed as follows: "The fact that it appears upon the face of the instrument that payment for all loans and advances, and compensation for all services, with extraordinary interest, is provided for, exclusive of the promise to pay ten thousand dollars without interest, tends to corroborate the averment that there was no consideration for the promise to pay the ten thousand dollars. But for the presumption that there is a consideration for every promise in writing, there would appear to be no consideration for the promise to pay the ten thousand dollars without interest." The construction thus placed upon the deed has become the law of the case, and the question of its correctness is not open to consideration upon this appeal. Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548. And, in view of what was thus said by the court on the former appeal, we think the court was not, upon its findings, justified in allowing to the defendant Calkins this sum of $10,000. The court found in relation to the consideration for this promise to pay this sum, as follows: "That the said trust deed, and every part thereof, was and is supported by a good and valid consideration received by said Alexander S. More, in the execution of said trusts, and that the item of ten thousand dollars mentioned in said deed of trust was a part of the entire transaction, and was a bonus or consideration in addition to interest on the money provided to be advanced, for the use and benefit of said Alexander S. More, and as part of the consideration for furnishing of the money in said deed of trust provided, and for the services to be rendered and the obligations assumed as set forth in said deed of trust." In this the court does not find that the defendant Calkins was to furnish any other money, or assume any other obligations, or render any other services, than appears from the deed itself. But if it be true, as the court held on the former appeal, "that payment of all loans and advances, and compensation for all services, with extraordinary interest, is provided for exclusive of the promise to pay the ten thousand dollars," it necessarily follows that, unless the promise to pay this $10,000 is founded upon some other consideration than the express agreement of defendant Calkins to furnish the money and assume the other obligations and duties provided for in the deed of trust, the promise to pay this sum must be held to be without consideration, if the law as declared in the former opinion is to be followed. For it was in view of the fact that the court construed the deed as providing in other parts for the payment of everything which the court below finds that defendant was to furnish in the way of money, and for the rendition of all his services as trustee, that upon the former appeal this court said that, "but for the presumption that there is a consideration for every promise in writing, there would appear to be no consideration for the promise to pay the ten thousand dollars, without interest." As already stated, we are not upon this appeal at liberty to review the former opinion, and place upon the deed under consideration any other construction than was given to it there. The defendant upon the close of his trust is entitled to a reasonable compensation for his services, in performing his duties as trustee under the deed, and is entitled to be reimbursed for all expenses incurred by him. The compensation will have to be fixed by the court, unless the parties can agree in relation thereto. The finding of the court, as to the amount which defendant Calkins is entitled to retain out of the proceeds of the sale of the property conveyed by the trust deed, is not questioned, except as to the item of the $10,000, already discussed; that is, his right to retain all the money found due him, except this $10,000, is not denied, unless he lost his right to retain the same by a failure to present his claim therefor to the executor of the deceased. Nor is there any other objection made to the judgment itself.

Under these circumstances it is not necessary that there should be any new trial of the action. Judgment reversed, and cause remanded, with directions to the superior court to modify its judgment in accordance with this opinion by striking therefrom the allowance to defendant Calkins of the said sum of ten thousand dollars, and providing in place thereof that he be allowed a reasonable compensation upon the settlement of the trust, to be fixed by the court.

We concur: McFARLAND, J.; SHARPSTEIN, J.

(97 Cal. 388)

NORTON v. ATCHISON, T. & S. F. R. Co.

(No. 14,614.)[1]

(*Supreme Court of California.* July 30, 1892.)

JUDGMENT—SETTING ASIDE ON MOTION—SUFFICIENCY OF EVIDENCE—APPEAL.

1. The fact that a judgment shows defendant to have been regularly served with process does not preclude evidence aliunde on motion to set aside the judgment made within a few days of its rendition. People v. Goodhue, 22 Pac. Rep. 66, 80 Cal. 199, and People v. Harrison, 24 Pac. Rep. 311, 84 Cal. 607, distinguished.

2. On a motion to set aside a judgment rendered against the Atchison, Topeka & Santa Fe Railroad Company, a foreign corporation, on the ground that service was not had upon its managing or business agent as required by Code Civil Proc. § 411, defendant introduced affidavits to show that the person upon whom service was had was not its agent, but the agent of a connecting line, which was operated as a distinct corporation, and that the term "Santa Fe Route" was not used to designate either corporation, but the line of travel formed thereby. Plaintiff sought to overcome this evidence by showing numerous advertisements of the "Santa Fe Route," to some of which the name of the person mentioned was attached as agent, and by showing also that defendant was the owner of a majority of the stock of the connecting company. *Held*, that a finding declaring the said person not to be defendant's agent, and setting aside the judgment, would not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action by C. V. Norton against the Atchison, Topeka & Santa Fe Railroad Company. After judgment for plaintiff by default, defendant appeared, and moved to set aside the judgment on the ground that the service of summons was not such as was authorized by law. From an order granting the said motion, plaintiff appeals. Affirmed.

William N. Fuller, for appellant. *A. Brunson* and *Hunsaker, Britt & Goodrich*, for respondent.

BELCHER, C. This is an action to recover the value of two horses which were delivered by plaintiff to defendant, at the town of Hiawatha, in the state of Kansas, to be transported to the town of Escondido, in the state of California, and which were killed while in transit over the defendant's railroad to their place of destination. The complaint is in the usual form, and alleges negligence in the management of the engine and train of cars as the cause of the killing. The complaint was filed in the superior court of San Diego county, and a summons was thereupon issued and placed in the hands of the sheriff of that county. By his return on the summons, the sheriff certified that he "personally served the same on the 19th day of November, 1890, on K. H. Wade, general manager of the Atchison, Topeka & Santa Fe R. R. Co., defendant therein named, by delivering to said defendant personally, in the county of San Diego, a copy of said summons, attached to a certified copy of the complaint in the action therein named." No demurrer or answer having been filed, the default of the defendant was entered by the clerk of the court on December 1, 1890. Three days later the case was called for trial, and, after witnesses had been called and examined by the plaintiff, judgment was entered in his favor, according to the prayer of the complaint. The judgment recites that the cause came on regularly for trial, the plaintiff appearing by counsel, and the defendant, a corporation, "having been personally, legally, and regularly served with summons or process, and having failed to appear and answer plaintiff's complaint filed herein, and the legal time for answering having expired, and no answer or demurrer having been filed, the default of said defendant * * * having been duly and legally entered against said defendant according to law: Now, therefore," etc. On the 12th of December, 1890, after due notice, the defendant appeared by attorneys, and moved the court to quash the service of summons and to vacate and set aside the said default and judgment, upon the ground that the said service was not such as was authorized by law, and that the court had no jurisdiction of defendant to enter said default or judgment, and that the same was void. In support of the motion, the defendant offered to read in evidence the affidavits of K. H. Wade and A. Brunson, copies of which had been served. The plaintiff objected to the affidavits being received in evidence, "for the reason that the judgment imports absolute verity, and cannot be attacked by proof *aliunde*." The objection was overruled, and an exception reserved. The hearing was then continued, and subsequently the plaintiff, not waiving his objections to the defendant's affidavits, introduced and read in evidence certain counter affidavits, and the defendants introduced and read certain additional affidavits. All of the affidavits offered were received and considered by the court; and, as the result of such consideration, the court on January 23, 1891, made an order granting the defendant's motion, and thereby quashed the service of summons, and vacated and set aside the default and judgment entered against defendant. The plaintiff excepted to the order, and has appealed therefrom to this court.

1. Appellant contends that the judgment of a court of general jurisdiction imports absolute verity, and that, on a motion like this to set aside a domestic judgment, the parties to it are estopped to deny the jurisdiction of the court, un-

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[1] Rehearing granted.

less its want of jurisdiction appears on the face of the record; that here the recitals in the judgment that the defendant had been personally, legally, and regularly served with process, conclusively show that the court had acquired jurisdiction of the person of defendant, and that no evidence outside the judgment roll was admissible to contradict these recitals; and hence that it was error to admit in evidence the affidavits offered by defendant and objected to by plaintiff. This position cannot, in our opinion, be sustained. The Code provides that "any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer," (section 1916, Code Civil Proc.;) and the only question is as to the method of procedure to effect the impeachment. The rule invoked is well sustained by the authorities, where a collateral attack is made upon a judgment, but it has no application to a direct attack. Here the motion to set aside the judgment was a direct, and not a collateral, attack, as has been held in numerous cases decided by this court. People v. Mullan, 65 Cal. 396, 4 Pac. Rep. 348; People v. Greene, 74 Cal. 400, 16 Pac. Rep. 197; People v. Pearson, 76 Cal. 400, 18 Pac. Rep. 424; Reinhart v. Lugo, 86 Cal. 395, 24 Pac. Rep. 1089. In Lyons v. Roach, 84 Cal. 30, 23 Pac. Rep. 1026, it is said that "the main difference between collateral and direct attacks is that in the former the record alone can be inspected, and is conclusively presumed to be correct, while on direct attack the true facts may be shown." But it is urged that a judgment can only be set aside on motion when it appears on its face to be void, and that when it does not so appear the proper and only remedy is an action regularly brought to test its validity. In support of this position, counsel cite People v. Goodhue, 80 Cal. 199, 22 Pac. Rep. 66, and People v. Harrison, 84 Cal. 607, 24 Pac. Rep. 311. In the first of these cases a decree of foreclosure was rendered therein on October 30, 1865, and a motion to set aside the decree was made on December 31, 1888, by the successor in interest of the defendant. The summons was served on Goodhue, the defendant, but not on his successor in interest. The court said: "We know of no provision of law which can be held to authorize the vacation of a judgment on a mere motion after so long a time;" and again: "A judgment cannot be attacked in this informal way years after its rendition." In the second case the motion to vacate was made 16 years after the judgment was rendered, and it was held that a motion will not lie to vacate a judgment after the lapse of time limited by statute, if the judgment is not void on its face, and that in all cases after the lapse of such time, when the attempt is made to vacate the judgment, by a proceeding in court for that purpose, an action regularly brought is preferable, and should be required. Here the motion was made within 10 days after the judgment was rendered, and the cases cited are therefore not in point. In a case like this, the proceeding by motion is, in our opinion, authorized, and is the proper way to bring up and test the validity of the judgment. Ede v. Hazen, 61 Cal. 360.

2. Appellant further contends that the decision of the court was not justified by the evidence, and that the order should be reversed for that reason. Section 411 of the Code of Civil Procedure provides that "the summons must be served by delivering a copy thereof, as follows: * * * "(2) If the suit is against a foreign corporation * * * doing business and having a managing or business agent, cashier, or secretary within this state, to such agent, cashier, or secretary." It was shown by the affidavits introduced in support of the motion, that the defendant, the Atchison, Topeka & Santa Fe Railroad Company, was a corporation organized under the laws of the state of Kansas, and having its principal place of business at the city of Topeka, in that state; that it owned, controlled, and operated a line of railroad from Kansas City, in the state of Missouri, to Albuquerque, in the territory of New Mexico, and no further; and that K. H. Wade, on whom the summons was served, was not at the time of such service, and never had been, the managing or business agent, cashier, or secretary of defendant, within this state or anywhere else. It was also shown that the Atlantic & Pacific Railroad Company was a corporation organized under an act of congress, and that it owned and operated a railroad from Albuquerque, New Mexico, to the town of Barstow, in the state of California; that the Southern California Railway Company was a corporation organized under the laws of this state, and that it owned and operated a railroad from Barstow to National City and other points in California; and that K. H. Wade was the general manager of the last-named company. It was further shown that the three railroads above mentioned constituted a continuous line, and were advertised as such under the name of the "Santa Fe Route," but that the officers of the companies were different, no two of them having the same president, general manager, or other business agents; "that each of said three railroad companies is owned, controlled, and operated independently of the other, under different organizations, with different stockholders and different interests; that the accounts between them are kept as distinctly and separately as are the accounts of any other of the railroads in the United States; that the three companies receive freight and passengers independent of the others, and only deliver to the others as connecting lines, forming a through line of railroad known as the 'Santa Fe Route;'" and that "the appellation 'Santa Fe Route' does not and never did designate either of the corporations operating such line of railroad, but is simply a term used to designate a particular line of travel composed of connecting railroads, operated by distinct railroad companies." Appellant sought to contradict and overcome the evidence introduced by respondent, by showing numerous advertisements of the "Santa Fe Route," to some of which the name, "K. H. Wade, General Manager," was appended, and also by showing that the defendant was the

owner of a majority of the stock of the Southern California Railway Company. It is urged that Wade is estopped by these advertisements from denying that he was one of the general managers of the defendant corporation, and "that the evidence clearly establishes the fact that the 'Santa Fe Route' is a synonym of the 'Atchison, Topeka & Santa Fe Railroad Company,' and is used by it to designate its great system, which stretches from Chicago to San Diego, over which through sleeping cars run from Chicago and St. Louis to San Diego, without change, every day in the year." There can be no question of estoppel here. Wade is not a party to the action, and whether he might be estopped or not by his acts, in connection with the advertisements, to deny his agency, is a matter which need not be considered.

The only question then is, was Wade the managing or business agent, cashier, or secretary of the defendant when the summons was served on him? If he was not, then the attempted service did not give the court jurisdiction of the person of the defendant, and its judgment was void. Whether he was such agent or not was a matter to be determined by the court below, in view of all the evidence introduced at the hearing of the motion. The court, as we have seen, decided the question against the theory of appellant; and we do not think its decision can be disturbed. The evidence was conflicting, but a clear preponderance of it seems to sustain the decision.

It is further objected that no sufficient affidavit of merits was filed. We do not think it necessary to pass upon this question, for the reason that, when a judgment is attacked upon the ground that it is not wholly void, no affidavit of merits is required. We therefore advise that the order be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

ALEXANDER v. CHICK *et al.* (No. 14,699.)

(*Supreme Court of California.* July 30, 1892.)

APPEAL—REVIEW—FINDINGS BY COURT.

Where the evidence is sufficient to justify the findings of the lower court, the judgment will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Suit by David B. Alexander against William Chick and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Smith, Winder & Smith, for appellants. *John D. Bicknell* and *Benson Wood*, for respondent.

BELCHER, C. The controversy in this case is as to the location of a dividing line. It is admitted that the plaintiff owns all of the north half of lot 5, block 13, of Ord's survey, in the city of Los Angeles, except a strip six feet wide at the west end thereof, and that over this strip he has a perpetual right of way or easement to give him access to the rear of his lot, and also that, subject to the plaintiff's right of way, the defendants own the said strip and the lot adjoining it on the west. Lot 5 is bounded on the east by Spring street, and on the north by Fifth street, and, according to the title deeds, its width is 120 feet, and its length from east to west 165 feet. The question is as to the location of the west line of the lot, and this depends upon the location of its east line. The defendants claim that the east line is the line of an old fence built in 1866 by one Ulyard, the common source of their and plaintiff's title, while plaintiff claims that the east line of his lot is the present building line of the block on the west side of Spring street. The fence referred to was about two feet east of the west line of the street as now recognized and established; and the real controversy is therefore in regard to the ownership of a strip about two feet wide, and sixty feet long, at the west end of the lot. The court below found, among other things, that the westerly line of Spring street, as now established, is the easterly line of block 13, according to Ord's survey, and accordingly rendered judgment in favor of the plaintiff. The defendants moved for a new trial, which was denied, and then appealed from the judgment and order.

In support of the appeal it is urged that the findings were not justified by the evidence, and that the motion for a new trial should therefore have been granted. It would subserve no useful purpose to state the substance of the evidence, or the theories of counsel in regard to it. After reading all that is found in the record, we are of the opinion that it was fully sufficient to justify the decision of the court, and that the judgment cannot be disturbed on this ground. The point is also made that numerous errors were committed by the court in the admission of evidence which, it is claimed, was immaterial. The point does not seem to be much relied on by counsel, and it is enough to say, in regard to it, that we fail to see any material error in any of the rulings referred to. We advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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95 Cal. 447

BROWNLEE v. RIFFENBURG *et al.* (No. 14,637.)

(*Supreme Court of California.* July 30, 1892.)

ACTION ON ATTACHMENT BOND—WHEN LIES—RETURN OF EXECUTION.

1. An action on an undertaking for the release of attached property cannot be maintained until return of execution unsatisfied in the attachment suit; Code Civil Proc. § 552, providing that, if such execution be returned unsatisfied, plaintiff may prosecute the undertaking, or may proceed as in other cases upon the return of an execution.

2. Where property is released from attachment on an undertaking that "defendant will, on

demand, redeliver such attached property, so released, to the proper officer," and plaintiff recovers judgment in the attachment suit, and makes demand for the return of the attached property, action will lie on such undertaking, without demand being made by the sheriff.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action by John D. Brownlee against W. G. Riffenburg and R. A. Schulenburg upon an undertaking for the release of attached property. From a judgment for plaintiff, defendants appeal. Reversed.

Wellborn, Stevens & Wellborn, for appellants. *Shaw & Holland*, for respondent.

BELCHER, C. This action is upon an undertaking, executed by the defendants, for the release of property taken under a writ of attachment in an action wherein the respondent here was plaintiff and one W. D. Lewis was defendant. The court below gave judgment for the plaintiff, and the defendants have appealed from the judgment and an order denying their motion for a new trial.

The court found that the plaintiff, Brownlee, commenced an action against Lewis for the recovery of money, in the superior court of San Diego county, and took out and caused to be levied on the property of Lewis a writ of attachment; that, after the levy, the defendants here executed and filed in court for the benefit of plaintiff, and pursuant to sections 554 and 555 of the Code of Civil Procedure, the written undertaking sued upon; that upon the filing of the undertaking the court ordered all the property attached to be released and returned to Lewis, and the sheriff thereupon released the same; that such proceedings were afterwards had in the action that the plaintiff recovered judgment therein for the sum of $524.30, no part of which had been paid; that after the recovery of the judgment, and before the commencement of this action, plaintiff demanded of Lewis that he redeliver the property so levied upon to the sheriff of the county to be applied to the payment of his judgment, and also demanded of the defendants, in the possession and custody of one of whom the attached property had been left by Lewis, that they redeliver the same to the sheriff, to be applied to the payment of said judgment; that neither Lewis nor the defendants delivered the property to the sheriff, and that upon their failure to do so plaintiff demanded of defendants that they pay him the full amount of his judgment, which they failed and refused to do; and that no execution was ever issued on the said judgment. Appellants contend that no action can be maintained upon an undertaking given pursuant to section 555 of the Code of Civil Procedure, until an execution has been issued and returned unsatisfied, in whole or in part; and in support of their contention they cite section 552 of the same Code, which reads as follows: "If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty, or section five hundred and fifty-five, or he may proceed as in other cases upon the return of an execution." The argument is that this section makes the issuance and return of an execution a condition precedent to the right to commence an action. That the undertaking here sued upon was given pursuant to sections 554 and 555 of the Code of Civil Procedure is alleged in the complaint, recited in the instrument, and found by the court, and it must therefore be regarded as a statutory undertaking. This being so, we think the contention of the appellants must be sustained. Section 552, by providing that if the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute, etc., in effect declares that, unless or until an execution is issued and returned, no such prosecution shall be had. If this be not the meaning and purpose of the section, then, so far as we can see, it has no meaning or purpose, and might be stricken from the Code without affecting any right or impairing any remedy whatever. In Smith v. Fargo, 57 Cal. 157, the same point was made, and the court said: "In support of the first point, appellant relies upon section 552 of the Code of Civil Procedure; but that section has no application to the case, for the reason that the undertaking was not given pursuant to section 540 or section 555 of the Code. It was not a statutory undertaking, and cannot be held valid and binding as such." From this language the necessary inference would seem to be that, if the undertaking had been a statutory one, given pursuant to the sections referred to, then section 552 would have been applicable and controlling. Appellants also contend that the demands for the redelivery of the attached property should have been made by the sheriff, to whom it was to be delivered, and not by the respondent, and that as made the demands were insufficient. The undertaking was that the "defendant will, on demand, redeliver such attached property, so released, to the proper officer," etc. This is also the language of the Code, § 555, supra; and in it we see nothing to indicate an intention to limit the right to make demand to the officer. On the contrary, it would seem that the plaintiff, in whose behalf the demand is to be made, might himself make it, and it would only be necessary that the officer be clothed with authority to receive the property and sell it. It follows that the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

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95 Cal. 454

O'SHEA v. WILKINSON. (No. 14,843.)

(*Supreme Court of California*. August 2, 1892.)

APPEAL—RECORD—JUDGMENT ROLL—ACTION AGAINST WARD—DISMISSAL.

1. Where a transcript containing what purports to be the documents that the statute pro-

vides constitute the judgment roll has a certificate of the clerk attached, which states that they are correct, but does not say that they constitute the judgment roll, such certificate is sufficient.

2. Where an action was brought against a ward, and she appeared and answered by general guardian, but no cause of action was stated against him individually, a dismissal as to such ward was a dismissal of the entire action.

Department 1. Appeal from superior court, Kern county; A. R. CONKLIN, Judge.

Action by O'Shea against Wilkinson. From a judgment in favor of plaintiff, defendant appeals. Reversed.

C. C. Cogwill, for appellant. *Ahern & Fay*, for respondent.

PATERSON, J. The transcript contains what purports to be copies of the pleadings, order overruling the demurrer, minutes of the court, findings, and judgment, with a certificate of the clerk attached, which states that they are correct, but does not say that they constitute the judgment roll. Respondent claims that we cannot consider matters contained in these papers without a certificate of the clerk that they are copies of the records which constitute the judgment roll. This contention cannot be sustained. The Code specifies what documents shall constitute the judgment roll. Except in cases of default, it is made up by attaching together "the pleadings, a copy of the verdict of the jury or finding of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating to change of parties, and a copy of the judgment." Section 670, Code Civil Proc. It is no part of the duties of the clerk to certify that the papers contained in the transcript constitute the record on appeal, (Hayne, New Trial & App. § 268,) although it is the general practice and is proper for the clerk in his certificate to state that the transcript contains a copy of the judgment roll. In the absence of a showing to the contrary, we must presume that the pleadings, order, findings, and judgment mentioned in the certificate are those which constitute the judgment roll. If they do not, it is an easy matter for the respondent, upon suggestion of diminution of the record, to have the transcript corrected here. The complaint stated a cause of action against Agnes Stine, an incompetent person, and the summons was served upon her personally. She appeared and answered by her general guardian, Wilkinson, on June 27, 1889. On December 13, 1889, the plaintiff filed an amended complaint. On December 16th, by consent of all parties, the action was dismissed as against the defendant Agnes Stine, and on the same day a demurrer was filed by Wilkinson on the ground that the amended complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and thereafter Wilkinson filed an answer denying specifically the allegations of the complaint.

The demurrer of Wilkinson to the amended complaint ought to have been sustained. It stated no cause of action against Wilkinson. The complaint showed on its face that he was not the real party in interest. An executor, administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue or be sued without joining with him the persons for whose benefit the action is prosecuted, but a guardian does not belong to any of these classes. The guardian appears in the action simply to manage and take care of the interests of the infant when he is a party to the action, and "is no more a party to the action than the attorney, who appears in an action for one who has attained his majority, is a party to the suit in which he enters his appearance." Emeric v. Alvarado, 64 Cal. 593, 2 Pac. Rep. 418; Justice v. Ott, 87 Cal. 530, 25 Pac. Rep. 691.

It is claimed by respondent that, at most, there was but a defect of parties, an objection which was waived by a failure to demur or answer on that ground. It is not a case of a mere defect of parties. A dismissal as to the ward was in effect a dismissal of the action itself, because no attempt was made to charge the defendant in his individual capacity, and he could not represent his ward in the action unless she was a party thereto. There is nothing upon which an amendment can be predicated, and the action must therefore be dismissed. Fox v. Minor, 32 Cal. 111. Judgment reversed, with directions to the court below to dismiss the action.

We concur: HARRISON, J.; GAROUTTE, J.

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3 Cal. Unrep. 506

RISING v. GIBBS. (No. 14,715.)

(*Supreme Court of California.* Aug. 1, 1892.)

CANCELING DEED—PLEADING.

A complaint to cancel a deed alleged that defendant, without plaintiff's consent, abstracted the deed from a safe where it had been deposited by plaintiff in escrow pending the completion of a proposed sale to defendant of land therein described; that defendant after thus obtaining the deed caused it to be recorded; that no money was ever paid for the land; and defendant refused to pay the consideration or reconvey to plaintiff. *Held*, that the complaint showed a good cause of action.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Charles E. Rising against E. A. Gibbs to set aside and cancel a deed to land. Plaintiff had judgment, and defendant appeals. Affirmed.

Geo. W. Glowner, (*Frederick Hall*, of counsel,) for appellant. *Knight & Knight*, for respondent.

FOOTE, C. This action is to set aside and cancel a deed, which it is alleged the defendant without plaintiff's consent fraudulently abstracted from a safe, where it had been deposited in escrow by the plaintiff pending the completion of a proposed sale of the land described therein to the defendant. It is further alleged in the complaint that, after getting possession of the deed in this fraudulent manner, the defendant kept it and caused it to be recorded; that no money was ever paid for the purchase of the property; that the defendant refused and still refuses to pay the consideration of the deed so fraudulently obtained and recorded, or restore the property by reconveyance to plaintiff. It is prayed that the deed be ordered delivered to plaintiff and canceled. As will be readily seen, the action is in its nature to quiet the title of the plaintiff to his property, by ordering a deed to be canceled which has surreptitiously and fraudulently come to the possession of the defendant, and had been recorded by him to the injury of the plaintiff. We think the facts set out in the complaint show a good cause of action, and that the demurrer was properly overruled.

The point is made that the findings are not supported by the evidence. The evidence for the plaintiff fully makes out his case; that of the defendant is flatly contradictory thereto, but seems not to have had any weight given to it by the trial court. The evidence as to value of the land and the consideration for the proposed sale was proper to meet the contention of defendant that the consideration paid for the land described in the deed was the sum of $332.95, a small and inadequate price for it, and which the evidence showed on the trial was a store account owed by plaintiff to defendant. We perceive no error whatever in this record, and are of opinion that the appeal is totally devoid of merit, and advise that the judgment and order refusing a new trial be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order refusing a new trial are affirmed.

95 Cal. 444

BOHNERT v. BOHNERT. (No. 14,893.)

(*Supreme Court of California.* July 29, 1892.)

DIVORCE—ADULTERY—CONDONATION—APPEAL.

1. Where the "statement" used on a motion for a new trial does not "specify the particular errors upon which the party will rely," as required by Code Civil Proc. § 659, subd. 3, errors discussed on appeal will not be considered.

2. A single act of sexual intercourse between husband and wife, after commencement of suit for divorce on the ground of adultery, is not alone sufficient to show "restoration of the offending party to all marital rights," as required by Civil Code, § 116, to constitute condonation.

Department 1. Appeal from superior court, Siskiyou county; EDWIN SHEARER, Judge.

Action for divorce for adultery. From a decree in favor of plaintiff, defendant appeals. Affirmed.

H. B. Warren and *Gillis & Tapecott*, for appellant. *J. Chadbourne*, *Clay W. Taylor*, and *J. V. Brown*, for respondent.

PATERSON, J. This is an action for divorce and the custody of a minor child. The court found the charge of adultery to be true as alleged in the complaint, and rendered judgment in favor of the plaintiff, dissolving the bonds of matrimony, and awarding to him the custody of the child.

In their brief, counsel for appellant discuss a large number of errors alleged to have been committed by the court during the trial; but, as there is no specification of error in the statement, they cannot be considered. Ferrer v. Insurance Co., 47 Cal. 427; Fleming v. Albeck, 67 Cal. 227, 7 Pac. Rep. 659; Pico v. Cohn, 67 Cal. 258, 7 Pac. Rep. 680. The statute provides that "when the notice designates as the ground of the motion errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely." Section 659, subd. 3, Code Civil Proc. The object of this provision is apparent: it is to enable the adverse party to prepare his amendments without the necessity of going through the statement proposed by the moving party to ascertain what objections, rulings, and exceptions are incorporated therein. Unless the alleged errors are specifically pointed out, they are deemed to have been waived by the moving party. He is bound to state upon what particular errors he will rely for a new trial.

The defendant, after denying the allegations of adultery, alleged that, subsequent to the filing of the amended complaint, the plaintiff, being fully informed as to the matters alleged therein, freely condoned all offenses committed by the defendant, freely forgave the defendant, and cohabited with her. The court found that the plaintiff did not condone or forgive, nor did he cohabit or have sexual intercourse with her, as alleged in the answer, and that there was not any reconciliation between the parties, or restoration of the defendant to any marital rights. This is the only finding of the court which is attacked as not supported by the evidence. The defendant testified that after the commencement of the action she went to the hotel kept by the plaintiff; that he requested her to go down to the cottage; that she went to the cottage with him, where they undressed and went to bed together; that they stayed there most of the afternoon, and had sexual intercourse. The plaintiff testified that he did not have sexual intercourse with the defendant, as stated by her, nor at any time after the commencement of the action, but did not say whether he had undressed and occupied the bed with her in the cottage. Appellant insists that upon this state of the evidence the court ought to have found in favor of the defendant on the defense of condonation. It has been held that one act of sexual intercourse is conclusive evidence of condonation in cases of adultery, (Anon., 6 Mass. 147,) although it is not where the offense alleged is extreme cruelty or desertion, (Gardner v. Gardner, 2 Gray, 434; Kennedy v. Kennedy, 87 Ill. 250.) But, however this may be, it is sufficient to say here that the court has found against the defendant on the plea of condonation, and its finding is conclusive. The question of the plaintiff's credibility, and the probability of his statement, in view of his failure to deny that he undressed and went to bed with the defendant, as stated by her, are matters for determination in the court below, and not here. Furthermore, under our statute, one of the requirements necessary to condonation is "restoration of the offending party to all marital rights," (section 116, Civil Code,) and this requirement is not proved by evidence of sexual intercourse alone. The testimony of the defendant, taken as true, does not necessarily show forgiveness or intention on his part to take her back to his home, and restore her to marital rights. Kennedy v. Kennedy, 87 Ill. 254.

Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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95 Cal. 463

SMITH v. CITY OF SAN LUIS OBISPO. (No. 14,628.)

(*Supreme Court of California*. Aug. 3, 1892.)

HIGHWAYS—COMMON-LAW DEDICATION—WHAT IS.

In ejectment for a strip of land which defendant city claimed as a public street, it appeared that the strip was used by the public before H., plaintiff's grantor, became the owner of the tract in which it was included, but was never formally dedicated to the public or platted as a street; that in 1875 H. sold a lot abutting thereon, representing to the purchaser that the land in suit was a street; that in 1883 H. built a fence on each side of the strip, leaving it open at each end, and it was thus used by the public for eight years, and until plaintiff, becoming the owner of the abutting land, fenced it up, claiming it as his land; that in 1884, before selling the land, H. stated that he had intended the strip for a street, but, as the town had not worked it, he considered that he had a right to sell it. *Held*, that the acts of H. constituted a common-law dedication of the land to the public as a street, and plaintiff could not recover.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. E. GREGG, Judge.

Ejectment by Levi Smith against the city of San Luis Obispo. Plaintiff had judgment, and defendant appeals. Reversed.

Wm. Shipsey, for appellant. *Wilcoxon & Bouldin*, for respondent.

HAYNES, C. Ejectment to recover a parcel of land in the city of San Luis Obispo, alleging an ouster on November 13, 1890. The answer denied all the allegations of the complaint, except that defendant was a municipal corporation, and alleged that the demanded premises "is, and for many years last past has been, a public street of said city, to the possession of which the defendant is entitled for street purposes." The plaintiff had judgment, and defendant appeals upon the judgment roll. The demanded premises is a strip of land about 45 feet wide and 175 feet long, and which would be wholly occupied or covered by Beach street, in the city of San Luis Obispo, if that street were extended from a point claimed by plaintiff to be its present northwesterly terminus to Marsh street. A diagram made part of the findings, but which it is not necessary to reproduce in this opinion, shows the course of Marsh street to be northeasterly and southwesterly. Pacific street is easterly from and parallel to Marsh street. Nipomo street crosses both Marsh street and Pacific street nearly at right angles, and Beach street is about 500 feet southerly from and parallel to Nipomo street. The land in controversy extends from Marsh street easterly about half way to Pacific street, to the point claimed by the plaintiff to be the westerly terminus of Beach street, from which point Beach street extends easterly across and beyond Pacific street. The court found that in October, 1871, the United States conveyed by patent to the trustees of the town of San Luis Obispo a tract of land which included the demanded premises, and in November of the same year said trustees conveyed to one Higuera a portion of said patented tract, including the part in controversy. In January, 1884, Higuera conveyed to one St. Clair. In March, 1884, St. Clair conveyed to Forbes, and in March, 1888, Forbes conveyed to the plaintiff. The court further found that Beach street, extending from the land in controversy easterly, has been a public street since the year 1870, but that from 1870 until some time in 1888 there was an obstruction on that part of Beach street adjoining the land in controversy, consisting of a corral maintained by one Martinez; that for eight years last past the land in controversy has been fenced on both sides on the lines of Beach street, if produced to Marsh street, but was not fenced on the line of Marsh street, but has always been open until after Forbes conveyed to plaintiff in 1888, when plaintiff built a fence on the line of Marsh street across Beach street, if produced, which fence was maintained by plaintiff until removed by defendant on November 13, 1890; during all the times above mentioned the land remained in the condition above described, having no other structure or improvement thereon; that, for 15 years prior to the building of said fence by the plaintiff on the line of Marsh street, the land in controversy was traveled over by a large number of persons when the bars in said corral were down, and when not down were passed by persons on foot who desired to pass; that in June, 1875, Higuera, who had purchased a part of said patented tract on each side of and including the premises in controversy, sold and conveyed to one Pellerie a lot fronting on Marsh street which adjoined the land in controversy, and at the time of the sale Higuera informed the purchaser that the lot he was selling to him was a corner lot, and that the street on the easterly side of the lot was Beach street. Nine years after selling that lot to Pellerie, viz., in 1884, and before he conveyed to St. Clair, Higuera said to one Pinho that he had intended the land in controversy for a street, but as the town authorities had not worked it, or done anything about it, he considered he had a right to sell it, and intended to sell it. The court further found that these premises had never been platted as a street, nor marked as such, upon any map, public or private; that from 1871 to the present time, except two years when it was not assessed, it was assessed to Higuera and his successors in interest, and the taxes thereon were paid by them. Upon the foregoing facts the trial court concluded that there had never been a dedication by the plaintiff or his predecessors in interest of this property to public use as a street, and that the defendant had not in any manner accepted any dedication thereof as a street; and the questions now to be determined are whether these findings are sustained by the record.

Dedication of land to a public use is simply setting it apart or devoting it to that use. To constitute a dedication at common law, no particular formality of either word or act is required. "It may be made either with or without writing, by any act of the owner, such as throwing open his land to public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate; or an acquiescence in the use of his land for a highway, or his declared assent to such use, will be sufficient; the dedication being proved in most, if not all, of the cases by matter *in pais*, and not by deed. The vital principle of the dedication is the intention to dedicate; and, whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made." Harding v. Jasper, 14 Cal. 648. This case has not only been cited and approved by this court down to the present time, but accords with the best-considered cases in many other states. We think the probative facts found by the court clearly show an act of dedication of the land in controversy by Higuera to public use for street purposes, both preceded and followed by expressed statements showing his intention so to dedicate it. The act to which we especially refer was that of building a fence on each side of this strip of land on the side lines of Beach street produced to Marsh street, while leaving it open at each end, thus giving free access to it from either direction. These fences were built eight years before the trial of the case, viz., in 1883. For fifteen years prior to that time this parcel of land was traveled over by a large number of persons when the bars of the corral were down. This use of the land by the public does not appear to have been objected to at any time. If it had been without his consent, we may reasonably suppose that, instead of marking out specifically the lines of the street, he would have built an obstruction across it; but thus building the fences while it was being used as a street seems to be as clear and explicit a dedication to the public for street purposes as could well have been made. Much the larger number of cases of this character in cities and towns base the evidence of dedication upon plats showing streets, and the reference thereto in sales and conveyances of lots; but the visible marking out upon the ground of the extension of Beach street from a point about midway between Pacific and Marsh streets by fences, especially when the ground between these fences was then and for many years had been used and traveled by a large number of persons, would seem to be more conclusive evidence of intention to dedicate the same to public use than the mere platting of unused ground. Indeed, in the latter case, until an acceptance by the town authorities or by the public, or until by the sale of lots in accordance with the plat by which the owner has vested an interest in the street in others, it is a mere offer to dedicate the land for street purposes, which he may withdraw at his pleasure. The obstruction maintained by Martinez, consisting of a corral, the bars of which were sometimes up and sometimes down, could not effect the dedication of the land in controversy to street purposes. It was not upon Higuera's land, nor maintained by him, but was upon a public street of the city, as expressly found by the court. Even if the obstructions were permanent, and such as the public could not remove otherwise than by condemnation, it is expressly held that a *cul-de-sac* may be dedicated to public use. Stone v. Brooks, 35 Cal. 497, 498, and cases there cited.

As to the fact that this strip of land had been assessed to Higuera and his successors in interest, and the taxes paid by them continuously, except two years, when it was not assessed, we are of opinion it does not affect the dedication. The findings do not show that this was assessed as a separate lot by a designation which would identify it, nor that the larger tract owned by Higuera, as shown by the second finding, had ever been subdivided into lots and blocks; and if the entire tract was assessed as a whole, as we may fairly infer from the findings, the failure to except this part covered by a traveled way was entirely proper,—as much so as not to except a highway in the assessment of a farm. Besides, we think the general public are not estopped by the act or omission of the city assessor in this regard, nor that the payment of the tax by Higuera, under the circumstances disclosed by the findings, could be held to rebut his intention, as shown by specific acts, to dedicate the land for street purposes. In 1875, eight years before Higuera built these fences, he represented to one Pellerie, to whom he sold a lot fronting on Marsh street, that "it was a corner lot; that that was Beach street on the east side of the lot referred to," thus recognizing it as an existing street at that time. In 1884 he said to one Pinho that he had intended the land in controversy for a street, but, as the town authorities had not worked it or done anything about it, he considered he had a right to sell it, and intended to sell it. This statement confirms our conclusion as to the intention with which all his previous acts had been performed, and only shows his legal conclusion that he had a right to sell the land because the town authorities had not improved the street. In this conclusion we think he was wrong.

If it were necessary that the municipal authorities should accept the dedication by some formal act, or by improving the street, in order to consummate or perfect the dedication, or to render it irrevocable, then Higuera's conclusion that he had a right to sell the land was correct, and the judgment should be affirmed. Upon the question whether the acceptance must be by the municipal authorities, or whether the use of the street by the general public under and in accordance with the dedication is sufficient, the authorities are by no means uniform. In some states legislative enactments require a formal acceptance. In others, in the absence of any statutory requirements, the improvement of the road or street by the authorities specially charged with their care is required by the courts to establish the fact of acceptance, in the absence of more formal action. The ground upon which these statutes and decisions rests is that the municipality ought not to be charged with the burden of improving streets which the authorities may deem unnecessary. But that does not seem to have been the policy of this state, legislative or judicial. Prior to 1883, section 2619 of the Political Code provided that "all roads used as such for a period of more than five years are highways." The chapter containing the above provision was repealed, and sections 2618–2756, Pol. Code, were enacted February 28, 1883, and section 2618, as it now exists, recognizes as highways, not only those laid out by the public, but those also which have been dedicated or abandoned to the public, or made such in actions for the partition of real property. It will be noticed, too, that this section expressly includes streets, alleys, lanes, courts, places, etc., in the term "highways." "A 'highway' is nothing but an easement, comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair." Peck v. Smith, 1 Conn. 103, 132. It might with some force be contended that the use of the ground in controversy for the period of more than five years prior to the repeal of section 2619, Pol. Code, in the manner stated in the findings, made it a statutory highway. See Bolger v. Foss, 65 Cal. 250, 3 Pac. Rep. 871.

Independently of the statute, however, we think the use of the street by the public for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient, without any specific action by the municipal authorities, either by resolution or by repairs or improvements. A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large as well as by the municipal authorities of the city, for a street is a highway for the use and benefit of the public at large, though under the immediate care of the municipality. In New Orleans v. U. S., 10 Pet. 662, it was held that, in order to dedicate property for public use in cities and towns and other places, it is not essential that the right to use the same shall be vested in a corporate body. It may exist in the public, and have no other limitation than the wants of the community at large. This case was cited and approved by this court upon this point in School Dist. v. Heath, 56 Cal. 480, where Bryant v. McCandless, 7 Ohio, 426, was also cited to the point "that dedications of land for public or charitable uses are good without a donee to take title." These cases were not those involving the acceptance of streets or highways, but the principle involved is the same. Indeed, it is difficult to conceive how the general public could, without legislative intervention, accept a dedication to their use otherwise than by user for the purpose for which the dedication was made. In Harding v. Jasper, 14 Cal. 647, it was said: "If the soil be accepted and used by the public in the manner intended by the owner, the dedication is complete;" and this quotation is cited in San Francisco v. Calderwood, 31 Cal. 589, in such connection as to show that the acceptance by the public was that shown by mere user. In San Francisco v. Canavan, 42 Cal. 553, this court said: "To constitute a valid and complete dedication, two things must occur, to wit, an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication. This acceptance is generally established by the use by the public of the land for the purpose to which it had been dedicated." In Stone v. Brooks, 35 Cal. at 497, it was said: "There does not seem to be any necessity for a formal acceptance by some particular board of officers. Such a requirement would destroy the common-law doctrine of dedication." In several cases where the distinction between a formal acceptance and an acceptance by user was not important to be observed, general language is used which might seem to imply that a formal acceptance was necessary; but we do not recall any case where the doctrine that user alone by the public is sufficient acceptance is denied. We therefore advise that the judgment of the superior court be reversed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

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95 Cal. 457

DEHAIL *et al.* v. MORFORD *et al.* (No. 14,698.)

(Supreme Court of California. Aug. 2, 1892.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—WAIVER OF OBJECTIONS.

1. St. 1889, p. 70, § 2, relating to the improvement of streets, provides that before ordering any work to be done the city council shall pass a resolution declaring its intention and describing the land to be taken, and specifying the exterior boundaries of the district to be affected and assessed. The city of Los Angeles adopted an ordinance for the widening of a certain street, which provided that "the exterior boundaries of the district of land to be benefited by said improvement, and to be assessed to pay the damages, costs, and expenses thereof, are as follows: All lots and parcels of land fronting on each side of First street, from the west side of Los Angeles street to the west line of Alameda street; also all of the property of the railroads situated upon said First street between said points shall also be assessed," etc. *Held*, that the ordinance failed to specify the "exterior boundaries" of the district to be assessed, and that the city acquired no jurisdiction.

2. Plaintiffs, by appearing before the city council and filing objections to the improvements, and afterwards protesting against the report of the commissioners, did not waive the right to object to the want of jurisdiction.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Suit by Dehail and others against Morford and others to retrain the sale of certain lands to satisfy a street assessment. Judgment for plaintiffs. Defendants appeal. Affirmed.

C. McFarland, for appellants. *J. L. Murphey* and *M. S. Stiles*, for respondents.

HARRISON, J. The city of Los Angeles adopted an ordinance July 8, 1889, for the widening of First street from the west side of Los Angeles street to the west line of Alameda street, for which certain lands were to be taken, and the costs, damages, and expenses thereof to be paid by an assessment upon other lands to be benefited thereby. Further proceedings were had under the ordinance, culminating in an assessment upon certain lands bordering upon the improvement, which was placed in the hands of the defendant Morford, a street superintendent of the city, for collection; and the defendant having advertised for sale, and being about to sell, for the purpose of satisfying said assessment, certain lots of land belonging to the plaintiffs, this action was brought to restrain him from making the sale. The defendants answered the complaint, setting out the proceedings leading up to the assessment, and the proceedings thereunder; and upon the motion of the plaintiffs the court rendered judgment in their favor upon the pleadings, perpetually enjoining the defendants from making said sale. From this judgment the defendants have appealed.

Section 2 of the act of March 6, 1889, (St. 1889, p. 70,) under which the proceedings for widening the street were had, declares: "Sec. 2. Before ordering any work to be done, or improvement made, which is authorized by section 1 of this act, the city council shall pass a resolution declaring its intention to do so, describing the work or improvement, and the land deemed necessary to be taken therefor, and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, costs, and expenses thereof." The ordinance adopted by the city of Los Angeles for widening said street provides for an assessment to pay the cost of the improvement, in the following language: "Sec. 2. That the exterior boundaries of the district of land to be benefited by said improvement, and to be assessed to pay the damages, costs, and expenses thereof, are as follows: All lots and parcels of land fronting on each side of First street, from the west side of Los Angeles street to the west line of Alameda street; also all of the property of the railroads situated upon said First street between said points,—shall also be assessed to pay said costs, damages, and expenses." This is not a compliance with the provisions of the above section of the statute, for a resolution "specifying the exterior boundaries" of the district to be assessed to pay the cost of the improvement. The only boundaries of the district which are "specified" are the lines of First street between Los Angeles and Alameda streets, and these, instead of being the "exterior boundaries" of the district to be assessed, are only the boundaries of a tract within the district which is exempted from assessment. There is nothing in the description of the district from which its extent in either direction from First street can be ascertained, or by which any one can determine the quantity of land which is to be assessed. A very obvious reason for this requirement of the statute is that each owner of property within the district may be informed of the extent of territory which is to bear the burden of the improvement, and thus, by calculating the relative burden upon himself, determine whether the burden to be borne by himself will be so disproportionate to the benefit of the improvement that he can make suitable representations to the city council when it comes to act upon the ordinance in pursuance of its resolution of intention. While each owner of property may know the depth and area of his own lot within the district, he is not presumed to know that of the other lot owners, and consequently cannot know the relative proportion of the expense which he will be called upon to bear, and cannot intelligently make any objections before the council "to the extent of the district of lands to be affected or benefited by said work or improvement," which by section 4 of the statute he is authorized to make and have considered by the council. Irrespective of such reason, however, it is a sufficient reason that the legislature has prescribed this as a requirement to be observed by the city council, and one of the steps to be taken by it, before it can have any jurisdiction in the matter; and it is a fundamental principle in proceedings of this character that every requirement of the statute which has a semblance of benefit to the owner must be observed in order to give to the municipality jurisdiction in the premises. After the jurisdiction has once been acquired, subsequent proceedings can be attacked for only such irregularities as affect substantial rights, but, for the purpose of acquiring jurisdiction, every requirement must be regarded as of equal necessity.

The plaintiffs did not waive their right to object to this want of jurisdiction by the fact that they appeared before the city council and filed objections to the improvement, and afterwards protested against the report of the commissioners. If the city council failed to acquire jurisdiction of the subject-matter of the improvement, it could not acquire jurisdiction by the consent of the plaintiffs, much less by the fact that they objected to the improvement. It was said in Hewes v. Reis, 40 Cal. 263: "The right to appear before the board and object cannot certainly excuse the performance of those acts which are conditions precedent to the exercise of the power, nor does this right of remonstrance possess the least semblance of a remedy for a wrong that may be committed notwithstanding the protest;" and the actual appearance and protesting cannot have any greater effect for the purpose of conferring jurisdiction than the unexercised right of so appearing and protesting.

The judgment is affirmed.

We concur: DE HAVEN, J.; PATERSON, J.

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95 Cal. 475

CARTER v. BALDWIN. (No. 14,598.)

(*Supreme Court of California.* Aug. 3, 1892.)

ATTORNEY'S CONTRACT—COMPENSATION—WAIVER OF PERFORMANCE.

Where a firm of attorneys is employed for a stipulated amount, payable on the termination of a suit, to assist other senior counsel to prosecute a specified suit, and such suit is not brought, and no further demand is made of such firm for said services, after waiting a reasonable time for such demand performance will be deemed waived, and recovery may be had on the contract of employment.

Department 2. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Action by Carter against Baldwin to recover on a contract. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Wells, Monroe & Lee, for appellant. *Anderson & Anderson*, for respondent.

DE HAVEN, J. This action is brought by plaintiff as assignee of a contract made by defendant with the law firm of Silent, Wade & Fitzgerald. The complaint was filed on April 14, 1890, and alleges, in substance, that defendant on February 10, 1886, employed said firm of Silent, Wade & Fitzgerald to prosecute certain libel suits then pending, and to be brought, against one Bell, and a civil suit against the Los Angeles Times for libelous articles theretofore published, the defendant agreeing to pay for such services $2,000, of which sum $500 was to be paid in cash, $500 in 60 days from date of the agreement, "and the balance of $1,000 on the termination of said suits." The complaint further alleges that the assignors of plaintiff fully performed said contract, and that all of the suits referred to in the agreement have been terminated, and that defendant has not paid the balance of $1,000 agreed to be paid on the termination thereof, and this action is brought to recover such balance. The answer of defendant denied that plaintiff's assignors had performed the services required of them under the contract stated in the complaint, and in this connection alleged that the suit against the Los Angeles Times was never commenced, and that no services had been rendered therein, as contemplated by said contract. The action was tried by the court without a jury, and findings were filed, and a judgment rendered in accordance therewith in favor of the plaintiff for the full amount claimed by him. The defendant appeals.

It is conceded that the contemplated suit against the Los Angeles Times was never commenced, and the claim of appellant is that, this being so, the plaintiff is not entitled to recover. We think, however, that the evidence tended to show a waiver of performance of this particular service, and the findings of the court fairly construed are to this effect. The evidence upon the part of the plaintiff tended to show that the firm of Silent, Wade & Fitzgerald were employed to assist other attorneys of defendant in the prosecution of the suits referred to in the complaint. The attorneys thus to be assisted were the regular attorneys for defendant, and had commenced the civil suits which were then pending, and, according to the testimony for plaintiff, were to continue as senior counsel, not only in these, but were to act as such in the one to be brought against the Los Angeles Times. The defendant never went near the firm of Silent, Wade & Fitzgerald after employing them, nor in any manner thereafter requested them to bring the action against the Los Angeles Times, nor did the other attorneys, whom they were employed to assist in the matter, ever call upon them for any service in relation to such suit. When this action was commenced the period of limitation fixed by the laws of this state within which to commence the action against the Los Angeles Times for the alleged libel had expired. It is true the defendant in such an action might waive this defense, but still such long delay upon the part of the defendant in the matter of directing the commencement of such suit is strong evidence that he had abandoned all intention of bringing it. It is undoubtedly true that in many cases the contract employing an attorney to prosecute an action would be construed as containing an implied, if not express, direction to the attorney to bring such action without further request upon the part of the client, but, under the contract which the evidence of plaintiff tended to establish in this case, it was not incumbent upon the assignors of plaintiff to commence the action against the Los Angeles Times without further directions from defendant, or from the other attorneys who were to act as senior or leading counsel for defendant in the prosecution of the case; and, having waited a reasonable length of time without receiving such directions, they were justified in assuming that defendant had waived the performance of this particular service, and they were entitled to recover upon the contract, as if such service had been actually performed. The complaint in this case alleges full performance of the contract upon the part of Silent, Wade & Fitzgerald, whereas the evidence upon the part of plaintiff tended to show performance by them of all services contemplated by the contract, except in relation to the suit against the Los Angeles Times, and as to that a waiver of performance by defendant. We do not regard the variance as material. The evidence was received without objection, and it is apparent from the record that the defendant was not misled thereby. This being so, the variance is to be disregarded, under section 469 of the Code of Civil Procedure, which declares: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." The evidence upon the trial was conflicting upon material points, but the case seems to have been fully and fairly tried, and we find no error in the record.

Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(95 Cal. 461)

In re GATES. (No. 20,937.)

(*Supreme Court of California.* Aug. 3, 1892.)

CUSTODY OF CHILDREN.

Where it is to the manifest interest of a child to remain with relatives of her deceased father, who have always had the care of her, and who are amply able and desirous to provide for her maintenance and education, while her mother has no means to support her unless they are furnished by her husband, a man of small means, and the child is deeply attached to such relatives, while she looks on her mother as a stranger, a writ of habeas corpus for the possession of the child, issued on petition of the mother, will be discharged.

In chambers. Petition of Margaret J. Olsen for a writ of *habeas corpus*, to obtain the custody of Della Gracie Gates, petitioner's daughter by a former marriage. Writ discharged.

F. M. Brandon, for petitioner. *Clay W. Taylor*, for respondent.

BEATTY, C. J. The petitioner, Margaret J. Olsen, a resident of Santa Clara county, is the mother of Della Gracie Gates, aged 10 years and 5 months, who, the petitioner alleges, is unlawfully restrained of her liberty by James Eldridge, at his residence, in Lassen county. Said Eldridge admits that he has the custody of the child, and claims that he has a right thereto by virtue of an order of the superior court of Shasta county, appointing him her guardian. From the facts disclosed by the petition, the return, and the evidence adduced at the hearing, I am satisfied that the order appointing Mr. Eldridge guardian of the child is void for want of jurisdiction, and that the petitioner is the person legally entitled to her custody. But, in view of the special circumstances of the case, I do not feel called upon to make any coercive order by which the mere legal right of the petitioner may be enforced against the child's manifest inclination and reasonable choice to remain where she is. The petitioner voluntarily relinquished the care of her child when she was scarcely a year old, and ever since she was two years of age has left her in the exclusive charge and control of Mr. and Mrs. Eldridge, the latter being a sister of the child's father. The natural and inevitable consequence has been that this little girl, knowing no other parents or protectors, and never seeing her mother but twice in nearly nine years, has become deeply attached to her aunt and uncle, as they have to her, and has come to look upon her mother as a stranger. Though she has not reached the years of legal discretion, she is sufficiently intelligent to be trusted in some degree to choose in a matter affecting so deeply her feelings and her interests, and, having examined her privately, I am convinced that it would be nothing less than an act of extreme cruelty to tear her from the only home she has ever known, even for the purpose of placing her under the care of her own mother. Her material interests also will be promoted by leaving her where she is, and where she chooses to remain. Her mother is without means to support her, except as they may be provided by her present husband, who, however willing he may be, is under no legal obligation to support a step-child, and has but small ability to do so. Mr. and Mrs. Eldridge, on the contrary, have ample means and have no children of their own. They live in a healthy locality in the country, where all the surroundings are favorable to the moral and physical well-being of the child, and they have the disposition and ability to provide for her nurture, education, and future comfort and security. Under these circumstances, I consider that my duty in the premises is fulfilled by seeing that the child is freed from all illegal restraint, and leaving her free to go to the home of her choice. Writ discharged.

(3 Cal. Unrep. 507)

KELLEY v. OWENS *et al.* (No. 13,804.)

(*Supreme Court of California.* Aug. 3, 1892.)

EVIDENCE—SHIFTING BURDEN OF PROOF—FRAUD.

1. Plaintiff asked that an agreement made by her to convey land to defendant for stock in an iron and steel company be canceled, alleging that defendant induced her to make the contract by representing that a new method had been discovered for the cheap manufacture, at a great profit, of a superior quality of fine steel and iron, for which invention a caveat had been filed, and that this company had been formed for the manufacture of steel under this process; which representations plaintiff alleged to be false, and known by defendant so to be. *Held* that, as these were negative allegations, but little was necessary to shift the burden of proof to the party having the best opportunities for knowledge of the facts, and that testimony of an expert that the process, as given in the caveat, would not produce steel, was sufficient to place on defendant the burden of proving the truth of the representations made by him.

2. In such case, if the representations made by defendant were false, he cannot show that plaintiff did not rely on them by evidence that plaintiff investigated the matter for herself, and expressed herself as fully satisfied, when such investigations consisted merely in asking information from persons to whom she was referred by defendant, and who knew and could know nothing of the process, except what they were told of it by him.[1]

3. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time, is admissible.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; R. CROUCH, Judge.

Action by Mrs. H. S. Kelley against William Owens, executor, and Helen M. Owens. From a judgment for defendants, and an order denying a motion for a new trial, plaintiff appeals. Reversed.

D. M. Delmas, (*Bull & Cleary*, of counsel,) for appellant. *Garret W. McEnerney* and *George Maxwell*, for respondents.

HAYNES, C. This was a suit in equity to rescind and cancel an agreement for the sale of land made by appellant with said H. K. Owens, and a conveyance to him of said land pursuant to said agreement. H. K. Owens died after the commencement of the action, and the executor of his estate was substituted. Helen M. Owens, the wife of H. K. Owens, was made a party originally, because of the conveyance of said land to her by her husband. Defendants had judgment, and this appeal is taken from an order denying appellant's motion for a new trial.

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[1] Decision on this point withdrawn. See 31 Pac Rep. 14.

Appellant was the owner of 480 acres of land in Colusa county, alleged to be of the value of $20,000, and found by the court to be of the value of $17,000; and on June 5, 1884, entered into a contract with H. K. Owens, by which she agreed to convey said land to him in consideration of 55,240 shares of the capital stock of the Pacific Coast Steel & Iron Manufacturing Company. The said stock was transferred to appellant immediately after said contract was made, and on the 14th of June, 1884, appellant conveyed said land to said Owens. The complaint alleged, in substance, that said Owens, in order to induce plaintiff to exchange said land for said stock, represented that one "Lee was the discoverer and inventor of a new method for the cheap manufacture, at great profit, of a superior quality of fine steel and merchantable iron from pig iron and other iron and iron ore;" that said Lee had secured the right to have his said invention patented; that he (Owens) had aided and assisted Lee in obtaining said right to a patent, and in forming a corporation for the manufacture of said steel by said process,—which representations she alleged were false, and known so to be by Owens; that she relied upon them, and believed them to be true, and was thereby induced to enter into said contract and make said conveyance. The complaint further charged that Lee and Owens confederated together to form said corporation for the purpose of defrauding plaintiff and other purchasers of stock, and, in pursuance of said design, made representations similar to those above recited, all of which averments were denied in the answer. The court found the contract, conveyance, and transfer of the stock as alleged. The findings upon the other allegations, upon which issues were raised, are very full, covering seven pages of the transcript. These findings are to the effect that H. K. Owens did not, for the purpose of inducing the plaintiff to make the conveyance or otherwise, represent that Lee was the discoverer or inventor of the said process, but that he did represent that he "believed Lee was the discoverer and inventor of a new method for the cheap manufacture, at great profit, of a superior quality of fine steel and merchantable iron, from pig iron and other iron and iron ore." The findings further show that Owens represented to plaintiff that Lee had filed a *caveat* for his said invention; that Owens had advanced from time to time large sums of money to Lee to enable him to perfect his invention, and manufacture specimens of steel; that he had aided Lee in forming said corporation; and that his representations were true. The court further found "that said Lee was, at all times alleged in the amended and supplemental complaint mentioned, the discoverer and inventor of a new method for the cheap manufacture, at great profit, of a superior quality of fine steel and merchantable iron, from pig iron and other iron and iron ore." It was further found that the representations made by Owens to plaintiff were none of them false, or known or believed by Owens to be false, but that each of them was true, and known and believed by Owens to be true; that the plaintiff did not rely upon said representations, or any of them, in making said contract and deed, and was not induced thereby to do so. Appellant, in her motion for a new trial, attacked nearly all of the findings, including those above mentioned, upon the ground that they were not justified by the evidence.

Many witnesses were examined, and the testimony is voluminous. I think the findings in several particulars covered by appellant's specifications are not sustained by the evidence. Some general facts disclosed by the evidence, and not controverted by counsel, may be first stated. In 1883, Dr. Lee claimed to have discovered the process mentioned in the complaint for the manufacture of steel. He was without financial ability to conduct experiments necessary to perfect his alleged discovery; as Owens stated to the witness Cousins, he (Lee) was very poor, that he had nothing, that he (Owens) furnished him means, and, he thought, even bought him clothes. Under these circumstances, Mr. Owens furnished Lee a laboratory in the city of San Francisco, where for some time he prosecuted his experiments, and then a plant at Melrose was secured, where it was claimed steel was made by Lee's alleged process. This plant was afterwards moved to Martinez, for the purpose of securing better freight facilities, and where a larger plant was to be and was in part erected. In the mean time, in October, 1883, Lee and H. K. Owens organized the corporation known as the Pacific Coast Steel & Iron Manufacturing Company, with a capital stock of 215,000 shares, of the par value of $5 each, and of which stock the complaint alleges, and it is not denied, Lee and Owens had issued to them 115,000 shares, and of which corporation Lee was president and Owens treasurer; three other persons, with Lee and Owens, constituting the board of directors.

1. The representation that Lee was the discoverer and inventor of a new method for the cheap manufacture, at great profit, of a superior quality of fine steel, whether true or false, or whether made positively, or upon belief merely, lies at the foundation of this controversy. The fifth finding is that H. K. Owens did make that representation to plaintiff, but that it was made upon belief, while the tenth finding is that it is true; and, if true, it is immaterial whether it was made as the positive assertion of a fact, or merely as an assertion that he believed Lee was the discoverer of such new process or method. This representation was very comprehensive. It was not merely the discovery of a method of making steel, but of a new

method for the cheap manufacture, at a great profit, of a superior quality of fine steel. Then, as now, the manufacture of steel was a great industry. Methods of its manufacture had long been known. The opportunity for any one to engage in its manufacture by methods theretofore known was open, but by such methods the new manufacturer must compete on not more than equal terms with those who then occupied the field. The inducement, therefore, to engage in this enterprise was a new method, a cheap one, affording large profits, while the product was superior, thus assuring a ready market, and in addition that a *caveat* protecting the discovery had been filed, thus securing the corporation against competition in the use of the same process. In order, therefore, to justify the tenth finding, something more must appear than that Dr. Lee discovered a method theretofore unknown to him, by which he could make steel; but the method must be new, in the sense that it was unknown to and unused by all others engaged in the manufacture of steel, while the cheapness of the method, insuring large profits, and the superior quality of the steel, were equally potent elements in recommending it to the favor of investors. The evidence bearing upon the proposition that such discovery or invention was not made by Dr. Lee is voluminous, and is found in parts of the testimony of many witnesses. The alleged discovery or invention is described in the *caveat* filed by Dr. Lee in the United States patent office, under date of April 12, 1884, copy of which appears in the transcript. Patrick Noble, a witness called on behalf of the plaintiff, testified that he was superintendent of the Pacific Rolling Mills, had been in that business eight years, and was familiar with the manufacture, composition, and handling of metals, including steel; that he had made a study of that subject, and was familiar with the different processes of making steel that are known to the world; that he had seen the *caveat* which was in evidence, and had carefully examined the drawing attached to it; that the *caveat* does not describe any method whatever of making steel; that steel could not be made by following the directions contained in the *caveat;* that it would spoil the metal; that putting a warm blast on top simply burns the metal; that if the air is put in the metal it would make steel, but would be an infringement of the Bessemer process; that none of the fluxes used are calculated to make steel. No experts were called to contradict this testimony of Mr. Noble. Mr. Hatton, who was in charge of the rolling department in the Pacific Mills, testified that Dr. Lee brought some steel there, that he rolled it for the doctor, but he did not know where it came from. The only thing tending to identify it was that it appeared to have been cased in a railroad bar, or something like that; and defendants' witness Holland testified that he was in Lee's employ, that he was with him at Melrose, that he remembered of steel being sent to the rolling mills, that it was run in a railroad bar, but that he did not see the chemicals put in. This testimony therefore raises no conflict with the testimony of Mr. Noble. It only shows that steel of some quality was made by Dr. Lee at Melrose, but by what method or process, new or old, cheap or expensive, does not appear. Both Mr. Owens and Dr. Lee exhibited to appellant and others at Martinez specimens of what was represented by them as steel made by Dr. Lee's process at Melrose.

One of plaintiff's witnesses, Alfred F. McMillan, a blacksmith who had worked at his trade continuously more than 20 years, testified that Owens exhibited to him three different pieces of metal professed to be manufactured by Lee's process, and he found them to be common Bessemer steel. This witness further testified that Owens afterwards gave him a piece of waste metal and asked witness to test it, and told him it was manufactured the same as the others; that he tested it, and informed Owens that it was only a piece of pig iron decarbonized a little; that it could not be rolled nor hammered; that it was worthless. At this time Owens further said to the witness "the process of manufacturing steel was a secret between him and Dr. Lee;" and Owens then requested witness "not to say anything about it, so as people should not think anything wrong was going on, as I understood." The witness further testified that Lee came to him, and asked if he did not have a piece of steel. "I told him I did, — two pieces of iron, — of those bars Mr. Owens gave me. He asked me what I thought of the steel. I told him it was an ordinary grade of open hearth or Bessemer steel. During the conversation I broke off a piece of this steel and a piece from an old plowshare, and bet the doctor a new hat if he could pick out his from the two pieces, and the doctor said it was hard to tell." Ostello, a witness for appellant, testified that three pieces of steel of different grades were brought to him, that Robbins and Perrin tried some, and both reported to him that it was good. Other witnesses, among them Patrick Noble, examined and tested these specimens,—some of them were undoubtedly steel. One bar, Noble testified, "was steel; that it looked like tool steel; that is, high in carbon. That it was an article well known to commerce, coming from Damascus, and has been for centuries, two or three," and "that it was not different from merchantable steel known to commerce for fifteen years or more." I find in the record, however, no evidence, beyond the representations of Lee and Owens, that these specimens of steel were made at Melrose, or, if made there, that they were made by the process alleged to have been discovered by Lee, nor that, if so made, that the process was cheap, or resulted in the manufacture of a superior quality of steel. It cannot be said that these representations were evidence of the fact stated in the findings under consideration, or that it in a legal sense conflicts with the testimony of Noble, that the formula shown by the *caveat* filed by Lee would not produce steel.

It may be added, however, that Owens, in a conversation with the witness Cousins, after this suit was brought, said that he did not know that Dr. Lee had ever made that steel; that he never saw him make it; that Dr. Lee might have bought it, or got it from some other source. The witness further said he referred to the steel that was exhibited by Lee and Owens to induce stockholders to subscribe for stock. There was some metal that was called "steel" by Dr. Lee and others, made at Martinez, and which was also referred to by the appellant in a letter to Mrs. Paddock, put in evidence by respondent; but upon examination it will be found that all the statements or expressions, in regard to the manufacture of steel at that place, were simply repetitions of Lee's statements; while the witness Williamson, an iron founder and machinist of 35 years' experience, and who was employed by Dr. Lee about the 1st of June, 1884, at the works in Martinez, and who cast the battery shoes represented to be of steel, testified as follows: "I went there some time after Mr. Owens left, and after this lady (Mrs. Kelley) bought her stock. I think that was about the beginning of June. From that time I remained there in charge of the works up to the time that Dr. Lee left. During the time I was there, there was not any steel made at those works Dr. Lee claimed these stamps and dies that I have spoken of to be steel, and he claimed that it was produced by the use of his chemicals. He either put in the chemicals himself, or had some one else. * * * On one heat there was none put in, as I said before. That was the heat I ran, which was the last one. While I was there I urged Dr. Lee to make steel." Again the witness said: "From my observation of Dr. Lee during the time while I was there, as an expert I say that he didn't manifest any knowledge of working that iron and steel. * * * I did not see any evidence or any trace of any new process of manufacturing steel during the time I was there. * * * The doctor professed to be making steel out of the cupola, and made what he termed to be steel, but I could see no steel about it. * * * I tested it by heating it and trying to work it, and I pronounced it as not steel, * * * if it has got to be a direct answer." Mr. Bunker, another witness, testified that he urged Dr. Lee to make some of his fine steel, to which the doctor replied that he would not till he got ready. It may also be added that some time in August, 1884, Dr. Lee abandoned the enterprise, as it appeared, and, so far as the record shows, was never heard of by those interested afterwards. Counsel for respondents do not contend that Lee did discover such process, but say that the evidence upon this point was not deemed satisfactory by the court, and it therefore prefaced the findings by the statement that the allegation that Lee was not the discoverer of such new method, etc., "is not sustained by the evidence, and the court therefore finds," etc. The only comment made by respondents' counsel upon this finding is "that the testimony is such as would not ordinarily produce material [moral?] certainty or conviction in an unprejudiced mind." It is true the burden was on appellant of proving her negative allegation, that being the foundation of her action. The degree of proof of a negative allegation is seldom measured by that required of an affirmative allegation. In some cases a negative may be positively and conclusively proved, and in such cases the general rule laid down in section 1869, Code Civil Proc., must be complied with; but in many cases this is impossible, and hence the amount of proof required to support the negative proposition and to shift the burden will vary according to the circumstances of the case; and very slight evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into. Steph. Dig. art. 96; U. S. v. Southern Colorado Coal, etc., Co., 18 Fed. Rep. 273.

It is perfectly clear that appellant made all the proof of her negative allegation that the nature of the case and the rules of evidence required. The witness Noble, whose learning and experience qualified him to testify as an expert, and whose competency was not questioned, testified that the method or process given in the *caveat* would not produce steel. That, without anything more, was quite sufficient to shift the burden of proof to the other side. If it had been met by the testimony of another expert that it was a new method, and would produce steel profitably, there would have been a material conflict in the testimony; or if it had been shown that Lee's process had, by actual test, shown that steel could be produced by it of a superior quality, cheaply and profitably, and that the method was new, the great preponderance of the evidence would have been with respondents; and that evidence they were bound to produce, if it existed. Appellant, however, did not rest upon that, as she might have done, but proved by Williamson, who was in charge of the works at Martinez under Lee, that what Dr. Lee called steel, made by his process, was not steel. The bars of steel exhibited and tested at Martinez, and which were represented by Lee and Owens to have been made by this process at Melrose, were not proved to have been so made, and therefore raised no conflict in the evidence.

As to the finding that these representations which were made by Owens to the plaintiff were made only upon his belief, little need be said. Appellant testified positively that Owens' statements were made positively and repeatedly; that he exhibited to her specimens of steel which he asserted were made by Lee by his new method. About the same time, and before, as well as after, he made the same statements to Cousins, Barry, Bunker, and others. But it is claimed on behalf of respondents that appellant's testimony is contradicted by Mrs. Paddock, who was present at the first conversation between appellant and Owens. That conversation was at Mrs. Paddock's house, early in April, when Mrs. Paddock was trying to sell to appellant 200 shares of the stock in this corporation, and had called in Mr. Owens and introduced him to appellant as one "who knew all about it." It is not necessary to discuss the want of probability, under all the circumstances, of Mrs. Paddock's statement that Owens said he "believed Lee had invented the process and had made the steel which he exhibited, inasmuch as that was a different transaction, not involved in this suit. Appellant bought Mrs. Paddock's shares in April, and afterwards, in June, exchanged her farm for the stock owned by Owens. It is conceded by respondents' counsel that, after appellant purchased Mrs. Paddock's stock, Mr. Owens may have changed the form of his representations from "belief" to that of an absolute fact, when he came to negotiate a sale of his own stock. If it be true that he did, the former representation can have no weight. Appellant's testimony shows that Owens called upon her many times after her purchase of Mrs. Paddock's stock, and made these representations as statements of fact, and urged her to visit Martinez and see the works, and there showed her specimens of steel, which he declared in Lee's presence was made by Lee by his process, and "that is our make of steel," and made other expressions of like character, and also informed her that he had the formula of Dr. Lee, but did not know that he could make the steel himself without experiment; all which statements and occurrences, subsequent to the first conversation at Mrs. Paddock's, are wholly uncontradicted. It is true that at the time she gave her testimony Mr. Owens was dead, and could not, therefore, contradict her. That fact should require the court to scrutinize her testimony, but could not authorize such distrust of it, if otherwise reasonable and probable, as to seriously diminish its weight. The same positive statements were made to others before, and at about the same time, in reference to the same facts, and while inducing others to take stock in the corporation. This testimony, counsel for respondents contend, was irrelevant, and, even if admitted by the court below without objection, should not be considered here. The cases cited by respondents' counsel are not in point; with one exception these were criminal cases, and the evidence held irrelevant was of other, distinct offenses, of the same character. In criminal cases, where the knowledge of the defendant is an essential ingredient of the offense, other offenses of the same character may be shown, as, for example, where the offense charged was that of passing a counterfeit bill, it is competent, for the purpose of showing that the defendant knew it was counterfeit, that about the same time he passed other counterfeit bills of like character, which were known to him to be counterfeit. Cases of fraud are, however, exceptions to the general rule. In Lincoln v. Claflin, 7 Wall., at 138, the court said: "On the trial declarations of the defendants were received, which related, not merely to the transaction which is the subject of inquiry in this action, but to similar contemporaneous transactions with other parties. The evidence was not incompetent or irrelevant, as contended by counsel. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time, is admissible." See, also, Cary v. Hotailing, 1 Hill, 311.

The only other finding necessary to be noticed is the fifteenth, viz.: "That said plaintiff did not rely upon said representations, nor upon any thereof, in making said contract or deed, nor was she by said representations, or any thereof, induced to make said contract or deed." Appellant, after testifying fully to the representations made to her by Owens, testified that she had never been engaged in the business of manufacturing steel or iron of any kind; that she knew nothing about it further than had been represented to her by Mr. Owens; that she believed his representations, and relied and acted upon them in making the transfer of the land to him. It is not necessary that we should repeat these representations. The only testimony in the case tending to show that appellant did not rely upon the representations made to her by Owens was the testimony of Mr. James F. Stewart, an attorney, whose son, also an attorney, occupying the same office with his father, drew up the contract between appellant and Owens. Mr. Stewart testified that while the contract was being drawn Mr. Owens left the office, and he took occasion to ask appellant if she knew the facts connected with the matter, and she replied that she did; that she had informed herself fully; that she had received her information from parties at Martinez; that she was competent to make the agreement; and that she got her information outside of Owens. The uncontradicted evidence in the case, however, shows that up to the time this agreement was entered into no one at Martinez, except Dr. Lee and Owens, knew anything about the matter, except from the representations of those two men; and further shows that others could not have known anything about the alleged process otherwise. Therefore the invitations of Owens, repeatedly given to appellant, to go to Martinez and investigate, was an invitation to hear from others the representations he had made them, and in so doing simply repeated to her the representations he had made to her before, but in such manner as to greatly strengthen her confidence in him. While, therefore, to Mr. Stewart, who knew nothing of the situation at Martinez, it might appear that appellant had fully investigated the subject, and did not rely solely or principally on Mr. Owens' statements, in the light of the record, his testimony does not raise a material conflict. My conclusion, therefore, is that the findings referred to are not justified by the evidence. The testimony of Mr. Stewart should have been excluded, and the court erred in receiving it, in the light of the circumstances shown by the record; but whether the appellant was prejudiced thereby to such extent as to justify a reversal upon that ground alone it is not necessary to decide.

Respondents' counsel have argued at considerable length that appellant's complaint does not state facts sufficient to support a judgment in her favor, and contend that for that reason the order denying a new trial should be affirmed, regardless of error. In this case there was no appeal from the judgment, and it is well settled that the sufficiency of the pleadings cannot be considered on appeal from an order denying a new trial. Brison v. Brison, 90 Cal. 323, 27 Pac. Rep. 186, and cases there cited. I think the order should be reversed, and new trial granted, with leave to the plaintiff to amend her complaint if she desires, and so advise.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and new trial granted, with leave to the plaintiff to amend her complaint if she desires.

95 Cal. 501

MORGAN v. SOUTHERN PAC. CO. (No. 14,841.)

(*Supreme Court of California.* Aug. 5, 1892.)

INJURY TO PASSENGERS — CONTRIBUTORY NEGLIGENCE—DAMAGES—EXCESSIVE.

1. In an action for personal injuries caused by defendant's negligence, it appeared that plaintiff was a passenger on defendant's train; that at the station where plaintiff wished to leave the train, while in the act of alighting, she was thrown from the steps of the car platform by a sudden backward movement of the train. Witnesses for plaintiff testified that she was not on the platform when the car stopped, and did not leave her seat till afterwards, and that it was from a half minute to a minute after the train stopped before it started back. The engineer testified that when the train stopped he immediately reversed the engine, and moved the train back. *Held,* that the question of contributory negligence was for the jury.

2. Where, in such case, the whole charge of the court is on the theory that exemplary damages cannot be given, and the jury is instructed that the measure of plaintiff's "recovery is what is called 'compensatory damages,'—that is, such sum as will compensate her for the injury she has sustained,"—it is not reversible error to say in such charge that "money is an inadequate recompense for pain."

3. In an action for personal injuries there was evidence that plaintiff's right arm and shoulder were greatly injured; that the internal ligaments of the shoulder joint were ruptured; that she suffered great pain, and at the time of the trial, two years after the injury, still suffered great pain in the shoulder, in the back of the head and neck, and in the chest; that her memory was impaired; that she was unable to do any work of value; that but little progress had been made towards recovery; and that her injuries would probably be permanent. *Held,* that a verdict of $15,000 should not be disturbed as excessive.

Department 2. Appeal from superior court, Kern county; A. R. CONKLIN, Judge.

Action by Flora Morgan against the Southern Pacific Company to recover for personal injuries received while a passenger on defendant's train. From a judgment rendered on the verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

E. L. Craig and *Horace Hawes,* (*R. B. Carpenter,* of counsel,) for appellant. *Lamberson & Taylor* and *J. W. Ahern,* for respondent.

MCFARLAND, J. This action was brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, a railroad company. It is averred in the complaint that while plaintiff was in the act of alighting from the car of defendant, it was, through the negligence of defendant's servants and employes, suddenly and violently put in motion, whereby plaintiff was, without any fault on her part, thrown upon the ground, and seriously injured. The jury gave a verdict in favor of plaintiff for $15,000, for which amount judgment was rendered; and defendant appeals from the judgment and from an order denying its motion for a new trial.

1. The point of appellant that the evidence was insufficient to warrant any finding of liability on the part of defendant for the injury complained of cannot be maintained. The accident happened at the town of Delano. At that place the train usually stops with the locomotive at a water tank, so that water may be taken for the engine while passengers are going off and on the train. When the train arrived on the evening of the accident, the engineer did not succeed in stopping it until the locomotive had gone about a car's length beyond the water tank, and he moved the train back far enough to bring the engine at the proper place to take water. He testified that he did this immediately, so that there was only a moment of time between the first stop and the commencement of the backward movement, and his testimony to this effect was to some extent corroborated. Counsel for appellant contends that, this fact being established, it follows that plaintiff must have been guilty of contributory negligence; because if she had retained her seat in the car until the train first stopped, as she ought to have done, she could not have been on the steps of the platform when the train started back. It is argued that she must have been wrongfully on or near the steps before the car stopped. But witnesses for the plaintiff testified that it was from a half minute to a minute after the train stopped before it started back; plaintiff testified that she did not leave her seat until the car stopped; and another witness testified that she was not on the platform when the train stopped. There was therefore a substantial conflict of evidence as to the period of time which elapsed between the stop and the beginning of the movement backwards. Counsel say that it was natural and in accordance with the usual course of things for the engineer to have immediately reversed his engine and started back when he found himself beyond the water tank; that there was no reason for his waiting 30 or 60 seconds before doing so; and that, therefore, the contrary testimony of plaintiff's witnesses should not be considered as raising a substantial conflict. It could be well argued, and no doubt was so argued to the jury, that the engineer's version of the affair was more probably correct than that of plaintiff's witnesses; but, after all, the question was one of probability, to be determined by weighing conflicting evidence. It was therefore a question fairly

within the province of the jury to decide.

2. The court, in the course of its charge to the jury, used the following language: "Money is an inadequate recompense for pain, but, as the law can afford no other redress, it aids the sufferer to obtain this in such measure as a jury dispassionately considering all the circumstances of the case will allow; and, whether the injury is the result of negligence or direct personal violence, the resulting pain is an element of damage to be compensated. In other words, it is an element of compensatory damage." And appellant contends that the use of the words, "money is an inadequate recompense for pain," constitutes a material and reversible error.

The language objected to would, no doubt, be more appropriate to social and private conversations and disputations than to the grave duty of instructing a jury, in discharging which the utmost possible accuracy should be aimed at, and loose and general remarks avoided. The remark objected to is probably true in a general abstract sense, although it can hardly be considered as specially apropos to a charge in which the jury are told that money may be given as a recompense for pain. But, taken in connection with other parts of the instruction, we do not see how the language objected to could have influenced the jury to the prejudice of appellant. Counsel contend that by this language the court invited the jury to give any sort of damages they might see fit to give, compensatory or exemplary, and to any amount within the prayer of the complaint; and that in effect it told them that, no matter how large their verdict might be, it would still be "an inadequate recompense for [plaintiff's] pain." But such would be a strained and incorrect construction of the language used, and it is not to be presumed that a jury would give it any such meaning. The whole charge was upon the theory that exemplary damages could not be given, and at appellant's request the court expressly instructed the jury that, if plaintiff was entitled to recover, "the measure of her recovery is what is called 'compensatory damages;' that is, such sum as will compensate her for the injury she has sustained." The jury were correctly told that "the determination of the amount is committed to the judgment and sound discretion of the jury," and that it should be "in such measure as a jury dispassionately considering all the circumstances of the case will allow;" and we do not think that the weight of these instructions could be lessened to any appreciable extent by the general remark which appellant assails.

3. The most difficult question in the case is raised by appellant's point that the damages awarded by the jury are excessive. The amount of the verdict is certainly quite large,—larger than we, if sitting as a jury, would have felt it our duty to give. But that consideration alone is not sufficient to warrant us in disturbing the verdict. There is no absolute rule in such a case, and about all that can be safely said on the subject may be found in the opinion of the court in Aldrich v. Palmer, 24 Cal. 513, and the cases there cited. The general conclusion, as nearly as one can be formulated, is as there stated, namely, that a verdict will not be disturbed because excessive, "unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." Cases are cited where verdicts for damages less than the amount awarded in the case at bar have been set aside, but there are many cases where verdicts for larger amounts have been allowed to stand. Two cases exactly alike are not to be found. Counsel argue that because in the case at bar legal interest on the amount of the verdict would exceed in value plaintiff's past earnings, and her probable future earnings if she had not been injured, therefore the amount is excessive. But that rule has never to our knowledge been applied to a case where the cause of action was the plaintiff's own personal injury; it has been applied only to cases where suit has been brought for the death of a relative. Such was the fact in the authorities cited on the point by appellant. Cooley, Torts, 274; Railroad Co. v. Bayfield, 37 Mich. 205; Rose v. Railroad Co., 39 Iowa, 254.

The great difficulty in the present case is in determining the extent of plaintiff's injuries, or, rather, what conclusion the jury had the right to arrive at from the evidence as to the extent of those injuries. As no bones were broken, and there was but little external evidence of injury, it is no doubt possible that plaintiff's sufferings from the result of the accident, and its injurious effect upon her physical and mental health, may have been greatly exaggerated. But there was direct testimony to the points that she was greatly injured in the right arm and shoulder; that the internal ligaments of the shoulder joint were seriously ruptured; that she suffered great pain, and at the time of the trial, nearly two years after the accident, still suffered great pain in the right arm and shoulder, in the back of the head and neck, and in the chest; that her memory was at times impaired; that she was unable to earn a livelihood, and practically unable to do work or perform services of any value; that but little progress had been made towards recovery; and that her injuries would probably be permanent. There was, no doubt, some evidence tending to show that her condition was not as bad as above stated; but the issue as to the extent of her injury was one of fact, about which there was a substantial conflict of evidence; and we cannot say that the jury were not warranted in finding according to the direct testimony above referred to. And such being the case, we are not prepared to say that the verdict should be set aside for excessiveness in the amount of damages. There are no other points in the case requiring notice. Judgment and order appealed from are affirmed.

We concur: De Haven, J.; Sharpstein, J.

95 Cal. 510

MORGAN v. SOUTHERN PAC. CO. (No. 14,842.)

(*Supreme Court of California.* Aug. 5, 1892.)

DEATH BY WRONGFUL ACT—DAMAGES—PLEADING.

1. In an action for the death of a child, the amount of plaintiff's recovery is limited to the actual pecuniary injury sustained by her, by reason of the death of her child.

2. Where, in such case, it appeared that plaintiff's child was a daughter two years old at the time of its death, a verdict of $20,000 is excessive.

3. A complaint in such case need not specially aver the loss of the services of the child.

Department 2. Appeal from superior court, Kern county; A. R. CONKLIN, Judge.

Action by Flora Morgan against the Southern Pacific Company to recover damages for the death of her child caused by defendant's negligence. From a judgment rendered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

The facts fully appear in Morgan v. Pacific Co., 30 Pac. Rep. 601.

E. L. Craig, Horace Hawes, and *P. D. Wiggington,* for appellant. *Lamberson & Taylor* and *J. W. Ahern,* for respondent.

McFARLAND, J. The parties to this action are the same as in Morgan v. Pacific Co., 30 Pac. Rep. 601, (No. 14,841, this day decided,) in which plaintiff recovered a judgment for $15,000 for alleged personal injuries received by being thrown from the steps of defendant's car, which judgment was by this court affirmed. When she fell from the steps of the car she had in her arms her infant daughter, aged about two years. Nine days afterwards the child died from an attack of pneumonia; and plaintiff brought this present action to recover damages for the death of said child, upon the theory that the pneumonia was caused by said fall. The jury gave her damages in the amount of $20,000, for which sum judgment was rendered; and defendant appeals from the judgment, and from an order denying a motion for a new trial. The evidence upon the issues of the alleged negligence of defendant's employes at the time of the accident, and the alleged contributory negligence of plaintiff, was substantially the same as in the other case, and as to those issues the verdict cannot be disturbed. There was some evidence tending slightly to show that the death of the child was caused by the accident, but it is not necessary to inquire whether or not it was sufficient to establish that fact, because the judgment must clearly be reversed on account of the excessive damages awarded by the jury.

There was no averment in the complaint of any special damage, and no averment of any damage at all, except the general statement that the child died, "to the damage of plaintiff in the sum of fifty thousand dollars;" and there was no evidence whatever introduced or offered upon the subject of damage. The jury, therefore, had nothing before them upon which to base damages except the naked fact of the death of a female child two years old; and it is apparent, at first blush, that "the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." The main element of damage to plaintiff was the probable value of the services of the deceased until she had attained her majority, considering the cost of her support and maintenance during the early and helpless part of her life. We think that the court erred in charging that "the jury is not limited by the actual pecuniary injury sustained by her, by reason of the death of her child." An action to recover damages for the death of a relative was not known to the common law; it is of recent legislative origin. There are statutes in many of the American states providing for such an action, and it has been quite uniformly held that in such an action the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative; that sorrow and mental anguish caused by the death are not elements of damage; and that nothing can be recovered as a *solatium* for wounded feelings. The authorities outside of this state are almost unanimous to the point above stated. The following are a few of such authorities: Railroad Co. v. Vandever, 36 Pa. St. 298; Iron Co. v. Rupp, 100 Pa. St. 95; Railroad Co. v. Freeman, 36 Ark. 41; Railroad Co. v. Brown, 26 Kan. 443; Pennsylvania Co. v. Lilly, 73 Ind. 252; Donaldson v. Railroad Co., 18 Iowa, 280; Railroad Co. v. Paulk, 24 Ga. 356; Railroad Co. v. Miller, 2 Colo. 466; Kesler v. Smith, 66 N. C. 154; March v. Walker, 48 Tex. 372; Railroad Co. v. Levy, 59 Tex. 563; James v. Christy, 18 Mo. 162; Hyatt v. Adams, 16 Mich. 180; Chicago v. Major, 18 Ill. 349; Railroad Co. v. Delaney, 82 Ill. 198; Blake v. Railroad Co., 18 Q. B. 93.

With respect to the decisions in this state we do not think those cited by respondent (except one) are, when closely examined, inconsistent with the general authorities. Beeson v. Mining Co., 57 Cal. 20, is a leading case on the subject, and is cited by all the cases which follow it. In that case the action was brought by the widow for the death of her husband, and the question was whether or not the lower court erred in allowing evidence of the kindly relations between the plaintiff and the deceased during the lifetime of the latter. The court sustained the ruling of the court below, but clearly upon the ground that those relations could be considered only in estimating the pecuniary loss. The court say: "It is true that in one sense the value of social relations and of society cannot be measured by any pecuniary standard; * * * but, in another sense, it might be not only possible, but eminently fitting, that a loss from severing social relations, or from deprivation of society, might be measured from a pecuniary standpoint. * * * If a husband and wife were living apart by mutual consent, neither rendering the other assistance or kindly offices, the jury might take into consideration the absence of social relations and the absence of society in estimating the loss sustained by either from the death of the other. So if the husband and wife had lived together in accord, each rendering kindly offices to the other, such facts might be taken into consideration, not, as the books say, for the purpose of affording solace in money, but for the purpose of estimating pecuniary losses. The loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy." A quotation is made from a Pennsylvania case where the same rule was applied to the loss of a wife, the court saying that "certainly the service of a wife is pecuniarily more valuable than that of a mere hireling." The Beeson Case, therefore, does not decide that the jury may depart from a pecuniary standpoint in assessing damages; it merely holds that in estimating the pecuniary losses of a wife from the death of her husband they may consider whether or not the deceased was a good husband, able and willing to provide well for his wife. The opinion of the court no doubt goes somewhat further in this direction than the general current of authorities, but it decides nothing more than above stated. Cook v. Railroad Co., 60 Cal. 604, also cited by respondent, decides nothing more than the Beeson Case. In McKeever v. Railroad Co., 59 Cal. 300, the point was not involved, and in Nehrbas v. Railroad Co., 62 Cal. 320, the point does not appear in any way to have been involved; and the *dictum* at the close of the opinion, as it refers to the Beeson Case, must be held as only intended to go to the length of the latter case. It is true, however, that in Cleary v. Railroad Co., 76 Cal. 240, 18 Pac. Rep. 269, a decision in department, views were expressed favorable to respondent's contention. The opinion of the commission in that case was, however, expressly based on Beeson v. Mining Co., supra, and upon, as we have seen, a misunderstanding of that case. There appears to have been no petition for a hearing in bank. It was stated in that case that there could be a recovery for the "mental anguish and suffering of the parents," but we have been referred to no other case that holds such doctrine. Certainly it was not so held in the Beeson Case. But entirely contrary views were expressed in the latest decision of this court on the subject, (Munro v. Reclamation Co., 84 Cal. 515, 24 Pac. Rep. 303.) In that case—which was for the death of an adult son—the lower court had instructed that the jury in estimating the damages might consider "the sorrow, grief, and mental suffering occasioned by his death to his mother;" and this court held the instruction erroneous, and for that reason reversed the judgment, the court holding that such a rule would afford an "opportunity to run into wild and excessive verdicts." The court said: "We are of opinion that the court erred in including in the instruction the words, 'sorrow, grief, and mental suffering, occasioned by the death of the son to his mother.' In thus directing the jury the court fell into error. In our opinion, the damage should have been confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of the deceased. * * * We have found no case in which damages for sorrow, grief, and mental suffering are allowed, under any of the statutes." And, further, that the statutory action is a new one, "and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury." The case was decided in bank. Justice THORNTON delivered the opinion, which was concurred in by two other justices, and a fourth justice concurred in the judgment, and must, therefore, have concurred in the one main reason for which the judgment was reversed. He may not have been ready to say that the "comfort and society" of the deceased could be considered. There was only one dissent, but upon what ground does not appear. We think, therefore, that the case is full authority on the main point. At all events, we think that the opinion states the general propositions of law governing the case correctly, although, as to one matter, it may be misunderstood. The language, "the loss of the comfort, society, support, and protection of the deceased," must be held as having been used within the meaning given to it in Beeson v. Mining Co., supra, as hereinbefore stated, that is, with reference to the value of the life of the deceased, and the pecuniary loss to the plaintiff caused by the death. The said language would not be correct in any other sense. But in the case at bar the jury were not confined by the instructions to pecuniary loss or any other kind of loss; they were given wide range to run into any wild and excessive verdict which their caprice might suggest. We do not think that the complaint is defective because it does not specially aver the loss of the services of the deceased; that was a natural and necessary sequence of the death. It was not special damage necessary to be averred. There is nothing in the point made by respondent that the answer was not verified. Upon that point the court ruled in favor of defendant, and plaintiff is not appealing. The judgment and order appealed from are reversed, and a new trial ordered.

SHARPSTEIN, J. I concur.

DE HAVEN, J. I concur in the judgment and generally in the foregoing opinion. The measure of damages in actions by a parent for the death of a child, when the facts are not such as to warrant exemplary damages, is correctly stated in section 763 of Shearman and Redfield on Negligence, as follows: "The damages recoverable by a husband, parent, or master for a negligent injury to the person of his wife, child, or servant are strictly limited to an amount fully compensatory for the consequent loss of service for a period not exceeding the minority of the child, or the term of service of a servant, and the expenses which the plaintiff has incurred in consequence of the injury, such as for surgical attendance, nursing, and the like." The sixth instruction given upon the request of plaintiff, to the effect that "in estimating the damage sustained by her the jury is not limited by the actual pecuniary injury sustained by her by reason of the death of her child, but such damages may be given as under all the circumstances of the case may be just," is contrary to this rule, and was erroneous. The object of section 376 of the Code of Civil Procedure is not to give redress or compensation for the mental distress of a mother, consequent upon the death of her child. The general language of section 377 of the Code of Civil Procedure, that in actions of this character "such damages may be given as under all the circumstances of the case may be just," is used with reference to the fact that the damages which are allowed to be recovered by sections 376 and 377 of the Code of Civil Procedure are, with the exception of the expenses incurred by the plaintiff in consequence of the injury resulting in the death for which they are claimed, prospective in their nature, relating, as they do, to the loss of future service, and necessarily based upon probabilities, and upon *data* which in many respects are uncertain, and therefore the estimate of such damages calls for the exercise of a very large discretion upon the part of the jury; and all that is meant by the language quoted is that the jury shall, in view of all the circumstances of the case, and considering also the age and the ability of the deceased to serve the relative for whose benefit the action is brought, give such damages as they shall deem just, keeping in view that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff.

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95 Cal. 479

BATES v. BABCOCK *et al.* (No. 19,017.)

(*Supreme Court of California.* Aug. 4, 1892.)

APPEAL—REVIEW—DEFECTS IN COMPLAINT—STATUTE OF FRAUDS.

1. Objections to a complaint, such as uncertainty and ambiguity, which should be pointed out by special demurrer, if overruled after being so specified, will not be considered for the purpose of sustaining a judgment for defendant which was erroneously rendered after trial on the merits.

2. An agreement to share the profits arising from the purchase and sale of real estate, apart from any contract for the transfer of an interest in the land itself, is not within the statute of frauds, and parol evidence thereof is admissible. Beatty, C. J., dissenting.

In bank. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by Bates against Babcock and others. Judgment for defendants, and plaintiff appeals. Reversed.

Sprigg & Barber, for appellant. *Works & Works*, for respondents.

HARRISON, J. The plaintiff brought this action against the defendants for an accounting upon a partnership agreement between them for the purchase and disposition of certain real estate in San Diego. At the trial of the action the plaintiff offered himself as a witness, and, under the objection of the defendants that it was incompetent and immaterial, gave testimony tending to show that an oral agreement had been made between himself and the defendant Babcock, acting on behalf of the defendant the Coronado Beach Company, of which he was president, by which they were to pay off the incumbrances upon certain real estate, sell and dispose of the same, and share the profits and loss in dealing therein; that for that purpose he gave to the defendants $15,000 with which to pay certain claims and incumbrances thereon, and that the same was so applied; and that at the request of the defendant Babcock a conveyance of the property was executed to one Hubbell, who was the secretary of the defendant corporation. After this testimony had been given the defendants moved to strike out all portions thereof "relating to an agreement for an alleged partnership between the plaintiff and the defendants, or either of them, in the land described in the complaint, or any partnership between the parties, upon the ground that the same is incompetent and immaterial; that a partnership of the character alleged in the complaint must be proved by an instrument in writing, signed by them, or one of them." The court granted the motion, saying that "the contract, as alleged in the complaint and supported by the evidence, is one clearly for an interest in lands, and as such is void under the statute of frauds." Upon the submission of the cause the court in its decision found that there had been no agreement for a partnership in the land, and rendered judgment in favor of the defendants. From this judgment, and an order denying his motion for a new trial, the plaintiff has appealed.

We cannot upon this appeal consider the objections to the complaint that were made by the demurrer thereto, except the one specifying that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled for "want of presentation," and the defendants, having gone to trial upon their answer, obtained a judgment in their favor upon the merits. Upon an appeal by the plaintiff from that judgment we can consider only such errors of the court as are shown to have contributed to its rendition, and not such as might have defeated a contrary judgment. If a judgment in favor of the defendant is the result of errors in excluding evidence that should have been received, he, as respondent upon an appeal, cannot for the purpose of sustaining that judgment have a consideration of errors against him which were entirely disconnected with the trial, or the judgment rendered. Objections to a complaint which should be pointed out by special demurrer, such as uncertainty or ambiguity, are insufficient, unless so specified, to defeat a verdict against the defendant, nor can they, if overruled after having been so specified, be considered for the purpose of sustaining a judgment in his favor that was erroneously rendered after a trial upon the merits. It is only when there is in the complaint an entire absence of averment of a fact essential to a recovery, so that no evidence of that fact could be received at the trial, that a judgment in favor of the plaintiff cannot be sustained; but, if the objection be merely that such fact is defectively alleged, evidence received under such averment, if sufficient, will sustain the judgment. While the complaint in the present case is not entirely free from criticism, and might have been made more certain and precise in some of its averments, yet we think that it contains a sufficient statement of facts to justify the court in receiving evidence thereof, and, if sufficient to sustain the averments, to render a judgment as asked by the plaintiff.

The character and effect of an averment that may be uncertain in one of its clauses is not limited to a construction of that clause merely, but the averment is to be considered as a whole, and in connection with the entire complaint. The averment that the defendants agreed with the plaintiff that if he would pay certain claims against the property "they would become equal partners with him in the said property," does not necessarily imply an agreement for a conveyance from him to them, and taken in connection with the averment immediately following, viz., "and would share equally with him, in the proportion of one half to plaintiff and one half to defendants, all sums received for said property, and all profits and losses accruing on account thereof," which is evidently inserted by way of explanation, shows that the agreement was for a partnership in the profits that might result from dealing in the land, and had no necessary relation to the ownership of the land. It appears from the complaint that at the time of this agreement the property in question was owned by one Miller and his wife, and that the defendant corporation held certain mortgages thereon, which were subordinate to certain other liens, and that the title to the property stood in the name of the plaintiff, and was held by him "as trustee for the benefit of said Miller and wife." It does not appear that the plaintiff had any beneficiary interest in the land, and the averment that $5,000 of the money advanced by him under the agreement was paid to the Millers, "for a release from the said trust in their favor," confirms the inference that it was merely a dry, naked trust. The subsequent averment that, "in pursuance of said agreement" then made, the plaintiff paid to the defendants $15,000 with which to remove certain charges and incumbrances, and that "all of said property was duly transferred by plaintiff to O. S. Hubbell, Esq., secretary of said Coronado Beach Company, as trustee for the parties hereto, to facilitate a sale," and that with the concurrence of the defendants the plaintiff paid liens and debts on account of said property amounting to $42,000, removes all possibility of construction that the agreement was for a sale of the property to the defendants, or for the creation of an interest or estate therein, and shows that the parties dealt with the property as assets of their said partnership.

A partnership may be formed for the purpose of dealing in lands, as well as for dealing in personal estate, or for engaging in professional or commercial or manufacturing occupations. Like any other contract of partnership, it is an agreement to share in the profit and loss of certain business transactions. Such a partnership may be formed for the purpose of buying and selling land generally, or it may be limited to a speculation upon a single venture. Dudley v. Littlefield, 21 Me. 422; Chester v. Dickerson, 54 N. Y. 1; Williams v. Gillies, 75 N. Y. 201.

Whether such a partnership can be formed, except by an agreement in writing, has been the subject of conflicting decisions. There is a *dictum* in Gray v. Palmer, 9 Cal. 639, to the effect that it must be in writing, for which Story, Partn. § 83, is cited as authority; and in Smith v. Burnham, 3 Sum. 458, it was so held by that distinguished jurist. The great weight of modern authority, however, is in support of the rule that such a partnership may be formed in the same mode as any other, and that its existence may be established by the same character of evidence. It was so stated in Coward v. Clanton, 79 Cal. 23, 21 Pac. Rep. 359, where it was held that an agreement for the purchase of a tract of land, and its subdivision and sale in parcels and for a division of the profits resulting therefrom, in which one party was to furnish the capital and take a conveyance of the land, and the other to furnish the skill and labor in making the sales, could not be avoided after the transaction had been completed, merely because it was not in writing. More than a hundred years ago it was held by Lord THURLOW in Elliot v. Brown, reported in 3 Swanst. 489, 1 Vern. 217, that the right of survivorship in a joint demise of a farm was destroyed by reason of the tenants having farmed the land upon joint account, and thus by their acts made it partnership assets. The question was very fully considered by Vice Chancellor WIGRAM in Dale v. Hamilton, 5 Hare, 369, wherein previous decisions involving similar principles were reviewed, and it was held that under the principles of those decisions the existence of such a partnership could be shown by general evidence, without the necessity of a written agreement. In that case a parol agreement had been entered into under which a tract of land was to be purchased in the name of one McAdam, and laid out in lots, and resold, he furnishing the capital, and the plaintiff the skill and labor, necessary therefor, and the profits resulting from the venture were to be divided between them. The purchase was accordingly effected in the name of McAdam, but the defendants, who had succeeded to McAdam, with notice of the agreement, afterwards refused to carry it out. Thereupon the plaintiff filed his bill for an accounting and a sale of the land under the direction of the court, with a division of the proceeds, in accordance with the terms of the agreement. The defendants resisted the suit upon the ground that the agreement was within the statute of frauds, and could be established only by an instrument in writing, but the vice chancellor overruled their objections and upheld the bill. In his opinion (page 383) he uses the following illustration in support of his conclusion, which is peculiarly appropriate to the present case: "In order to try this question in the most simple manner, I will suppose the case to be the converse of what it is. I will suppose that the land purchased, instead of rising, had fallen in value, that a loss had been sustained, and that Hamilton and McAdam were the plaintiffs, seeking to compel Dale to contribute his proportion of the loss. If in this case the authorities would have enabled Hamilton and McAdam, by proving the partnership with Dale, and that the land was part of the partnership stock and effects, to have compelled contribution from Dale, the same authorities will upon like proof support the present suit upon the principle—that of mutuality in remedies—which enables a vendor to recover the purchase money in this court, though the remedy at law may be equally adequate and more appropriate," and cites several authorities to the effect that in such a case the defendant would have been liable for contribution. The rule laid down in Dale v. Hamilton has since been generally followed, and, although there are some decisions to the contrary, may now be said to be the prevailing rule upon that subject. Irrespective of any decision, however, an agreement of this character cannot be said to contravene the provisions of the statute of frauds. It does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands. In one sense the parties to such an agreement may be said to have an interest in the lands that are to be purchased under the agreement,—that sense in which the beneficiary under a trust for the sale of real estate, and payment to him of the proceeds of the sale, has an interest in the land but it is only a pecuniary interest resulting from the sale, and a right to have the land sold, rather than an interest in the land itself. The statute of frauds does not prevent parol proof for the purpose of showing an interest in lands, but declares that an agreement by which an estate or interest in lands is to be created must be in writing. No interest or estate in the land is created by such an agreement, but by the subsequent acts of the parties under the agreement rights are acquired in reference to the land that may be purchased in pursuance of the agreement, which a court of equity will protect against any attempt to make the statute of frauds an instrument of fraud. A bill for the conveyance of the lands could not be maintained under such an agreement, but, by reason of the acts of the parties thereunder, an equity would be raised in their behalf which would be superior to the legal title held by him to whom the land was conveyed, and would control that title in subordination to this superior equity. It is a familiar rule in equity that lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement. The same principle should apply when the object of the partnership is to deal in lands, and the assets of the partnership with which the lands are to be purchased are made up of the skill and money which are respectively contributed by the partners as its capital. Upon proof of the existence of such a partnership, the rights and obligations of the respective partners should be determined upon the same principles and with the same results as in other partnerships.

The settlement of partnership accounts, and the conversion into money of the assets of the partnership, whether real or personal, and their division among the partners, has always been one of the functions of a court of equity, and that court never stops to inquire into the source of the title of such assets, or in whose name they are held. The question has frequently arisen in actions for the division of the proceeds after a sale under such an agreement, and it has been invariably held that the statute of frauds is no defense thereto. Bruce v. Hastings, 41 Vt. 380; Benjamin v. Zell, 100 Pa. St. 33; Trowbridge v. Wetherbee, 11 Allen, 361; Babcock v. Read, 99 N. Y. 609, 1 N. E. Rep. 141; Coward v. Clanton, 79 Cal. 23, 21 Pac. Rep. 359; Reed, St. Frauds, § 727. See, also, Byers v. Locke, 93 Cal. 493, 29 Pac. Rep. 119. Under such an agreement it is invariably held that an action for the division of the profits can be maintained after they have been received, whereas, if the agreement was invalid at the outset, it could not form the basis of such an action. If, however, the agreement was valid at its inception, it is not rendered invalid by the subsequent act of one of the parties, and, although it cannot be changed into a different agreement, such as an agreement for the conveyance of the land, yet either party has the right to its enforcement for the purpose of carrying out its original purpose, the division of the profits resulting from the speculation. The same principles are applicable in an action to subject land which has become a portion of the assets of such a partnership to a sale under the directions of a court of equity, with a distribution of the proceeds thereof according to the rights of the individual partners. This was the case presented and maintained in Dale v. Hamilton. The same procedure was upheld in Richards v. Grinnell, 63 Iowa, 44, 18 N. W. Rep. 668; Bunnel v. Taintor, 4 Conn. 568; Hunter v. Whitehead, 42 Mo. 524; Bissell v. Harrington, 18 Hun, 81; Holmes v. McCray, 51 Ind. 358; Coward v. Clanton, 79 Cal. 23, 21 Pac. Rep. 359. After the agreement for the purchase and sale has been executed by making the conveyance in accordance with such agreement, it cannot be objected that such conveyance could not have been compelled on account of the statute of frauds. Pico v. Cuyas, 47 Cal. 174. The statute of frauds has no application to an executed agreement.

That the agreement between the parties which is averred in the complaint, and the evidence given in support thereof, did not contemplate any transfer of the land, or of any interest therein to the defendants, or either of them, but had for its object only a division of the profits and loss that would remain after its sale, is shown by a consideration of the averments of the complaint hereinbefore presented, and, also by the direction of Babcock to the plaintiff while negotiating the agreement to "sell it off as soon as you can, pay up the debts, and divide the profits." It was not necessary for the plaintiff in support of these averments to produce written evidence of the agreement, but the agreement could have been established by his oral testimony, and the court erred in striking out the testimony that he gave in support of the agreement. The first question to be determined by the court was whether there was a partnership, and that fact could be shown by general evidence. In Forster v. Hale, 5 Ves. 309, where the right to an interest in the leasehold of a colliery claimed by virtue of a partnership with one of the lessees was involved, and it was objected that, by permitting parol evidence to establish such interest, an interest in real estate or a declaration of trust would be gained without any writing, in violation of the statute of frauds, Lord Loughborough said: "That is not the question; it is whether there was a partnership. The subject being an agreement for land, the question is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership." Under the same principles, if in the present case the court should find upon sufficient evidence that a partnership existed between the parties, the fact that they would have an interest in the land which forms a portion of the assets of the partnership would result by operation of law as an incident to such partnership, but this result would not constitute a reason for excluding parol testimony to establish the existence of the partnership. For the error of the court in striking out the evidence of the plaintiff, the order and judgment are reversed, and the court is directed to grant a new trial.

We concur: Paterson, J.; Sharpstein, J.; De Haven, J.; Garoutte, J.; McFarland, J.

Beatty, C. J. I dissent. The complaint, in my opinion, shows no cause of action, and the evidence offered and stricken out by the court was of a parol contract, invalid under the statute of frauds.

64 Cal. 369

People v. Murback.[1]

(Supreme Court of California. Nov. 28, 1883.)

Murder—Degrees—Instructions — Judgment—Corrections.

1. On trial for murder, the court instructed the jury that "you can find defendant guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of manslaughter, or you may render a verdict of not guilty; and it is for you to decide which one of those verdicts you may render. But if you do find the defendant guilty of murder in the first degree you have the discretion to determine the nature of his punishment; and if, in your sound judgment and discretion, there is any fact or circumstance in the case which ought to mitigate the extreme penalty of death, you will by your verdict indicate the same; but if you find no such mitigation in the facts of the case, and think the death penalty should be inflicted, you will simply find him guilty of murder in the first degree." *Held,* that the language of this instruction does not assume that defendant is guilty of murder in the first degree.

2. Such instruction does not restrict the jury, in the exercise of their discretion, to determine the punishment to be inflicted.

3. No words of reproach, however grievous, are sufficient provocation to reduce the offense of intentional homicide with a deadly weapon from murder to manslaughter.

4. The statement by the court to defendant of the nature of the offense of which he has been convicted, although necessary as preliminary to pronouncing judgment, is not a part thereof, and a mistake in the entry of such statement does not invalidate the judgment, but may be corrected by order of the court made pending an appeal from such judgment.

5. Where such mistake in the entry is merely clerical, and does not prejudice the defendant in any substantial right, (Pen. Code Cal. § 1404,) the judgment will not be reversed on appeal, although the mistake has not been corrected.

In bank. Appeal from superior court, Napa county.

Indictment against John Murback for murder. There was a verdict of guilty, and from a judgment entered thereon, and also from an order made after judgment, defendant appeals. Judgment and order affirmed.

Henry C. Gesford, for appellant. *Atty. Gen. Marshall* and *Dist. Atty. Coombs,* for the People.

McKee, J. Appeal from a judgment of death pronounced against the defendant upon a conviction for murder in the first degree, and also from an order made subsequent to the judgment. The assignments of error are that the court exceeded its jurisdiction in making the order appealed from, and that it misdirected the jury by the following instructions, namely: "(1) You can find defendant guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of manslaughter, or you may render a verdict of not guilty; and it is for you to decide which one of those verdicts you may render. But if you do find the defendant guilty of murder in the first degree you have the discretion to determine the nature of his punishment; and if, in your sound judgment and discretion, there is any fact or circumstance in the case which ought to mitigate the extreme penalty of death, you will by your verdict indicate the same; but if you find no such mitigation in the facts of the case, and think the death penalty should be inflicted, you will simply find him guilty of murder in the first degree. (2) No words of reproach, however grievous, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter." Objection is made to the first instruction that the court in saying to the jury "but if you do find the defendant guilty of murder in the first degree," etc., virtually announced that the defendant was guilty of that crime; and that by the other parts of the instruction the jury were improperly restricted in the exercise of their power of discretion to determine the punishment to be inflicted upon the defendant. There was no assumption of the guilt of the defendant in the language employed by the court. The jury were properly directed that they could, upon the indictment, find the defendant guilty of any offense included within the crime for which he was indicted; but if they should find him guilty of the highest offense, namely, murder in the first degree, it would be their duty to decide whether he should suffer death or confinement in the state prison for life, and that was to be determined at their discretion. With this power of discretion a court cannot interfere. The jury should be left entirely free to act according to their judgment. If they see fit to exercise the power at all, they have the exclusive right to determine, within the limits prescribed by the law which gives them the power, the punishment for which the defendant ought to be sentenced. And we find nothing in the challenged instruction which limited or restrained them in the exercise of that power. The second instruction was applicable to the case, and was a correct explanation of the law of the subject to which it related. People v. Turley, 50 Cal. 470; People v. Butler, 8 Cal. 435; Whart. Crim. Law, 368.

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[1] This case, filed November 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

The question upon the appeal from the order made after judgment arises out of the following facts: The indictment charged that the murder was committed on the 26th day of November, 1882. Of that crime the defendant was convicted, and, upon the conviction, judgment of death was regularly pronounced. But the clerk, on making up his minutes of the proceeding in court when the defendant appeared for sentence, entered, as part of the proceeding, that the court informed the defendant "of the indictment found against him for the crime of murder committed on November 26, 1883." This entry did not express the fact; and, after discovering the mistake which had been made, the court, upon notice to defendant and his counsel, ordered the entry to be corrected by changing the figures "1883" to "1882," so as to express the truth. The order to that effect was made March 12, 1883. Meantime the appeal had been taken from the judgment, and it is contended that the court had no jurisdiction, pending the appeal in this court, to make the order. But the true statement which was made by the court to the defendant of the nature of the charge made against him, and of which he had been convicted, although necessary as preliminary to pronouncing judgment, (§ 1200, Pen. Code,) was no part of the judgment pronounced; and a mistake made by the clerk in the entry of the statement on the minutes of the court would not invalidate the judgment. The mistake was therefore one which could be corrected at any time, while the record of the case was subject to the physical control of the court, so as to make the record speak the truth The power of the court in that regard was not suspended by the appeal. Rousset v. Boyle, 45 Cal. 64; Sheldon v. Gunn, 57 Cal. 40; Boyd v. Burrel, 60 Cal. 284. Besides, as the defendant was sentenced for the crime for which he had been indicted and convicted, by a judgment regularly pronounced, the error as to date in the entry referred to would be so evidently a mere clerical mistake, which in no way prejudiced the defendant in any substantial right, that the judgment itself would not be reversed, even if the error had not been corrected. Section 1404, Pen. Code; People v. Sprague, 53 Cal. 491; People v. Gilbert, 57 Cal. 96; People v. Brotherton, 47 Cal. 388; People v. Colby, 54 Cal. 37. Judgment and order affirmed.

ROSS, SHARPSTEIN, MYRICK, and THORNTON, JJ., concurred.

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64 Cal. 354

BIDDEL v. BRIZZOLARA *et al.*[1]

(*Supreme Court of California.* Nov. 28, 1883.)

STATUTE OF LIMITATIONS — ACKNOWLEDGMENT OF DEBT — RIGHTS OF MORTGAGEE AGAINST PURCHASER.

1. An acknowledgment by a mortgagor to a stranger of the existence of the debt secured by the mortgage, without an express promise to the mortgagee to pay such debt, will not prevent the bar of the statute of limitations from applying in a suit to foreclose the mortgage.

2. A mortgagee is not entitled to the benefit of a contract between the mortgagor and a purchaser of the mortgaged premises, to pay off the mortgage as a part of the purchase money, except in so far as he may be subrogated to the rights of the mortgagor; so that, if the contract of sale between the mortgagor and such purchaser be rescinded before suit to foreclose the mortgage, the mortgagee has no recourse against the purchaser.

In bank. Appeal from superior court, San Luis Obispo county.

Action by Phillip Biddel against B. Brizzolara and Austin Roberts to foreclose a mortgage given to secure a purchase-money note, executed by defendant Brizzolara, and due June 25, 1875. The complaint, filed March 22, 1881, alleged that defendant Brizzolara sold the property in question to his codefendant, Roberts, October 22, 1878, for $11,000, Roberts paying a part of the purchase money by assuming the mortgage on the property held by plaintiff; that after the execution of the contract Roberts resold the property to Brizzolara; and that so late as June 28, 1880, after the reconveyance by Roberts to Brizzolara, the latter, in writing, acknowledged the existence of plaintiff's mortgage lien on the property. From a judgment for defendants, plaintiff appeals. Affirmed.

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[1] This case, filed November 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Venable & Scott and *Craig & Meredith*, for appellant. *W. J. Graves* and *J. M. Wilcoxon*, for respondents.

McKinstry, J. The court below sustained the defendant's demurrer to the complaint. The defendant by his demurrer, among others, took the objection that the cause of action alleged in the complaint was barred by the statute of limitations, and the objection that the complaint did not contain a statement of a cause of action. The complaint contains the allegation: "So late as the 28th day of June, 1880, * * * the defendant Bartolo Brizzolara, by an instrument in writing signed by him, acknowledged said mortgage indebtedness, and that the same was a lien on said mortgaged property." To establish a new contract, made after the statute has run, there must be a promise to pay, or an acknowledgment from which a promise is necessarily implied. Biddel v. Brizzolara, 56 Cal. 374. It is very certain that an actual promise can only be made to the creditor, and it follows that the acknowledgment from which the promise is to be inferred must be made to the creditor. An admission to a stranger of the existence of the debt cannot be construed an acknowledgment to the creditor such as indicates an intention on the part of the person making the admission to hold himself bound to pay, nor is it expressive of his willingness to pay. "An unqualified acknowledgment to a stranger will not take a case out of the statute, or constitute a good cause of action." Trousdale's Adm'r v. Anderson, 9 Bush, 276. See Kyle v. Wells, 17 Pa. St. 286; Taylor v. Hendrie, 8 Nev. 243. Treating the complaint as a bill for the foreclosure of the mortgage, the action was barred by the Code limitation of time within which such an action may be commenced. In the contract of sale of the mortgaged premises from Bartolo Brizzolara to Roberts, the consideration of the sale is thus stated: "That the consideration of said sale is as follows: Eleven thousand dollars in gold coin, to be paid as follows: The party of the second part assumes a mortgage on said property held by Phillip Biddel, principal and interest amounting to $6,090, and assumes to pay the county and state taxes on said property for the current year, amounting to $136, and this day pays to the party of the first part the sum of $1,000 in cash, the receipt whereof is hereby acknowledged by the party of the first part, and the balance of such purchase money, $3,774.50, is secured to be paid by a promissory note of this date, payable on the 5th day of November, 1878." The complaint alleges that Roberts, prior to the commencement of this action, reconveyed the mortgaged property to Bartolo Brizzolara, the mortgagor. It is urged by appellant that, although the statute of limitations may have run against the mortgage debt, the plaintiff is entitled to a decree for the sale of the mortgaged premises, and to a personal judgment for any balance of the mortgage debt unsatisfied by application of the proceeds of the sale, against Bartolo Brizzolara, as successor in interest of Roberts; and that, as the promise of Roberts was made within four years before the commencement of this action, the plea of the statute is not well taken against the action as an action on such promise. There is no averment in the complaint that Bartolo, by reason of any language in the reconveyance from Roberts or otherwise, ever promised the latter to pay the mortgage. It was held in New York the liability to the mortgagee of the grantee of the mortgagor, who assumes and agrees to pay the mortgage, arises out of the broad doctrine that, when one makes a promise to the benefit of a third person, the latter may maintain an action upon it. Burr v. Beers, 24 N. Y. 178. But the case last cited was an action at law, and Denio, J., says there was abundant authority to the point that the right to a personal judgment for a deficiency against the grantee of the mortgagor was not based in the previous chancery decisions in New York upon the notion of a direct contract between the grantee of the equity of redemption and the holder of the mortgage, but upon the principle that the undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. He proceeds to say that the common-law judgment in the case then before the court obviously could not be sustained by reference to the doctrine of courts of equity. He adds, i. the judgment could be sustained at all, it must be upon the broad principle that if one person make a promise to another, for the benefit of a third person, the third person may maintain an action on the promise. He admits that upon that question there has been a good deal of conflict of judicial opinion, and that the cases supposed to create a direct obligation from the purchaser of the equity of redemption to the mortgagee "are doubtless subject to some of the criticisms which have since been applied to them. Some of the opinions were pure *obiter dicta*, and in others the case, though presenting the point, was decided on other grounds. * * * Finally, the question came squarely before this court in Lawrence v. Fox, 20 N. Y. 268, and we there held, with hesitation on the part of a portion of the judges who concurred, while others dissented, that the action would lie. We must therefore regard the point as definitely settled, so far as the courts of this state are concerned." In view of the very able and exhaustive examination of the cases by Mr. Justice Comstock, in his dissenting opinion in Lawrence v. Fox, we can give but little persuasive effect to the judgments in that case and in Burr v. Beers.

The doctrine of Burr v. Beers—which has not been generally approved—can have no place in courts of equity, where the right of the mortgagee to take a decree against the grantee personally, for a balance unsatisfied by the sale of the premises mortgaged, has been placed upon different ground. The case at bar is not an action at law. The framework of the complaint is that of an equitable pleading, and the prayer is for a sale of the premises, and for a personal judgment for deficiency against the defendants, Bartola Brizzolara and Austin Roberts, etc. Indeed, under our Code, an independent action at law cannot be maintained for a debt, whatever its form, secured by mortgage. Code Civil Proc. § 720.

It has distinctly been decided by the supreme judicial court of Massachusetts that no action at law by the mortgagee lies on a promise made to the vendor, by the purchaser of an equity of redemption, to assume a mortgage on the premises, and to pay the mortgage note. Mellen v. Whipple, 1 Gray, 317, 324. The court in that case say that certain expressions used by Lord HOLT in Yard v. Eland, 1 Ld. Raym. 368, and by BULLER, J., in Marchington v. Vernon, 1 Bos. & P. 101, note, to the effect that "on a promise, not under seal, made by A for a good consideration to B., to pay B.'s debt to C., C. may sue A.," had been transferred into various textbooks, as if it were a general rule of law. But Mr. Justice METCALF remarked that the maxim required great modification, because it expresses rather an exception to a general rule than the rule itself; and adds that, by recent decisions of the English courts, the operation of the rule or maxim is restricted within their narrower limits, and the general rule to which it is an exception is now more strictly enforced. "That general rule is, and always has been, that a plaintiff in an action on a simple contract must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract. The rule is sometimes thus expressed: There must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action, by the plaintiff, on the contract;" citing cases. The learned judge then proceeds to classify the exceptions to the general rule, and the court are quite certain that the promise to the mortgagor by the purchaser of the equity of redemption, to pay off a mortgage, does not constitute an exception. The classification of the Massachusetts court may not be exhaustive, but, if there be other exceptions, they must be such as stand upon a like footing of reason and justice with those enumerated. For convenience the classes of exceptions may be summarized: *First*, those in which the action for money had and received may be maintained, where a debtor has put money or property as a fund into the hands of one who has promised to pay the debt of him from whom he has received the fund, (but see Weston v. Barker, 12 Johns. 282;) *second*, where promises have been made to a father or uncle for the benefit of a child or nephew. The supreme court of Massachusetts were very confident that the case Mellen v. Whipple did not come within any recognized exception. The defendant there—the purchaser of the equity of redemption—had no money which in equity and good conscience belonged to the plaintiff, the mortgagee. No funds of the mortgagor, property, money, or credit, had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on the mortgagor. The sale of the equity of redemption did not lessen the plaintiff's security for the mortgage debt. (A different reason is given by the Massachusetts court, but it is equally true in the case at bar that the sale of the mortgaged premises did not lessen the plaintiff's security. Except for the limitation pleaded, he retained a right to a decree for a sale of the mortgaged premises, and to judgment over for any deficiency.) There was (and is here) no nearness of kin between the parties. It was held in Mellen v. Whipple that the mortgagee could not maintain an action at law against the purchaser, because there was nothing in the nature of the transaction to take it out of the general rule in the opinion recited. The doctrine of courts of equity with reference to the liability of the grantee of the mortgagor is very clearly set forth in the cases cited by Mr. Jones in his work on Mortgages, (sections 740, 770,) and especially in Crowell v. Hospital, 27 N. J. Eq. 650. In the case last referred to it was said that a stipulation in a deed of conveyance *inter partes*, that the grantee shall assume and pay a prior mortgage on the premises, is a contract with the grantor simply for his indemnity, and will not be regarded in law or equity as a contract with the mortgagee or for his benefit. And in Halsey v. Reed, 9 Paige, 446, where the purchaser assumed the bond and mortgage, and there was a recital in the conveyance, "the amount thereof [of the mortgage debt] constitutes a part of the consideration of this conveyance, and has been deducted therefrom," Chancellor KENT held that this agreement was not intended as an absolute and unconditional promise to pay the principal and interest to the mortgagor, but an agreement to indemnify the mortgagor against the payment of the mortgage debt. In Crowell v. Hospital it was adjudged that the right of the mortgagee to a personal decree for a deficiency against a subsequent purchaser, whose deed contained such a stipulation, does not result from any fixed or vested right in the mortgagee, arising either from the acceptance of the conveyance of the mortgaged premises by the grantee, or from his obligation to pay the mortgage debt as between himself and his grantor; but it rests merely on the doctrine of courts of equity, that a creditor may have the benefit of all collateral obligations for the payment of a debt which a person standing in the position of surety holds for his indemnity, and in such case the mortgagee may proceed directly against the purchaser, who is ultimately liable, to avoid circuity of action. In the same case it was held that if the liability of the subsequent purchaser to his grantor to indemnify him against the mortgage debt be extinguished, as between themselves, by a reconveyance before bill for foreclosure filed, the contract of indemnity being thereby put an end to by the act of those who were parties to it, the mortgagee will not be entitled to a decree for a deficiency against such a purchaser, founded on such a stipulation in his deed. Roberts, the purchaser in the case at bar, is not a party to this appeal. As we have seen, the attempt here is to obtain a decree for the sale of the mortgaged premises, although the statute of limitations has barred an action on the mortgage debt and a personal judgment against the mortgagor, not only as mortgagor, but in his capacity of grantee from Roberts, although the deed from Roberts, accepted by Bartolo, the mortgagor, contains no language which can be construed a reassumption of the mortgage debt by the latter, or a promise on his part to indemnify Roberts. It is certain that, if plaintiff was not entitled to a personal judgment for deficiency against Roberts, he is not entitled to such judgment against Bartolo Brizzolara. If the complaint had been filed for a foreclosure before the running of the statute, plaintiff would have been entitled to a personal judgment for deficiency against Bartolo as mortgagor, but to no such judgment against Roberts if the reconveyance had been made before the filing of the complaint, and to none such against Bartolo in his distinct character as grantee of Roberts.

The general rule of chancery is that, as to strangers to the contract, the parties may at their pleasure abandon it, and mutually release each other from its performance. 2 Spence, Eq. Jur. 280. And the case at bar does not come within any established exception to the general rule. The case cannot be brought within the class in which trusts have been enforced by beneficiaries who have not previously agreed to the creation of the trust. The mortgagee, being the representative and standing in the place of the mortgagor, to enforce the rights of the latter against the purchaser, and having no greater or other equity in himself, is entitled only to such remedy as the mortgagor himself had when the bill was filed. "In other words, being a stranger to the contract of the purchaser with the mortgagor, and to the consideration whereon it was founded, it will be competent for those who were parties to it to rescind and extinguish it at their pleasure; and, after such rescission and extinguishment, the contract becomes utterly incapable of enforcement." Crowell v. Hospital, supra. The mortgagee can only be entitled to be subrogated to an existing remedy of his debtor, the mortgagor, upon a legal, existing stipulation. But the contract between Bartolo Brizzolara and Roberts was at an end when the complaint herein was filed. Even where the rule has been established that the purchaser is bound by his promise as a promise made for the benefit of the mortgagee, it is still necessary that the grantor should be personally liable upon the mortgage in order to render the grantee liable upon his covenant to the holder of the mortgage assumed. In King v. Whitely, 10 Paige, 465, the grantor of an equity of redemption in mortgaged premises, neither legally nor equitably interested in the payment of the bond and mortgage, except so far as the same were a charge upon his lands, conveyed the lands subject to the mortgage, and the conveyance recited that the grantees therein assumed the mortgage, and were to pay off the same as part of the consideration. It was held that, as the grantor in that conveyance was not personally liable to the holder of the mortgage, the grantees were not liable to the holder of the mortgage to pay the same. So late as the year 1877, King v. Whitely was approved, and its principle affirmed. Vrooman v. Turner, 69 N. Y. 280. In the case last cited the previous New York cases, including Burr v. Beers, are carefully considered and distinguished.

Under the section of the Code of Civil Procedure, (726,) "there can be but one action" for the recovery of any debt secured by mortgage, in which the court must by its judgment direct the sale of the incumbered property, and the application of the proceeds to the debt and costs, and, if it appear by the sheriff's return that the proceeds are insufficient, judgment can be docketed against the mortgagor, etc. Thus, whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency, which shall appear on the sheriff's return. The liability of the mortgagor is therefore contingent on the fact that a sale of the mortgaged premises shall fail to satisfy the debt and costs. It is against this contingency that the purchaser indemnifies him. True, the statute authorizes a single decree which provides for a sale of the mortgaged premises, and a subsequent judgment over against the mortgagor, to which, upon the equitable principle of subrogation, may be added a judgment over against the purchaser (where the latter has indemnified his vendor) for any deficiency which may appear from the sheriff's return. But the return of the sheriff, which makes absolute the personal liability that was before conditional, and liquidates and renders certain the damages for which the mortgagor is personally liable, must always follow and depend upon a decree for and a sale of the premises. In the case before us the mortgagor did not pay his debt, and he never became liable to a personal judgment for deficiency, because no decree for a sale of the premises was ever entered. Had the title to the premises remained in Roberts, Bartolo Brizzolara, the mortgagor, would have had no cause of action against him, nor would the plaintiff, who could have claimed only to be subrogated to Bartolo's claim against Roberts, such as it was. Plaintiff cannot take a decree for the sale of the lands in this action, against demurrer or plea of the statute of limitations. He cannot take a personal judgment for a deficiency, because the amount of the deficiency, if any, can be ascertained only after decree for the sale of the premises, a sale thereof, and the sheriff's return of said sale.

Judgment affirmed.

SHARPSTEIN, MYRICK, THORNTON, and ROSS, JJ., concurred.

MCKEE, J., (*specially concurring.*) I concur. Where a purchaser of real estate from a mortgagor assumes payment of the mortgage debt, as a part of the consideration of his contract of purchase, there arises out of the transaction, upon the principle of subrogation, a cause of action for the benefit of the mortgagee, which he may enforce, at any time within the life of his mortgage, by an action at law or in equity against the purchaser. But if, as in the case in hand, the mortgagee sleeps upon his remedial rights against the mortgagor and purchaser, until the time of the statute of limitations has run against the mortgage debt, and the lien of the mortgage has become extinguished, and the purchaser and mortgagor have rescinded their contract, there is no remedial right which can be enforced at law or in equity by the mortgagee against the mortgagor or the purchaser. Simson v. Brown, 68 N. Y. 355; Durham v. Bischof, 47 Ind. 211; Kelly v. Roberts, 40 N. Y. 432.

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64 Cal. 155

GRADY v. SUPERIOR COURT OF FRESNO COUNTY.[1]

(*Supreme Court of California.* Sept. 21, 1883.)

FINE—ENFORCEMENT OF EXECUTION.

An adjudication of the judge of the superior court of one county, that a judgment of the superior court of another county, directing that a person be imprisoned until he pay a fine for a contempt, was in excess of its jurisdiction, is in effect an adjudication that so much of the judgment as directed the imprisonment was void, and therefore brings the case within Pen. Code, par. 1214, which provides that, "if the judgment is for a fine alone, execution may be issued thereon as a judgment in a civil action."

In bank.

Application by W. D. Grady for a writ to review the proceedings of the superior court of Fresno county in enforcing the collection of a fine against him for contempt by execution. Pen. Code, par. 1214, provides that, "if the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action."

W. D. Grady, for petitioner.

PER CURIAM. It is admitted that the superior court had jurisdiction of the proceedings for contempt. That being the case, and the court having imposed a fine, it was competent for the court to enforce its collection by execution. Section 1214, Pen. Code. As to that portion of the order adjudging the petitioner guilty of contempt, which directed that imprisonment should be used as a means of collecting the fine imposed, it is sufficient to say that section 1487 of the Penal Code makes it the duty of the court or judges to whom a writ of *habeas corpus* is returned, in case it shall appear that the petitioner is in custody by virtue of process from any court, judge, or officer, and that the jurisdiction of such court, judge, or officer was exceeded in adjudging that the petitioner should be imprisoned, to discharge the petitioner. Section 1496 of the same Code declares that no person who has been discharged by the order of a court or judge on *habeas corpus* can be again imprisoned, restrained, or kept in custody for the same cause, except in certain specified cases, of which the present is not one. We think that the adjudication of the superior judge on *habeas corpus* that the judgment of the court, in adjudging that the petitioner be imprisoned, was in excess of its jurisdiction, (upon which followed the consequence that the petitioner could not again be imprisoned for the same contempt,) was in effect an adjudication (which the judge on *habeas corpus* had full power to make) that the portion of the contempt judgment which provided for such imprisonment was null and void. This leaves the judgment of the superior court in the contempt proceeding as imposing a fine only, and places the case within section 1214 of the Penal Code. We wish it to be distinctly understood that we express no opinion with respect to the correctness of the judgment of the superior judge on *habeas corpus.* His view of the law is not authority binding upon any other judge or court should the same question arise in another case upon the same or similar facts. The application for a writ of review is denied, and the order to show cause is discharged.

THORNTON and SHARPSTEIN, JJ., expressed no opinion.

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64 Cal. 166

MOULTON v. PARKS *et al.*[2]

(*Supreme Court of California.* Sept. 22, 1883.)

INJUNCTION — FICTITIOUS PARTIES — TRESPASS — PLEADING—CONSTITUTIONAL LAW—DRAINAGE.

1. The complaint alleged that plaintiff was ignorant of the true names of certain defendants designated as John Doe and Richard Roe. The record did not show that the true names of such defendants were discovered, and there was no amendment of the pleadings by substitution of other names for the fictitious ones. *Held*, that an injunction granted in the action was operative only against the real defendants designated by their proper names.

2. An action was brought against A., B., C., D., E., F., and others, to enjoin them from maintaining a dam, and for damages. The dam was built by defendant A. under a contract with the board of supervisors of S. county, of which defendants B., C., and D. were members, awarded by the board in pursuance of Act March 25, 1868, defendants B. and C. having signed the contract with A. Pending the action the dam was swept away, and was rebuilt by members of swamp land reclamation district No. 226, under Act March 28, 1868. The building of the original dam was unlawful on account of the unconstitutionality of the act of March 25, 1868. *Held*, in the absence of a supplemental pleading show-

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[1] This case, filed September 21, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed September 22, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

ing that the subsequent rebuilding connected defendants E. and F. with the original unlawful act, that the court erred in rendering judgment against them.

3. A finding that defendant D. was a member of "the board of supervisors," and took part in "the proceedings" under which the original unlawful contract was awarded, was not sufficient to justify a judgment against him, since it does not follow therefrom that he favored the contract in question.

4. The act of March 25, 1868, empowers the board to take possession of any land outside the levee district and "within the county of S." necessary for the construction of a levee or other work of protection within the district. *Held,* that the board of S. county had no authority thereunder to establish a levee in the adjoining county of C., though necessary for the protection of a district in S. county.

5. Such act, making it obligatory on the board of supervisors to establish a levee district at the expense of the entire county, on the petitions of persons owning more than one half of the acreage of any specified portion of the county, and that "it shall not be required to submit the question of tax to a vote of the people of any district so erected," is in conflict with Const. art. 1, § 8, providing that "private property shall not be taken or damaged for public use" without just compensation, etc.

Appeal from district court, Colusa county.

Action by L. E. Moulton against W. H. Parks and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Belcher & Belcher and *Van Clief & Cowden,* for appellants. *A. L. Hart,* for respondent.

McKinstry, J. In his complaint plaintiff alleges "that he is ignorant of the true names of the defendants above designated as John Doe and Richard Roe, and therefore has thus designated them, and prays that when their true names are discovered the pleadings and proceedings herein may be amended by inserting such names in the place and stead of the names herein used to designate such defendants." The "defendants" filed an answer. The record does not show that the true names of the defendants designated in the complaint as John Doe and Richard Roe have been discovered, nor have the pleadings and proceedings herein been amended by substituting any names for the fictitious names. Did the complaint not show that the names John Doe and Richard Roe were fictitious names, we might hold, perhaps, that the persons, whomsoever they were, who appeared and answered as John Doe and Richard Roe, were bound by the judgment; they having failed to plead the misnomer, or to respond in their real names to the allegations made against them. But as the record reads we construe the answer to be the answer of those of the defendants sued by their proper names, to wit, W. H. Parks, Eli Davis, W. H. Perdue, A. B. Van Arsdale, G. W. Santee, George Ohyler, and James T. Leary, and the injunction as operative only against such persons, their servants, etc.

The complaint was filed January 13, 1875. It avers that the plaintiff now is, and for more than two years last past has been, the owner and in possession of a tract of land containing 158 acres, situated in the county of Colusa, which tract is specifically described; that the land has been held and possessed by plaintiff for farming, grazing, and fruit-growing purposes, and is of the value of $5,000 for such purposes; that plaintiff has, and for more than a year past has had, on said land a dwelling house usually occupied by plaintiff's tenants and employes, about one half mile of fence, a well, corrals, and an orchard of fruit-bearing trees of the value of $800. The foregoing allegations of the complaint are denied by the answer, but the court below found them to be true, and the evidence is not before us.

The complaint further avers that plaintiff's land is situated between Butte creek and the Sacramento river, above where Butte slough puts out of said river; that said slough puts out of said river below plaintiff's land, less than a mile therefrom, and, running in a southeasterly direction to the mouth of Butte creek, flows thence in a southerly direction to and into said river, at a point more than 20 miles south of and below plaintiff's land; that Butte creek rises and has its source more than 40 miles northeast of plaintiff's land, and flows in a southwesterly direction and into Butte slough, at a point on said slough about 2½ miles southeast from plaintiff's land; that Butte creek and Butte slough, from their point of confluence with each other, and the said Butte creek from a point at least 20 miles northeast of plaintiff's land to such confluence, flow through a basin of lowland, which basin is bounded on the west by a strip of highland from one to three miles in width, extending along the east bank of the Sacramento river from a point on said river about 30 miles above and north of where said Butte slough puts out of said river to a point where said slough enters said river, and on the east by the high lands adjacent to the Butte mountains, and the highlands along the west bank of the Feather river, which said basin has an average width of about two miles; that during the winter and spring months in each and every year large quantities of water flow through said basin, slough, and creek, filling their banks in said basin and overflowing the same, and the waters from the Sacramento river above said highlands find by natural means their way into said basin, so that the water flowing into and in said basin during said months is in volume double that of the main Sacramento river at any point opposite said basin, and said waters are discharged through said creek, slough, and basin into the Sacramento and Feather rivers more than 20 miles south of and below plaintiff's land.

The answer admits the allegations of the complaint last set forth, except that the defendants deny that Butte slough runs to the mouth of Butte creek, or into the Sacramento river at any point; deny that Butte creek runs into Butte slough, or that there is any junction or confluence of said creek and slough, "except that both run into the same large basin of tule and swamp lands;" alleged that the water flowing into or through the basin described in the complaint is in volume not more than one tenth of the water of the main Sacramento, and deny that the waters of the basin described in the complaint, or any part thereof, are discharged from the Sacramento or Feather river, through said creek or slough, at any point south of the head of said slough.

The court found that Butte slough runs to the mouth of Butte creek, and flows thence in a southerly direction "to and into the tules of Sutter county" at a point more than five miles south of and below plaintiff's land; that Butte creek flows into Butte slough at a point on said slough about two and one half miles southeast of plaintiff's land; that Butte creek and slough, from the point of their confluence, flow through the basin described in the complaint, and discharge their waters into the said "tules of Sutter county," and that in the winter and spring months the waters flowing to and in said basin are in volume about equal to that of the main Sacramento at points opposite said basin. Thus the finding of the court accords with the last recited allegations of the complaint, except that the court finds that, after their junction, Butte creek and slough flow into the tules of Sutter county, instead of finding that Butte creek and slough flow into the Sacramento and Feather rivers, as alleged in the complaint.

It is averred in the complaint, and admitted by the answer, that the Sacramento river is a navigable stream from the town of Red Bluff, in the county of Tehama,—a distance of 70 miles above and north of plaintiff's land,—to its mouth, and from said town to said land and slough flows nearly due south; that opposite the basin described in the complaint the banks of said river are from 10 to 20 feet higher than the banks of Butte creek where said creek flows through said basin. The complaint further alleges that plaintiff's land is part of the said strip of highland lying on the east bank of the Sacramento river, and during the winter months of every year is at times partially overflowed by the waters of said Butte creek, and by the waters of the Sacramento river that find their way into said basin as aforesaid, but such overflow is slight, and does not interfere with the use and enjoyment of said land for the purposes for which it is owned and possessed; that said land is relieved from said overflow by the flowing off of said waters through said basin, creek, and slough, which constitute the natural and only outlet for said water; that if said slough, creek, and basin remain open, and the slough and creek unobstructed, the flood waters of each year will be drained off before any injury is done to said land of plaintiff, or the improvements thereon. The answer denies these last averments. The court found as alleged by plaintiff, except that it found a portion only of plaintiff's land was part of the highland on the east bank of the Sacramento.

The plaintiff further pleads that defendants, on the 17th day of October, 1874, unlawfully and wrongfully raised, constructed, and ever since have maintained, a dam across said basin below and within about two miles of plaintiff's land, and upon the freehold of defendants; that said dam extends from the highlands on the east side of said basin to the highland on the west side thereof, and crosses said Butte slough and Butte creek at points one fourth of a mile above and north of their confluence, and is of sufficient height, length, and strength to dam up and entirely obstruct, and does dam up and entirely obstruct, said creek, slough, and basin, and prevents the flow of any of said waters through the same at and below said dam, and has since its construction, and before the commencement of this action, caused the waters that flow upon plaintiff's land as aforesaid to remain thereon, and the waters which naturally, and which, but for said dam, would flow through said basin, creek, and slough without damage or injury to plaintiff's land, to back up, overflow, and remain upon plaintiff's land, to his damage in the sum of $1,000. The answer denies that either of the defendants ever built the dam, except as in the answer subsequently admitted, and expressly denies that the dam has obstructed the creek, slough, or basin, or that it caused any water to flow or remain upon plaintiff's land, or that, by reason of the dam, plaintiff has sustained any damage. The court found that the dam dammed up and obstructed the said creek, slough, and basin, and did cause the waters flowing upon plaintiff's land to remain thereon for a greater length of time than they would have remained except for said dam.

The plaintiff, in his complaint, further alleges that the defendants intend to and will, unless prevented by the judgment of the court, forever maintain said dam at its present height, length, and strength, and will forever by it dam up and obstruct said creek, slough, and basin, and prevent the flow of any of said waters; that, if defendants so maintain and so obstruct the flow of said waters, the waters that flow upon the land of plaintiff as aforesaid will remain thereon, and the waters will back up and overflow said land, flood plaintiff's dwelling house, wash away and destroy his fences, fruit trees, and other improvements, deposit injurious sediment, etc. These averments are denied by the defendants. Plaintiff's prayer is for an injunction, damages, and costs.

The defendants further allege in their answer that in the spring of 1871, in pursuance of an act of the legislature entitled "An act to provide for the protection of certain lands in the county of Sutter from overflow," approved March 25, 1868, defendant W. H. Parks, together with other persons not parties to this action, claiming in good faith to be the owners and in possession of over 60,000 acres of land in the county of Sutter, subject to overflow, petitioned the board of supervisors of said county, in accordance with said act of the legislature, to set apart and erect into a levee district "a specified portion of said county," with defined boundaries, of which the said lands of the petitioners constituted more than one half the acreage, and to place such levee district under the provisions of the act of the legislature, and in accordance therewith, as "Levee District No. 5," in said county; that such proceedings were regularly had; that on or before the 1st day of June, 1871, said portion of said county, containing over 100,000 acres of land in one body, was duly, by said board of supervisors, erected in a levee district, and placed under the provisions of said act, and called "Levee District No. 5;" that before the 15th of August, 1871, said levee district was duly and in good faith organized by the election and qualification of all such officers as are provided for by said act; that continually ever since the said petitioners, the board of supervisors, and all the officers of said district have in good faith claimed that said district was duly organized under said act, and that it became thereby a municipal corporation in fact; that the district, by its officers, has in good faith claimed the same to be such corporation, and, as such, has assessed the property of the district, levied and collected taxes, adopted plans for the protection of said district from overflow, contracted and paid for a large amount of work in pursuance of such plans, issued warrants and bonds for large sums of money, which are outstanding and unpaid, and done all other acts which said levee district might lawfully have done; that a part of one of the plans adopted by said board of supervisors and the engineers of said district to protect said district from overflow was the building of the dam or levee complained of; that the contract for said dam or levee, according to specifications fixed and prescribed by said engineers and board of supervisors, was awarded to defendant W. H. Parks, and duly executed by him on the 23d day of July, 1874; that defendant Parks, with his servants, built said dam or levee in exact accordance with said contract and specifications, and that none of the other defendants assisted or participated in the building thereof; that defendants Perdue and Van Arsdale, as members of said board of supervisors, and *ex officio* directors of said levee district, signed said contract for the building of said levee (called "dam" in the complaint;) that defendant Parks completed said levee according to said contract, and the same was accepted by said levee district, and Parks discharged from further obligations on said contract, long before the commencement of this action. Defendants further answered that after the commencement of this action, and on the ——— day of January, 1875, said dam or levee was wholly abated and removed.

The court below found that a petition in due form was presented by defendant Parks and others, not parties to this action, for the formation of a levee district, as alleged in the answer, and under the act referred to; that petitioners were the owners of more than one half of the lands described in the petition; that on the 11th of March, 1871, the board of supervisors duly made and entered an order as required by law, erecting said lands into "Levee District No. 5;" that the building of the dam was part of the plan adopted; that on the 23d of July, 1874, the board of supervisors, in pursuance of the act, made and entered into a contract with the defendant Parks for the construction of the dam described; that at the time of the presentation of the petition and the making of said order and the taking of the other proceedings, the defendants Perdue, Van Arsdale, and Davis "were members of said board of supervisors, and participated in the proceedings hereinbefore set forth;" that in pursuance of said contract defendant Parks constructed on lands of said defendant and others a dam across said basin, creek, and slough, within about two miles of plaintiff's said land; that said dam was constructed from the highlands on the east side of said basin to the highlands on the west side thereof, crossing said creek and slough at points about one fourth of a mile above and north of their confluence; that said dam, as constructed, was of sufficient height, length, and strength to dam up and obstruct, and did dam up and obstruct, said creek, slough, and basin so as to prevent, "except through a gate, culvert, and waste way, respectively," the flow of any of the waters of the same at and below said dam, and did cause the waters flowing upon plaintiff's land as aforesaid to remain thereon for a greater length of time than they would have remained had it not been for said dam; that said dam was constructed by said Parks in the summer and fall of the year 1874; that on the 19th of January, 1875, and after the commencement of this action, the said dam was broken by the pressure and force of the waters standing above and north thereof, and about 600 feet of said dam was then washed and carried away by said waters, the land above said dam, including plaintiff's said land, being thereby relieved from overflow, the water causing said overflow finding an outlet through the break in said dam.

The court, also at the request of defendants, adopted certain findings to the effect following: That the object of the dam or levee was to reclaim and protect from overflow by water the swamp and overflowed lands within the district No. 5; that the dam or levee was built in strict accordance with plans and specifications made by the engineer of district No. 5 and the contract of defendant Parks with said district through its proper agents, and was completed pursuant to said contract, and accepted by said district, before any injury resulted therefrom to plaintiff; that the basin referred to annually fills and overflows from the waters of the Sacramento river and Butte creek to a depth that renders a portion of plaintiff's said land unfit for cultivation, and has so overflowed every year for more than 20 years, except the year 1864; and the largest proportion of the water filling said basin flows from the Sacramento river over its banks and through Butte slough; that said basin fills as the river rises, and empties, if unobstructed, as the river falls; that on the 26th day of November, 1874, the said dam backed the waters up and over the plaintiff's land, and caused the same to remain thereon until the 19th of January, 1875, and that by said dam plaintiff has been damaged in the sum of $100.

Such were the issues made by the pleadings, and such the findings of the court so far as they responded to such issues. The cause was tried in the district court in January, 1876, and the court, in addition to the findings above set forth, found in substance as follows: That after the break in the dam, and after this action was commenced, certain lands in Sutter county were formed and created into a swamp land reclamation district, designated as "Swamp Land Reclamation District No. 226," under and in pursuance of an act of the legisature entitled "An act to provide for the management and sale of lands belonging to the state, approved March 28, 1868; and the defendant W. H. Parks was thereupon duly elected one of the trustees of said reclamation district, and he then and there qualified and acted as one of said trustees. That at the time of the formation of said reclamation district the defendants Davis, Ohyler, and Leary were the duly elected, qualified, and acting supervisors of the said county of Sutter, and have ever since constituted the board of supervisors of said county. That the trustees of said reclamation district —the defendant Parks being one of them— afterwards, and in pursuance of a plan of reclamation by them adopted, made and entered into a contract with one——— for the repair of said dam, and in pursuance of the said contract the said ——— in the summer and fall of 1875 did repair said dam by rebuilding so much thereof as has been previously washed away as above stated, and did at the same time enlarge and strengthen the whole of said dam; so that the same as repaired, enlarged, and strengthened is sufficient to dam up and obstruct the said waters as aforesaid. That the said trustees of said reclamation district ever since—the defendant Parks being one of them—have had their agents and employes upon said dam protecting and maintaining the same. That, unless restrained, the said trustees will continue to maintain said dam, and to keep the same in repair, and will forever thereby dam up the waters flowing through said creek, slough, and basin, so as to overflow and remain upon plaintiff's said land as aforesaid, and thereby to cause the waters to remain upon a portion of plaintiff's land for a period of at least six weeks longer each year than they otherwise would.

The judgment appealed from enjoins the defendants, their servants, etc., from constructing, maintaining, etc., and provides that plaintiff recover of defendants $100 damages, and $369.10 costs. The findings were all filed at the same time, but, for convenience of reference, we shall style those first hereinbefore set forth as the "original findings," and those stated to have been filed in addition, as the "additional findings." The additional findings, except in so far as they are evidence of an intent on the part of defendant Parks to continue the dam, are entirely without the issues, and cannot uphold a judgment against the defendants Ohyler and Leary. If it be conceded that the original erection of the dam was unlawful, and that Parks, Perdue, and Van Arsdale (the two last by reason of their having signed the contract with Parks) were parties to such unlawful erection, all others who aided or assisted in the work, and all who, after it was erected, either before or after the commencement of the action, aided or assisted in continuing or repairing the dam as agents, servants, employes, or coworkers with the persons who constructed it, would of course be bound by the judgment and restraining order against Parks, Perdue, and Van Arsdale, by virtue of their connection with and relation to the defendants last named. But plaintiff ought not, under the pleadings in this action, to have a judgment for damages and costs against Ohyler and Leary, who had in no way interfered with his rights, or assisted others in interfering with his rights, prior to the commencement of the action. It is found that defendants Ohyler, Leary, and Davis were members of the board of supervisors when a "reclamation district" was formed under the act of March 28, 1868, and when the trustees of such reclamation district let the contract for the rebuilding of the dam, in pursuance of a plan by them adopted. But if the establishment of the reclamation district so connected the defendants Ohyler, Leary, and Davis with the rebuilding of the dam—such rebuilding being conceded to be unlawful— as that they would be held to be parties to the rebuilding, the establishment of the reclamation district was a new and independent act on the part of Ohyler, Leary, and Davis, in no way connected with the previous formation of a levee district (No. 5) under the act of March 25, 1868, or with the erection of the dam thereunder,—an act which occurred after the commencement of this action, and no supplemental or amended complaint was filed under which they could be tried for such subsequent act. Plaintiff was not authorized to take a judgment for damages and costs against those who, as we have seen, if they did him any wrong, did it after suit brought, without supplemental pleading; *a fortiori* when it appears they are acting officially and independently in accordance with an act of the legislature different from the act under which the original wrongdoers claim to justify. And even if it should be conceded that, in consequence of the fact Ohyler and Leary having been members of the board of supervisors when the "reclamation district" was formed, etc., they should be held as the servants or coworkers of the persons who originally built the dam in maintaining and continuing it, and therefore bound by any injunction which should issue against such persons, yet, in the absence of supplemental complaint, charging them as such co-workers, and giving them an opportunity to deny the charge, no judgment for damages and costs should have been entered against them. The judgment is therefore erroneous as to defendants Ohyler and Leary.

On the other hand, the other defendants were not entitled to defend under the act of March 28, 1868. If it should be conceded that the original erection of the dam was unlawful, nevertheless, if the act of

March 28, 1868, is a valid act, and the dam was rebuilt in strict pursuance of that act, the defendants would have been entitled to assert the facts (although the rebuilding was done after the suit was brought) by way of defense, to show that the dam ought not to be abated, or its continuance enjoined, had they pleaded the facts by supplemental answer. But they failed to do so. Hence, under the pleadings, neither was plaintiff authorized to take a judgment against defendants Obyler, Leary, and Davis, based upon the fact that they were members of the board of supervisors when certain things were done, subsequent to the commencement of the action, nor can defendants rely as a defense upon the establishment of a "reclamation district," under the act of March 28, 1868, after the commencement of the action. The answer avers that defendants Perdue and Van Arsdale, as members of the board of supervisors and *ex officio* directors of levee district No. 5, signed a contract for the buiding of the dam by defendant Parks. Whether the admission that they signed the contract makes them responsible is a question hereafter to be considered. But there is no finding in the "original" findings which can be held to charge either the defendant Perdue or Van Arsdale or Davis. The finding is that, when the petition was presented by Parks and others, when the order was made by the board of supervisors erecting "Levee District No. 5," and when the contract was made with Parks, "Van Arsdale, Perdue, and Davis were members of said board, and participated in the proceedings." *Non constat* but at least one of the three voted against the reception of the petition, against the order erecting the district, and against the order, if any, directing the contract to be executed. The finding fails to state who of the three favored the proceedings. There are, therefore, no facts found which can uphold the judgment against the defendant Davis.

The judgment against the defendant Santee is clearly erroneous. The findings in no way connect Santee with any of the acts claimed to be wrongful.

It remains to inquire whether the judgment against Parks, Perdue, and Van Arsdale should be permitted to stand. As we have seen, the court below found that the dam or levee was built in strict accordance with plans and specifications made by the engineer of district No. 5, and the contract. It may be conceded, for the purposes of this decision, that, if the legislature had power to pass the act of March 25, 1868, and that act was pursued by the supervisors and other officers whose duties are prescribed by it, and the dam was a work which they had authority to erect under the act,—the plans by them adopted and carried out not being inherently defective or violative of the law,—the present action cannot be maintained; that, under such circumstances, any incidental damage which may have occurred to plaintiff in the prosecution or completion of a public work authorized by the state is *damnum absque injuria*. Green v. Swift, 47 Cal. 536. The present constitution of the state provides: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner." Article 1, § 14. The constitution of 1849 reads: "Nor shall private property be taken for public use without just compensation." Article 1, § 8. The dam was erected, and the case at bar tried by the district court, while the former constitution was in force. In Green v. Swift, supra, it was held that the incidental damage caused by a public work authorized by law in flooding or washing away of the soil from the land of a citizen—the work having been done in strict accordance with law, skillfully, and without malice—was not a taking of private property within the meaning of the constitution then in operation. We have repeatedly intimated that we would follow the construction of the provisions of the former constitution given by the highest tribunal created by that constitution. And it may be conceded, for the purposes of this decision only, that the doctrine of Green v. Swift is applicable to the facts of the present case.

It is proper to inquire whether the erection of the dam or levee found to have damaged the plaintiff's land was authorized by the act of March 25, 1868. The land within the delta above the junction of Butte creek and Butte slough is in Colusa county. Pol. Code, § 3916. The court below found that the dam, as constructed, extended from the highlands on the east side of the basin to the highlands on the west side thereof, crossing said creek and slough at points about one fourth of a mile above and north of their confluence. The portion of the dam between the creek and slough was therefore in Colusa county.

The act of the legislature under which defendants Parks, Perdue, and Van Arsdale seek to justify is entitled "An act to provide for the protection of certain lands in the county of Sutter from overflow." St. 1867-68, p. 316. By its terms it confers power on the board of supervisors of Sutter to establish levee districts only within the limits of their county. Sections 2, 21. The board of supervisors is authorized to adopt a plan for the protection of any levee district created under the act, to divide it into sections, and to let contracts for the construction of sections of a levee or other work of protection. Section 10. The power to adopt a plan is not in terms limited to the adoption of a plan which shall provide for the construction of levees or other works only within Sutter county, nor is the power conferred upon the board to contract for the construction of levees without the county, unless such power is conferred by the general terms of the grant. It may be that, in the opinion of the board of supervisors of Sutter county, no efficient plan for the protection of levee district No. 5 could be carried into effect which did not provide for the construction of a levee outside of the district and outside of the county, and it may be argued that such a condition of things must have been anticipated by the members of the legislature, when the general power of adopting plans, and constructing works in accordance therewith, was given to the board. But the board of supervisors of Sutter county had the right to employ only such power, with respect to the adoption of plans and construction of works, as was conferred by the act of the legislature; and in inquiring whether the grant is limited we should consider as well the whole act as the nature of the official powers, under the constitutions and laws of the supervisors, as legislative and executive public agents. The eighth section of the act empowers the board to take possession of any land within the district that may be necessary for any levee or work of reclamation. It also empowers the board to take possession of any land outside the district and within the county that may be necessary or proper to furnish material for the construction of a levee, or other work of protection, within a district. The same section requires that if the property, within the district or county, of which possession may thus be taken, is private property, the board shall petition the county judge of the county of Sutter to appoint three appraisers, etc. It may be conceded that the private proprietor may voluntarily surrender possession and waive damages, and that the power to condemn includes the power on the part of the county to accept lands within the district or county thus donated for the purpose of a levee, or for the purpose of the taking of material therefrom. There is no power conferred by the act upon the board of supervisors to contract for the purchase of lands for a consideration, or to levy an assessment to provide moneys to pay for lands thus purchased. It would seem that it was not within the contemplation of the legislature that lands should be acquired whereon to erect levees or works of protection, or from which to take building material, except through the employment of the power of eminent domain, (within which is included the acquisition by means of donations, which are operative by reason of the waiver of "just compensation" on the part of the private proprietor,) and, as we have seen, the employment of the power of eminent domain through the supervisors is carefully limited to the district where the land is taken for a levee, and to the county where it is taken for material.

This view is strengthened by a consideration of the nature of the office of supervisor. They are local officers. The act imposes the duty of keeping the levees and other works in repair, and of levying and collecting taxes upon all the property within the district for the purpose of raising funds to keep them in repair. If the supervisors of Sutter have power to cause to be erected and kept in repair a levee, or part of a levee, in Colusa, they have power to erect and keep in repair levees, all but one of which shall be in other counties than Sutter. It is not to be supposed that legislators closed their eyes to the complications between counties and property owners in different counties which would thus arise. Again, if the board of supervisors are authorized to include within levees large bodies of land not within the district, the effect may be a direct benefit to such lands, or portions of them, by protecting them from overflow. But the lands within the limits of the district only can be assessed for benefits conferred upon such lands. The legislature has no power to relieve a portion of the lands benefited. People v. Lynch, 51 Cal. 15. It may be said that the facts of this case do not show any of the lands without the district to be benefited by the work. But we are now considering the interpretation to be given the act of March 25, 1868, and may reasonably presume that the legislature did not intend that the power to adopt plans and build levees should be employed in such manner as to result in consequences which might be obnoxious, because violative of constitutional principles. People v. Parks, 58 Cal. 624. The establishment of an assessment district is a declaration that the only lands which will be benefited by the proposed protection works are the lands within the district. It must be admitted it was not intended the board should include within levees lands without the district which should be benefited by the work. It will be urged, however, that the board has power to determine that lands without the district are not benefited by the levees, and to include such lands within the district levees; that it is to be presumed the board had the limitation in mind, and that the levees as actually erected did not include any lands benefited other than the lands within the district. But whence comes the power to the supervisors of determining (after the creation of the district which itself determines that certain lands, and none other, will be benefited by the proposed work) that any lands—inside or outside the district—will be or will not be benefited? The argument would lead to this: By creating a levee district, the supervisors adjudge that the lands within the district will be benefited by work to be done at any places outside the district which the board shall subsequently provide for; the board reserving the entire power, by its final and conclusive judgment, of deciding that any plan it may adopt will not include any lands which will be benefited, other than the lands within the districts. In view of the other sections of the statute, the nature of the functions of supervisors, and the consequences which might follow from the adoption of the construction claimed by counsel for appellants, we ought not, in the absence of any provision of the act conferring on the board the power of extending their works beyond their county, to hold that such vast discretionary authority has been conferred on the supervisors merely because of the clause which authorizes them generally to adopt plans, etc. Our conclusion is that the officers of the county of Sutter had no power to cause a levee to be built in the county of Colusa.

We add that there are constitutional objections to the act of March 25, 1868, not heretofore considered by the supreme court. The twenty-first section of the act is mandatory. It reads: "Sec. 21. Whenever a petition shall be received by said board of supervisors from persons in possession of more than one half of the acres of any specified portion of said county, asking to be set apart and erected into a levee district, said board shall at once erect such territory into a levee district, and place it under the provisions of this act, to be called 'Levee District No. 1, 2, 3,' and so on, as the case may be; provided, that it shall not be required to submit the question of tax to a vote of the people of any district so erected." Here is an attempt to transfer to persons in possession of more than one half of the acres of any portion of the county of Sutter, which they may specify, the power to declare that such portion of the county will be benefited by works to be erected at the expense of all the property, real and personal, within it, and to set in motion machinery for the enforcement of a tax and assessment against the owners of a minority of the acreage. The act provides for no judicial inquiry as to what lands will be benefited by a proposed work, nor does it contain any declaration by the state legislature that any specified lands will be benefited, nor provide that such declaration may be made by the supervisors, or by any officer or agent of the state or county. When those in possession of more than half of the land by them specified file a petition they assert that they will be benefited by the proposed work, and they also attempt to determine that the owners of other lands will be benefited. They determine that the work will benefit all, and attempt to levy a tax upon others as well as themselves, which shall be expended in work of joint as well as several benefit. No man can be a judge in his own cause, and no man's property can be taken without due process of law.

With respect to assessments for local improvements, Mr. Justice Cooley says: "The district within which the tax shall be laid may be determined in either of two modes: (1) The legislative authority either of the state, or, when properly organized, of the municipality, may determine over what territory the benefits are so far diffused as to render it proper to make all lands contribute to the cost; or (2) the assessors or commissioners who, under the law, are to make the assessment, may have the whole matter submitted to their judgment, to assess such lands as, in their opinion, are specially benefited, and ought therefore to contribute to the cost of the work." Cooley, Tax'n, 449. It is manifest that the act of the legislature we are considering does not provide for the creation of an assessment district in either of the two modes above pointed out. Under the twenty-first section, if valid, the levee district, which is the assessment district, is established neither by the legislative authority of the state or county, nor by assessors or commissioners authorized to ascertain what lands will be benefited by the proposed levees or works of protection. The section provides that on the presentation of a petition the board of supervisors "shall at once proceed" to erect the territory described in the petition into a levee district, "and place it under the provisions of this act." The supervisors have no discretion to reject the petition, or to modify or change the boundaries of the district, or otherwise to exercise any judgment with reference to the expediency of fixing the limits of the assessment district where the petition fixes them. One man in possession of 3,000 acres of land, which he believes will be protected by a levee, may thus decree that 5,999 acres (of which 2,999 are owned by 100 other men) will be benefited by a levee, and arbitrarily adjudge the 100 to pay almost half of the expense of building it. Under our constitution there never has been power in the legislature to delegate such legislative functions to interested individuals. By entering into the contract with defendant Parks for the construction of the levee the defendants Perdue and Van Arsdale aided and abetted the former in his unlawful act. The judgment against defendants Parks, Perdue, and Van Arsdale should be affirmed; against Santee, Ohyler, Davis, and Leary should be reversed. Ordered that the judgment of the district court be modified by reversing and setting aside so much thereof as adjudges that plaintiff have and recover of and from defendants Davis, Santee, Ohyler, and Leary the sum of $100 damages and $369 costs, and that the said judgment of the district court be in all other respects affirmed.

Ross, Sharpstein, and Myrick, JJ., concur. McKee and Thornton, JJ., concur in the judgment.

(64 Cal. 157)

People v. Markham.[1]

(*Supreme Court of California.* Sept. 21, 1883.)

Bribery—Sufficiency of Indictment—General Reputation of Witness—Appealable Order.

1. A demurrer to an information for bribery, on the ground that it cannot be ascertained therefrom whether defendant is charged with making a corrupt agreement not to arrest for violation of a state law, or for violation of a city ordinance, must be overruled, under Pen. Code, § 1004, providing that defendant cannot demur to an information on the ground that it is uncertain.

2. Pen. Code, § 68, provides that every executive officer who receives, or agrees to receive, any bribe upon any understanding that his "action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby," is punishable, etc. An information alleged that defendant received a bribe of $15 upon an understanding that he would not arrest persons engaged in violating a gaming ordinance. *Held*, that the indictment was sufficient, without alleging that any such offense had been brought before defendant in his official capacity.

3. The officer accepting such bribe may be found guilty under such statute, without proving that the offense of gaming, which he was bribed not to prosecute, was in fact subsequently committed.

4. The general reputation of a witness for truth, honesty, and integrity cannot be established by his reputation as to those particulars among the police officers of a small town.

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[1] This case, filed September 21, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

5. Under laws of California, an order denying a motion in arrest of judgment is not appealable.

In bank. Appeal from superior court, Santa Clara county.

Information against W. W. Markham for bribery. Defendant was convicted, and appeals. Affirmed.

Moore, Laine & Lieb, for appellant. *Atty. Gen. Marshall* and *Dist. Atty. Campbell*, for the People.

McKinstry, J. The charging part of the information is as follows: "The said W. W. Markham, on the 30th day of December, A. D. 1882, at the county and state aforesaid, then and there being an executive officer, namely, a police officer of the city of San Jose, county of Santa Clara aforesaid, did ask, receive, and agree to receive a bribe, to wit, fifteen standard dollars, lawful coin of the United States of America, upon an understanding and agreement that he would not arrest persons engaged in violating section 330 of the Penal Code of the State of California, nor would he arrest persons engaged in violating the gaming ordinance of the said city of San Jose, contrary to the form of the statute," etc. Defendant demurred to the information on the ground "that said information is uncertain, in that it cannot be ascertained therefrom whether he is charged with making a corrupt agreement not to arrest under section 330 of the Penal Code, or for a violation of a city ordinance." A defendant cannot demur to an information on the ground that it is uncertain. Pen. Code, § 1004. It is contended by appellant, however, that the facts stated in the information do not constitute a public offense. Section 1012 of the Penal Code provides: "When the objections mentioned in section 1004 appear on the face of the indictment or information, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment." At the proper time defendant moved in arrest of judgment, on the ground that the information did not state facts constituting a cause of action. He also moved for a new trial. Section 68 of the Penal Code reads: "Every executive officer * * * who asks, receives, or agrees to receive any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the state prison not less than one nor more than fourteen years," etc. The seventh section of the same Code defines the word "bribe" to signify anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence unlawfully the person to whom it is given in his action, vote, or opinion in any public or official capacity. The objection of appellant's demurrer is more specifically stated in his points filed in this court: "There was nothing [in the information] to show that anything ever could or did come before him in his official capacity concerning the matter." If we understand the argument of counsel, it is to the effect that the information should have stated that section 330 of the Penal Code was being violated by certain persons when the $15 was given and received with the understanding that defendant should not arrest such persons, or that when the money was paid it was paid in contemplation of an intended violation of the section by certain persons, and was received under an agreement of defendant that he would not arrest such persons. Further, that, in case the information had alleged that section 330 was being violated when the money was paid, it should also have alleged that defendant, in fact, failed to arrest the persons guilty of such violation. At the least, the argument of counsel for appellant involves the proposition that in case the information alleges that money is paid a police officer, and by him received, with the understanding that he will not arrest persons who subsequently shall commit a certain crime, it must also allege that some person or persons did subsequently commit the crime, and the officer, having the opportunity and ability to arrest, failed to arrest such person or persons. But we think, when a police officer receives money in consideration of his promise that he will not arrest any one of a class of offenders against the criminal laws, he is guilty of receiving a bribe, because the case of one who has committed the offense, and the consequent duty of the officer to arrest, is "a matter which may be brought before him in his official capacity." We are of opinion that a police officer who shall receive a weekly stipend, or a single payment of money, in consideration of his promise not to arrest any violator of the gaming law, is not only morally guilty, but may be found guilty under the statute, without his trial involving the necessity of the prosecution establishing the commission of a distinct crime by a third person, together with a want of energy and efficiency on the part of the officer in securing the arrest of the third person.

The scope of the definition of "bribery" is as broad as the duties of the officer who accepts the bribe. It is the duty of a police officer to arrest, with or without warrant, according to circumstances, every person who violates section 330 of the Penal Code. If, therefore, he agreed, in consideration of money paid him, not to arrest any person who should violate section 330, it would seem to the ordinary comprehension that he was bribed with respect to a matter which might be a subject of his official action. In opposition to the view above set forth, appellant cites certain cases. They are People ex rel. Perley, 2 Cal. 564; Barefield v. State, 14 Ala. 603; Collins v. State, 25 Tex. Supp. 202; State v. Hughes, 43 Tex. 518; Newell v. Com., 2 Wash. (Va.) 88; and Old v. Com., 18 Grat. 918. But the decision in People ex rel. Perley turned upon the phraseology of a statute different from that now under consideration. It was held that under the statute of 1850, which confined the offense of bribery of a judicial officer to the payment or offer to influence such officer "to acting more favorably to one side than the other in any suit, matter, or cause depending or to be brought before him," it should appear that a particular legal proceeding named in the presentment was commenced, or, at least, was to be commenced. In Barefield v. State the defendant below had been indicted for bribing a justice of the peace by corruptly promising him $25 to influence his decision in a certain controversy or proceeding that might be brought before him, wherein Miles Barefield was to be plaintiff and W. H. Owen was to be the defendant. Two of the three judges of the supreme court of Alabama held that while an offer to bribe a judicial officer was a grave offense at the common law, yet under the statute (similar to ours) it was necessary, to constitute the bribery, that there must have been an acceptance of the bribe; and also it must appear that the cause or proceeding was pending before the justice when the offer was made, or that the cause or proceeding was afterwards instituted, so that in the ordinary course it would come before him. Mr. Justice CHILTON dissented from his brethren upon both the points on which their conclusion rested, and we concur with his view of the law. He said: "But I feel constrained to differ with my brethren as to the construction which they place upon the statute under which the conviction was had. In my judgment, it is not indispensable that the matter, cause, or proceeding in which the decision or judgment of the officer is to be influenced by the bribe should afterwards be actually brought before him, in order to constitute the offense. But if the party corruptly give or promise any gift or gratuity whatever, 'with intent to influence the act, vote, opinion, decision, or judgment' of any officer, whether executive, legislative, or judicial, on any matter, cause, or proceeding which may be then pending, or may by law come or be brought before him in his official capacity, the crime is complete, although the matter never should come before such officer. The law, it is well remarked, abhors the least tendency to corruption; and at common law attempts to bribe, though unsuccessful, were held indictable. 1 Russ. Crimes, 156; U. S. v. Worrall, 2 Dall. 384; Rex v. Plympton, 2 Ld. Raym. 1377; Rex v. Vaughan, 4 Burrows, 2494, affirmed in Rex v. Pollman, per Lord ELLENBOROUGH, 2 Camp. 230. It is true the intention to corrupt the justice in regard to his anticipated action upon the case is not an offense which the law can punish; but, when that intention is evidenced by overt acts,—when the promise is complete to confer upon the officer the reward as a premium to incline him to act contrary to his duty, and in violation of the known rules of honesty and integrity,—the defendant has done his part towards consummating the guilt, and the punishment inflicted is not disproportioned to the demerit of his crime. The matter, cause, or proceeding must be one which may come before him,—that is, comes within his jurisdiction,—or which may be brought before the officer, or which may be pending at the time of the corrupt promise. The legislature, I think, did not intend that the prosecution should depend upon the fact whether the officer actually had it in his power to carry out the corrupt agreement before the indictment was exhibited. It is sufficient, I think, that the subject-matter upon which the bribe was to operate existed, and could legally be brought before the officer in his official capacity. The offense consists, in contemplation of the statute, in poisoning and corrupting the fountain of justice, and, although the particular deleterious consequence designed to be effected by the parties has not ensued, the state, nevertheless, has an officer corrupted, and society has lost all protection for its rights, so far as the administration of the law by him is concerned." In State v. Hughes, the defendant was indicted under a statute which made it a felony to bribe a witness. It was held that a charge that the defendant offered a person money to avoid becoming a witness was not authorized by the wording of the statute. In Newell v. Com., (decided in 1795,) it was said that a common-law information which attempted to allege that defendant, a justice of the peace, corruptly received a bribe to vote for a certain person as clerk of the peace, and that he did vote for such person, was too uncertain in not averring that an election for clerk of the peace was in fact held. In Old v. Com., the only question considered was whether the evidence justified the verdict of guilty. It was held that a new trial was properly denied. In Collins v. State, 25 Tex. Supp. 202, the indictment, founded upon a statute, omitted to state that the matter, to influence his action upon which it was alleged money was offered to the district attorney, was a matter of such nature as ever could come before him for official action.

None of the cases cited, when analyzed, would require a construction such as is claimed by appellant to be the correct construction of the section of our Code. The nearest case is Barefield v. State, and of that case we remark that the reasoning of the dissenting judge is to us more satisfactory than that of the prevailing opinion. Here the duty of the defendant was to arrest those violating a certain law, and the duty was one which he might at any time be required to discharge. The matter might be presented to him for official action. The sixty-seventh section of the Penal Code provides that any person who gives or offers a bribe to any executive officer, with intent to influence him in respect to any act, etc., as such officer, is punishable. By the sixty-seventh section the offense defined is that of one who offers, by the sixty-eighth that of one who receives, a bribe. If the witness who testified he paid money to the present defendant was informed against, would it not be enough to allege in the information that he paid the money in consideration of a promise that the officer would not arrest any person for a violation of section 330 of the Penal Code? His offense was complete. In the language of Mr. Justice CHILTON, "the legislature did not intend that the prosecution should depend upon the fact whether the officer actually had it in his power to carry out the corrupt agreement before the indictment was exhibited." See, also, People v. Ah Fook, 6 Pac. Coast Law J. 1021. People v. Kalloch, 60 Cal. 113, in no degree conflicts with the views above expressed. At the trial a witness, Cole, was asked by defendant's counsel: "Do you know Ah Hung's reputation for truth, honesty, and integrity in San Jose?" Ah Hung had been examined as a witness on behalf of the prosecution. To the question above recited the witness Cole answered: "I know his general reputation among the officers of San Jose; that is all." On objection, the answer was ruled out by the court. A witness may be impeached by evidence that his general reputation for truth, honesty, and integrity is bad. Code Civil Proc. § 2051. The section of the Code as to reputation for truth is but declaratory of the common-law rule. The evidence, to be competent, must be as to witness' general reputation in the community in which he resides; that is to say, to impeach him when the inquiry is as to his reputation for truth, he must have reached the bad eminence of notoriety as a liar. Bates v. Barber, 4 Cush. 107; Knode v. Williamson, 17 Wall. 586; Whart. Ev. 562, 563. The attack must be on his reputation among his neighbors, whether they know him personally or not, or among those who have had opportunities of ascertaining his reputation as generally estimated. 1 Greenl. Ev. 461. The question propounded to the witness was not as to the general reputation of Ah Hung, and the answer of the witness did not respond to any supposed question as to general reputation. The number of police officers in San Jose is, for aught that appears in the transcript, very limited, and there is no suggestion that Ah Hung's acquaintances and associates were confined to members of the police department. However this may be, if we assume, as we must assume, that there are few policemen in San Jose, their opinion of his character does not establish his general reputation in the community. Read as a whole, the charge of the court below fairly presented the law. The order denying defendant's motion in arrest of judgment is not appealable. Judgment and order denying new trial affirmed.

ROSS, SHARPSTEIN, MYRICK, MCKEE, and THORNTON, JJ., concurred.

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64 Cal. 185

ANAHEIM WATER CO. *et al.* v. SEMITROPIC WATER CO.[1]

(*Supreme Court of California.* Sept. 27, 1883.)

IRRIGATION—DIVERSION OF WATERS—ADVERSE POSSESSION—ESTOPPEL.

1. The right of a proprietor to use a due proportion of the waters of a stream, upon which his lands border, for irrigation purposes, cannot be affected by the grant of a right to divert the waters of the same stream, made by an adjacent proprietor.

2. The right to the exclusive use of the waters of a stream for irrigating purposes cannot be acquired by adverse possession, where, during the time in which such prescriptive right is claimed to have accrued, there has been an abundant supply of water in the stream for all claimants.

3. In such case, the supply of water having from natural causes proven insufficient for the wants of all claimants, the failure of a proprietor to object to the diversion of a disproportionate share of the water by an adjacent proprietor, during the season of abundance, will not estop him from making such objection thereafter.

In bank. Appeal from superior court, Los Angeles county.

Action by the Anaheim Water Company and others against the Semitropic Water Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Bicknell & White and *Glassel, Smith & Patton*, for appellant. *Smith & Hupp*, for respondents.

ROSS, J. In its course through Los Angeles county, the Santa Ana river forms the dividing line between the Ranchos Canon de Santa Ana, San Juan y Cajon de Santa Ana, and Las Bolsas on the one side, and the Ranchos Santiago de Santa Ana and Lomas de Santiago on the other. Between the Ranchos Canon de Santa Ana and the San Juan y Cajon de Santa Ana, and also fronting on the river, is a small piece of land belonging to the government. From a map furnished us by the respective parties, it appears that the Rancho Santiago de Santa Ana has a frontage on the river almost equal to the combined frontage of the Ranchos Canon de Santa Ana, San Juan y Cajon de Santa Ana, Las Bolsas, and the government land, and reaches from the sea to a point on the river but a little distant from where the river enters the boundary of the county. The plaintiffs assert a right to divert from the river sufficient water to keep their ditch, which is alleged and found by the court below to be six feet wide at the bottom, eight feet wide at the top, and two feet deep, (grade not given,) flowing full at all times and seasons of the year; and in this asserted right the decree of the court below secures them, without regard to the quantity of water that may be left in the river when such a quantity is so diverted, and irrespective of the wants and the necessities of the owners of the Santiago de Santa Ana rancho, under and for whom the defendant asserts the right to divert a portion of the water of the said river. Counsel for the plaintiffs contend that the right thus asserted and adjudged them is founded (1) in grant; (2) upon prescription; (3) upon prior appropriation; and (4) upon an estoppel *in pais*.

It will be convenient to consider these grounds in their order.

1. Omitting details, the plaintiffs' title by grant rests—*First*, upon a deed executed September 1, 1857, by Bernardo Yorba, the then owner of the Rancho Canon de Santa Ana, to Juan Pacificus Ontiveras, the then owner of the lower rancho, San

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[1] This case, filed September 27, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Juan y Cajon de Santa Ana; and, *secondly*, on two deeds executed September 12, 1857, by Ontiveras and wife to George Hansen and John Frohling,—the two last-named persons being the predecessors in interest of the plaintiffs. By the deed of September 1, 1857, Bernardo Yorba conveyed to Ontiveras, for the expressed consideration of $200, a right of way in and over a certain strip of the Rancho Canon de Santa Ana commencing at a point 100 varas below a dam in the river on his said rancho, "which leads a portion of the water of said river into a ditch running through a portion of said lands, and into and through a portion of the aforesaid lands of the said Juan Pacificus Ontiveras, (to wit, the Rancho San Juan y Cajon de Santa Ana,) and which is now used by him for irrigating a portion of said lands, and running from said point in a westerly direction to the boundary line of the Rancho Cajon de Santa Ana;" said strip of land to be sufficiently wide for the construction of a water ditch of capacity to hold and convey water sufficient to irrigate 1,200 acres of land, and for the passage of a man on horseback on either side of the ditch, for the purpose of inspecting and keeping it in order; "and also the right to construct a sufficient dam at the before-mentioned point in the said river in order to supply the said ditch with water for the uses and purposes above mentioned." By one of the aforesaid deeds of September 12, 1857, Ontiveras conveyed to Hansen and Frohling the same rights and interests conveyed to him by the aforesaid deed from Yorba; and by the other deed of September 12, 1857, Ontiveras conveyed to Hansen and Frohling 1,165 acres of the Rancho San Juan y Cajon de Santa Ana, afterwards and now known as the "Anaheim Tract;" "and also the right of way in and over a strip of land twelve varas wide, running through the said Rancho San Juan y Cajon de Santa Ana, for the purpose of making a ditch of capacity to carry water sufficient to irrigate the said piece of land; said ditch to be commenced at a point on the eastern boundary line of the aforesaid rancho, (San Juan y Cajon de Santa Ana,) which may be most convenient for the purpose, and to run as directly as the nature of the soil and the conformation of the ground will permit, to the said tract of 1,165 acres; and also the privilege of using so much of the water from the Santa Ana river as appertains to the said rancho (San Juan y Cajon de Santa Ana) for the purpose of irrigating the same, by virtue of the grant of said rancho by the former Mexican government, and by the laws and customs of the country at the time of such grant, and by virtue of the existing laws and customs as may be sufficient for the purpose of irrigating the aforesaid tract of 1,165 acres of land, together with the privilege of making such other ditches through the said rancho (San Juan y Cajon de Santa Ana) as may be necessary for irrigating and cultivating said tract of land." There can be no doubt that by the deed last mentioned Ontiveras conveyed to Hansen and Frohling the privilege of using so much of the water of the Santa Ana river as appertained to the Rancho San Juan y Cajon de Santa Ana as should be necessary for the irrigation of the Anaheim tract of 1,165 acres, provided the quantity of water appertaining to that rancho, and previously unconveyed by Ontiveras, was sufficient for that purpose. But, of course, this grant by Ontiveras could not affect any right of the owners of the Rancho Santiago de Santa Ana to the use of the water of the river.

It is said, however, that at the time of the execution of the deed from Yorba to Ontiveras of date September 1, 1857, Yorba was the owner of an undivided interest in the Rancho Santiago de Santa Ana, and that by his deed to Ontiveras he conveyed to him the right (subsequently vested in the predecessors of the plaintiffs) to divert sufficient of the water of the river for the irrigation of 1,200 acres of land upon the Rancho San Juan y Cajon de Santa Ana. It is not necessary to decide whether the deed of September 1, 1857, from Yorba to Ontiveras conveyed to the latter the right to divert any of the water of the river that pertained to the Rancho Canon de Santa Ana; for, while those who have succeeded to the rights of Yorba in that rancho were originally made defendants to this suit, the action was subsequently dismissed as to them, and the contest continued only as to those holding under the Santiago grant. Whatever else might be held with respect to the deed from Yorba to Ontiveras, we think it perfectly clear that no right to divert any of the water of the river that appertained to the Rancho Santiago was conveyed by it. The deed starts with the recital that, "whereas, the parties of the first part [Yorba and wife] are seised in fee of a certain rancho or tract of land called 'Canon de Santa Ana,' * * * lying on and near to the river, said river being one of its boundaries, and the said party of the second part [Ontiveras] being seised in fee of a certain tract of land called 'San Juan y Cajon de Santa Ana,' * * * bounding also on said river Santa Ana, and lying near to and below the lands of said Bernardo and Andrea Yorba: Now, therefore," etc., in consideration of $200, the grantors convey to Ontiveras the right of way over a strip of the Rancho Canon de Santa Ana, commencing and running as already described, sufficiently wide for the construction of a water ditch of capacity to hold and convey water sufficient for the irrigation of 1,200 acres of land, and also the right to construct a sufficient dam in the river at the point of commencement of the strip over which the right of way is conveyed in order to supply the said ditch with water for the irrigation of the 1,200 acres. There is no express grant in this deed by Yorba—and we speak of him as the grantor, because the court below found that, though his wife joined him in the deed, she had no interest in the property—of any right on the part of Ontiveras to divert any of the water of the river, and certainly no express grant of the privilege of diverting any of the water of the river that pertained to the grantor, as owner of an undivided interest in the Rancho Santiago de Santa Ana. Impliedly it undoubtedly recognized the right in Ontiveras to divert a part of the water, but it must be remembered that, by reason of his proprietorship of the Rancho San Juan y Cajon de Santa Ana, Ontiveras then possessed the right to divert such portion of the water of the river for the purposes of irrigation as appertained to his rancho. And the fact that he was then diverting a portion of the said water for that purpose is expressly recited in the deed; for by its terms the strip of the Canon rancho over which Yorba conveys to him the right of way for a ditch is made to commence at a point 100 varas below a dam in the river, on the Canon rancho, "which leads a portion of the water of said river into a ditch running through a portion of said lands, and into and through a portion of the aforesaid lands of the said Juan Pacificus Ontiveras, and which is now used by the said Juan Pacificus Ontiveras for irrigating a portion of his said lands." But no reference whatever is made in the deed to the Rancho Santiago. Irrigation upon that rancho, as well as upon the Ranchos Canon and Cajon, with the water of the river was then carried on, and had been carried on for many years. There was then, according to the findings of the court below, and continued to be until within a year or two prior to the commencement of this action in 1877, sufficient water flowing in the river to supply the wants of all the parties bordering on the stream. Under these circumstances, certainly, the owners of each of these were entitled to divert, for the purposes of irrigation upon their respective tracts, such portion of the water of the river as appertained to their respective ranchos, due regard being had to the rights of each and all the others. Ontiveras, as owner of the San Juan y Cajon de Santa Ana, was entitled to divert, for the purposes of irrigation upon his rancho, such portion of the water as rightly appertained thereto; and, in the deed by which he conveyed to Hansen and Frohling the Anaheim tract of 1,165 acres, he expressly granted to them the privilege of using so much of the water of the river appertaining to his rancho as should be sufficient for the irrigation of that tract. But in the deed from Yorba to Ontiveras, executed but a few days before, there is no such language. Yorba thereby conveyed to Ontiveras a right of way over his Rancho Canon for the construction of a ditch of capacity to hold and convey water sufficient for the irrigation of 1,200 acres of the Rancho San Juan *y* Cajon de Santa Ana, and also the right to construct a sufficient dam in the river at a designated point upon the Canon rancho in order to supply the ditch with water for the 1,200 acres. Whether the water thus to be diverted was the water that appertained to Ontiveras, as the owner of the Rancho San Juan y Cajon de Santa Ana, or water that appertained to Yorba, as the owner of the Rancho Canon de Santa Ana, need not be determined for the reason already assigned; but by no construction of the deed consistent with reason or authority can it be held to be any part of the water appertaining to the owners of the Rancho Santiago de Santa Ana, which is situated upon the opposite side of the river, and which is in no manner alluded to in the Yorba deed; and, even were this otherwise, it is clear that Yorba's deed could not affect the rights of the other owners of the Santiago rancho.

2. The title by prescription relied on by the plaintiffs is based on the fact found by the court below to the effect that from the 1st of January, 1858, until within a year or two prior to the commencement of this action, the plaintiffs, their predecessors, etc., quietly, openly, notoriously, and continuously appropriated, used, and enjoyed enough of the water of the river to keep their ditch, which was constructed in and over the strip of land described in the deed from Yorba to Ontiveras, flowing full to its utmost capacity at all times and seasons of the year, claiming the right and title so to do, adversely to the whole world, and so diverted, appropriated, used, and enjoyed the said water without let, hindrance, or objection by any person whomsoever; and that the owners of the Santiago rancho, with knowledge thereof, stood by and made no objection. But the court below also found that during the same time the water of the river was diverted, appropriated, used, and enjoyed by the owners of the Ranchos Santiago and Canon for the irrigation of their respective tracts, and, further, that while the diversion and use of the water by the respective parties, and upon the respective ranchos and tracts of land as stated in the findings, "has been done and claimed as of right, and claimed to be done adversely to all others, still, until within a year or two prior to the commencement of this action, there has been no interference of serious importance with the diversion or attempted diversion of any one by any of the others, there having prior to that time been sufficient water flowing in the river to supply the respective wants and demands of all the parties; but since then, that is, within a year or two prior to this suit, on account of the increased appropriations and diversions above the ditches of all the parties, water has become scarce and insufficient to supply the demands and necessities of all the parties; that, except as to noninterference and failure to object under the circumstances aforesaid, there has never been any acquiescence or consent to the use of water as to any person, party, or corporation, by the owners or claimants of any of the ranchos mentioned in these findings, or of any of the parties hereto or their predecessors or grantors; but ever since water has become scarce, as aforesaid, each party has respectively asserted, and at all times attempted, as best they could, to maintain, the rights as respectively claimed by them."

In the face of such facts as these, how can we be expected to hold that, as against the owners of the Santiago rancho, the plaintiffs have established any prescriptive right? In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the right of the party against whom it is set up. The enjoyment relied upon must be of such a character as to afford ground for an action by the other party. This is thoroughly settled. Now, it is very clear that, while there was sufficient water flowing in the river to supply the wants and demands of all the parties, its use by one would not be an invasion of any right of any other; and as the court below found, as a fact, that, until within a year or two prior to the commencement of the action, there was sufficient water flowing in the river to supply the wants and demands of all the parties, it is plain that the plaintiffs, as against the owners of the Santiago rancho, have acquired no right by prescription.

3. As against the owners of the Rancho Santiago, have the plaintiffs established a right to divert the water in question by reason of its prior appropriation and beneficial use? This claim of the plaintiffs is negatived by the facts found by the court below. As seen already, there was, according to the finding, sufficient water flowing in the river to supply the wants and demands of the owners of each of the ranchos mentioned, until within a year or two prior to the commencement of this action in 1877. It also appears from the record that from an early day irrigation with the water of the river was carried on upon the Rancho Santiago by its owners and their tenants. It was so carried on in 1857, when the conveyances from Ontiveras were made to the predecessors of the plaintiffs under which the plaintiffs' ditch was constructed, and sufficient of the water of the river diverted and appropriated to keep it flowing full to its utmost capacity at all times and seasons of the year, for the purpose of irrigating the Anaheim tract of 1,165 acres. But this appropriation by the predecessors of the plaintiffs was, according to the findings of the court below, neither prior to the use of the water of the river by the owners of the Santiago rancho, nor did it in any manner interfere with the use of it by the latter; for, according to the findings, there was then enough water flowing in the river to supply the wants and demands of all of the parties, and continued to be until within a year or two prior to 1877. As observed already, the court below found that, at the time of the purchase by the predecessors of the plaintiffs from Ontiveras in 1857, and for years before, the owners of the Santiago rancho were and had been using the water of the river for the irrigation of their rancho; but the court further found that prior to 1871 "said irrigation and cultivation were irregular both as to time and place, and also as to ditches, some years more and some years less, at one place one year and a different place another year, and during some years some of the ditches were not used, so that during some years not more than three irrigating heads, being each one hundred square inches under four inches pressure, were diverted and used during some years, and their ditches were often neglected and filled with weeds and dirt, and their capacity at times greatly diminished, and such was their condition in 1857." But that irrigation upon the Santiago rancho was, prior to 1871, "irregular, some years more and some years less, at one place one year and at a different place another year," and that during some years some of the ditches were not used, and other years some of them were neglected, is unimportant. The fact remains that the owners of the rancho did use the water of the river according to their wants and demands, and were so using three irrigating heads of it in 1857, and, further, there was at all times an abundant supply in the river for all parties until within a year or two prior to 1877. It may be added that while the court below found that the water diverted and appropriated by the predecessors of the plaintiffs in 1857, that is to say, sufficient of the water of the river to keep their ditch flowing full to its utmost capacity at all times and seasons of the year, for the purpose of irrigating the Anaheim tract of 1,165 acres, "was then, ever since has been, and now is, necessary for that purpose," it also found as a fact that the plaintiffs have sold water to parties on said Cajon rancho, outside of the Anaheim tract, "commencing about 1869, and gradually increasing said outside supply to about six hundred or eight hundred acres, except in very dry seasons, as existing at the time of the diversions complained of, when about all the water in the ditch is necessary for the Anaheim tract." These findings are not only inconsistent, but it certainly cannot be that water diverted and appropriated for the purpose of irrigating the Anaheim tract can be sold by the plaintiffs to supply other lands, to the injury of the owners of the Rancho Santiago, who, from a time long anterior to the purchase of the plaintiffs' predecessors, have been accustomed to use a portion of the water of the river for the irrigation of that rancho.

4. With respect to the estoppel relied on by the plaintiffs it is sufficient to say that, as the findings of the court below show that there was sufficient water flowing in the river in 1857 and for nearly 20 years thereafter to supply the wants and demands of the owners of each of the ranchos bordering on the stream, the owners of the Santiago rancho were neither called upon to object to the diversion and appropriation by the predecessors of the plaintiffs, nor had they any right to object thereto. No right of theirs was interfered with. Nor does it appear that there was any fraud, misrepresentation, or concealment of any kind practiced upon the predecessors of the plaintiffs by the owners of the Rancho Santiago. In a recent case we had occasion to quote with approval what was held here in the case of Boggs v. Mining Co., 14 Cal. 368: "There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title,—the effect of the estoppel being to forfeit his property and transfer its enjoyment to another." The findings in this case show that the scarcity of water in the river, that first made itself felt within a year or two prior to the commencement of this action, was caused by diversions made by parties above the highest ditch of any of the parties to this controversy. With the scarcity of the water arose disputes between the re-

spective claimants. It is not strange that this was so, for in the region in question water for irrigation is essential to the proper cultivation and enjoyment of the land. Upon the Anaheim tract, as well as upon the Rancho Santiago, numerous and extensive and valuable vineyards and orchards have been raised with the aid of the water of this river. Its continued use is all-important to all parties concerned. The plaintiffs, by virtue of the purchase of their predecessors from Ontiveras, and their subsequent appropriation and use, are undoubtedly justly entitled to such portion of the water of the river appertaining to the Rancho San Juan y Cajon de Santa Ana as is sufficient for the proper irrigation of the Anaheim tract. Whether, if the portion of the water appertaining to that rancho is insufficient for that purpose, the plaintiffs are entitled to enough of the water of the river appertaining to the Rancho Canon de Santa Ana to make good the deficiency, by virtue of the deed from Yorba to Ontiveras, we cannot now decide, for the reason already explained. But as, for the reason already given, the plaintiffs have acquired no right to any portion of the water that appertains to the owners of the Rancho Santiago de Santa Ana, the decree of the court below which secures to the plaintiffs sufficient of the water of the river to keep their ditch flowing full to its utmost capacity at all times and seasons of the year, without regard to the quantity of water that may be left in the river after such diversion, and irrespective of the wants and necessities of the owners of the Rancho Santiago de Santa Ana, cannot be sustained. We must therefore reverse the judgment, and remand the cause for a new trial. In doing so, we think it not improper to suggest, in view of the value of the water in dispute and the large interests at stake, whether it is not advisable for the parties to the controversy to divide the water upon an equitable basis, and devote the money that may otherwise be expended in litigation in the proper development and judicious use of it.

Judgment and order reversed, and cause remanded for a new trial.

MYRICK, J., concurred.

THORNTON, J. I concur. I am of opinion that the plaintiffs have failed to make out any case for relief upon the grounds of prescription or estoppel *in pais*. The reasoning on these point in the opinion of Justice Ross is conclusive. On whatever rules the rights of the parties herein are to be admeasured, whether by the rules applicable to appropriation, or those applicable to the common-law doctrine of riparian rights, the rights of the parties are at least equal; neither has made out a claim superior to the other. There has never been any exclusive appropriation by plaintiffs prior to that of defendant, and the same may be said of the appropriation by defendant. I can see no exclusive appropriation by either party of the water of the stream, or any part of it. The use of the water has always been had by either party, with the observance of the right of the other to a reasonable use of it for irrigation. Under these circumstances, the parties must be held to have at least equal rights to use the water for the purpose indicated. The court, therefore, in adjudging that the plaintiffs have, under all circumstances, the right to have their ditch flow full of water to the exclusion of the defendant, has violated the equality of right above mentioned, and has fallen into an error for which the case must be tried anew. The foregoing, in my opinion, is the substance of the able and elaborate opinion of Justice Ross, and I therefore concur in it. It is apparent that no question is made, in this case, as to the right to the use of the water for domestic purposes, and of course nothing is herein ruled in that regard.

McKEE, J. The case as made out in the court below failed to establish an exclusive right of ownership, arising out of prescription or estoppel, in the water of the Santa Ana river, to the extent claimed by the plaintiffs. In my judgment, the rights of the respective parties originated in a riparian source, are held by them in common, and invest each with equal rights to the use and enjoyment of the water of the stream. Being held in common, it is well settled that in a controversy between such owners as to their rights it is the duty of a court of equity to determine the respective rights of the parties so as to give to each the just proportion to which he may be entitled, and, if necessary, regulate the use between them according to their rights. Lyon v. McLaughlin, 32 Vt. 423; Arthur v. Case, 1 Paige, 447; Belknap v. Trimble, 3 Paige, 601; Webber v. Gage, 39 N. H. 182; Bardwell v. Ames, 22 Pick. 353; Ballou v. Hopkinton, 4 Gray, 324; Roath v. Driscoll, 20 Conn. 535; Brown v. Ashley, 16 Nev. 311. That principle was not observed in the adjudication of this case, and I agree that the judgment should be reversed, and the cause remanded for a new trial.

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64 Cal. 203

JUNKANS v. BERGIN.[1]

(*Supreme Court of California.* Sept. 28, 1883.)

JUDGMENT—JOINT DEFENDANTS—SERVICE OF PROCESS—COLLATERAL ATTACK.

1. A judgment by default entered against defendant in a joint action, when one of defendants was not served with process, is void, under Code Civil Proc. § 585, which provides that judgment by default may be entered in such action where all the defendants have been served and have failed to answer.

2. A void judgment may be attacked in a collateral proceeding.

Department 2. Appeal from superior court, Trinity county.

Action by Henry Junkans against John Bergin. From a judgment for defendant, plaintiff appeals. Affirmed.

W. J. Tinnin and *H. O. & W. H. Beatty*, for appellant. *C. E. Williams* and *White & George*, for respondent.

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[1] This case, filed September 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

THORNTON, J. This action was brought to quiet title, and judgment was rendered for plaintiff. Defendant's motion for a new trial was denied, and he appealed from the judgment and order denying the motion. The judgment roll in Whitmore & Reed v. Ah Hoe et al. was improperly admitted in evidence. The action was a joint one against all the defendants, Ah Hoe, Mon Kong, Ah Juan, Ah Sam, and Charlie Hop Lee. Ah Sam was never served with process, and the action was never dismissed as to him. The judgment was by default, and was entered by the clerk without any action of the court. The judgment was void. The clerk is only authorized to enter judgment by default, such as the one entered herein, when all the defendants have been served and have failed to answer. Section 585, Code Civil Proc. The clerk is a minister or servant of the law, to act in that state of the case in which the law orders him to act. Then only is his action valid. When the *casus legis* does not exist, his entry of judgment is void and of no avail. This very point was determined in Kelly v. Van Austin, 17 Cal. 565, 566, where, as here, the judgment was collaterally attacked. This ruling has been frequently approved. See cases cited in notes to Kelly v. Van Austin, above referred to, in the second edition of 17 Cal., issued in 1872. The court, therefore, erred in admitting the judgment roll and all the other documents in the case above mentioned. As the above is conclusive against the plaintiff's right to recover, it is unnecessary to pass on the other points made and argued. Judgment and order reversed, and cause remanded for a new trial.

MYRICK and SHARPSTEIN, JJ., concurred.

(64 Cal. 212)

PEOPLE v. YOUNG.[1]

(*Supreme Court of California.* Oct. 10, 1883.)

CRIMINAL LAW—PRELIMINARY EXAMINATION—INDORSEMENT OF COMMITMENT.

Pen. Code, § 872, provides that an examining magistrate shall indorse his commitment of defendant "on the deposition" taken at the examination. *Held*, where the deposition was taken in shorthand and written out afterwards, that an indorsement of commitment on the complaint was sufficient, under section 1404, providing that departures from modes prescribed in the Code shall be immaterial, unless they prejudice defendant's substantial rights.

In bank. Appeal from superior court, Yolo county.

Information against James Young for murder. Verdict of guilty, and judgment thereon. Orders were made denying motion to set aside information, refusing a withdrawal of pleas, denying motion in arrest of judgment, and refusing a new trial. Defendant appeals. Affirmed.

Pen. Code Cal. § 872, provides, with respect to the examination of persons charged with crime, that, "if there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the deposition an order" committing the defendant, etc. Section 1404 provides that departures from forms or modes prescribed in the Penal Code shall be immaterial, unless they prejudice or tend to prejudice defendant's substantial rights. Const. Cal. art. 1, § 8, provides that no person shall be deprived of life or liberty without due process of law.

C. P. Sprague and *F. S. Sprague*, for appellant. *Atty. Gen. Marshall* and *Dist. Atty. Craig*, for the People.

MYRICK, J. 1. The district attorney filed an information accusing the defendant of the crime of murder. When the defendant was arraigned, and before pleading, he moved that the information be set aside, on the ground that he had not been committed as provided in section 872, Pen. Code, previous to the filing of the information. The motion was based on the following facts: A complaint was laid before a justice of peace, December 25, 1882, accusing the defendant of the commission of the crime; an examination was had before the justice on the 5th of January, 1883; and, upon such examination being had, the justice made an indorsement upon the complaint, stating that it appeared to him that the offense had been committed, and that there was sufficient cause to believe the defendant, Young, guilty thereof, and ordering that he be held to answer the same, and that he be committed to the sheriff of the county; which indorsement was signed by the justice. This complaint, with the indorsement thereon, was filed in the superior court, January 8th. The information was thereafter, on the same day, filed. At the examination before the justice, the official shorthand reporter took down the evidence in shorthand, and subsequently wrote it out in longhand, and the depositions so taken and written out were indorsed, certified, and filed in the superior court, January 12th, four days after the filing of the information. The motion to set aside was made January 15th, and was denied by the court. We see no departure from any form or mode prescribed by the Penal Code, in respect to the proceedings narrated above, which prejudiced the defendant, or tended to his prejudice, in respect to a substantial right. Section 1404, Pen. Code. Before the information was filed, an examination had been had and commitment made by a magistrate, (section 8, art. 1, Const.;) the order of commitment, proper in form, being indorsed on the complaint. This was sufficient. People v. Smith, 59 Cal. 365.

2. The killing of the deceased by the defendant being admitted, whether or not the act was done in self-defense, or under circumstances of justification, was for the jury to determine. We see no error in the record. Judgment and order affirmed.

MCKINSTRY, THORNTON, ROSS, SHARPSTEIN, and MCKEE, JJ., concurred.

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[1] This case, filed October 10, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

64 Cal. 197

CORNELL v. CORBIN *et al.*[1]

(*Supreme Court of California.* Sept. 28, 1883.)

SALE OF MINE—FRAUD OF VENDOR—FORMATION OF CORPORATION—FORECLOSURE OF MORTGAGE—PARTIES.

1. The vendor and vendee of a mine agreed that the vendee should convey the mine to a corporation to be formed, and that the vendor should receive a part of the stock of such corporation in part payment of the price of the mine. The corporation was formed, and the conveyance made by the vendee. No stock was actually issued. *Held*, in an action by the vendor's assignee to foreclose a mortgage given by the vendee (defendant) to secure the price, that the formation of the corporation in question did not prevent defendant from setting up as a defense the fraudulent representations of the vendor in the sale of the mine. SHARPSTEIN, J., dissenting.

2. In such case the corporation in question was properly made a defendant to the action.

In bank. Appeal from superior court, Plumas county.

Action by L. Cornell against Frank Corbin and another. From a judgment for plaintiff, defendants appeal. Reversed.

J. D. Goodwin, D. W. Jenks, John C. Hall, and *Arthur Rodgers*, for appellants.

W. S. Goodfellow and *R. H. F. Variel*, for respondent.

MYRICK, J. This is an action to foreclose a mortgage alleged to be held by the plaintiff, assignee of George P. Cornell, for $25,000, to whom the notes and mortgages were executed by the defendants Corbin and Handy. The date of the assignment to plaintiff, as stated in the complaint, is a day subsequent to the maturity of the notes. The complaint alleges that the defendant corporation has some interest in the mortgaged premises subject to the mortgage. During the pendency of the proceedings the complaint was amended by stipulation, by striking out the name of the defendant Corbin in the prayer that judgment for deficiency be docketed. The defendants Corbin and the Indian Valley Mining Company answered, denying the assignment to plaintiff, and that she is, or ever was, the owner of the notes or mortgage. For a further defense, and by way of set-off, the same defendants, in their answer, averred in substance, among other matters, the following: George P. Cornell, being the owner of the undivided one half of a mine, undertook to obtain title to the other undivided one half, and to convey the mine to Handy and Corbin upon the payment to him by them of $100,000, he (Cornell) to have a certain amount of the stock of a corporation to be thereafter organized. The agreement as to the payment was subsequently modified so as to make the payment to be, money, $50,000, and $50,000 by notes and mortgage. (The two notes in suit are for the last $25,000, the first note for $25,000 having been paid.) The answer contains averments of specific acts of fraud on the part of Cornell and Handy, by and through which Corbin was induced to join in the purchase and to pay two thirds of the first payment of $50,000, and to expend $50,000 in the working of the mine. It is averred that it was agreed, as parts of the transaction, that Handy and Corbin should proceed to the eastern states, and procure a corporation to be organized, and that the mine should be conveyed by Corbin and Handy to such corporation, and each of the parties, Cornell, Corbin, and Handy, to have named proportions of the shares of the stock. In pursuance of this arrangement, the defendant the Indian Valley Mining Company was incorporated, and, after the execution of the notes and mortgage for $50,000, the mine was conveyed to it. No stock of the corporation has been issued, but the parties still retain their respective interests as agreed upon. For the purposes of this decision we regard the assignment of the notes and mortgage in suit from George P. Cornell to the plaintiff, his wife, as having been made after maturity, and without value, and that the plaintiff must be regarded as George P. Cornell would have been regarded. We also deem the acts of fraud averred in the answer to be sufficient to justify relief if Corbin and Handy still retained the title to the mine, and were the only defendants. The question, then, for consideration is, has the creation of the corporation, and the conveyance to it of the title, since the execution of the mortgage, so far changed the relations of the parties to each other and to the property as that no relief can be afforded?

The plaintiff asserts: (1) As to the defendant Corbin, by the complaint as amended, no judgment was sought against him which could in any way operate to the injury of his legal rights. By reason of his conveyance to the corporation he had no estate or interest in the land which could be affected by the decree. He had no interest in the controversy, and was not, therefore, in a position, either in his own behalf or jointly with the corporation, to set up matters of defense as alleged in the answer. (2) In respect of the corporation, such title as it has was acquired subsequent, and is subject and subordinate, to the mortgage. The corporation, therefore, in effect, acquired such interest in the property as would remain after satisfying the mortgage. In this view, the foreclosure proceeding is not an attack upon its property rights, and it cannot deny the validity of the debt. Whatever may have been the fraudulent practices of Cornell and Handy upon Corbin, the corporation has had no dealings with Cornell, and it has no counterclaim or offset, nor any damage to recoup. It might, perhaps, be conceded that, if the corporation was an independent existence, having no relation to the parties or their purposes or agreements, these assertions would be entitled to weight; but in cases like the present a court of equity reaches beyond the form and shadow of things, and grasps the substance. In this case the formation of the corporation was a part of the transaction at its inception, and its existence was used to carry out the plan. We can repeat, with reference to the facts of this case, what was said by this court with reference to the facts in Shorb v. Beaudry, 56 Cal. 446, that the corporation was formed as a mere agency for more conveniently carrying out the agreements between the parties is sufficiently apparent. As a corporation, it paid nothing, and incurred no liability. The profits, if any, would be distributed among the three parties in the proportion to the shares of stock held by them according to the contract. No certificates of stock had been issued, but the ownership of the shares remains in first hands The relation which the corporation sustained to Cornell, Handy, and Corbin was substantially, if not technically, that of a trustee. Substantial justice can be administered in this case by treating the parties in the light of their agreements between themselves, independently of their incorporation, and in no other way that we have been able to discover can this be done. Corbin, by means of fraudulent representations made by Cornell and Handy, was induced to enter into a contract whereby he was to pay, and in pursuance of which he did pay, $33,000. It was further agreed that, in consideration that Cornell should convey the mine (through Corbin and Handy) to a corporation to be formed, the corporation should, in effect, assume a mortgage to Cornell for $50,000, $25,000 whereof has been paid. Corbin, in consideration of his assent that the deed should be made to the corporation, (through him and Handy,) and that the corporation should pay the amount secured by the mortgage in order to relieve its assets of the lien, was to receive a certain share of the stock of the corporation. When formed, the corporation became a party to the agreement. The fraud practiced on Corbin was the inducing him to receive, in return for his money, a share of the stock of the corporation laden with the lien of the mortgage. If he has a right to relief at all, by way of recoupment, by reason of the fraud, he can seek it only by asking that the assets of the corporation (and thus his shares of the stock therein) be relieved of the balance of the mortgage. Admitting that his stock is personal property, and that he has no equitable estate in the land conveyed to the corporation, will equity refuse him help for that reason? In Jones v. Bolles, 9 Wall. 364, it was held that a stockholder could enjoin the setting up of a claim for purchase money against the lands of a company (corporation) whose capital stock was divided into shares, the vendor having induced the stockholder to take the stock by a promise not to assert his claim for the purchase money. The effect of the foreclosure of plaintiff's mortgage against the company must be to depreciate the value of Corbin's stock. The answer shows that Corbin owned all the stock except that belonging to Cornell and that claimed by Handy. The corporation was a proper party, because—*First*, it held legal title to the mine; and, *secondly*, it was a proper party to the answer of Corbin, although the relief prayed for was in its favor. Jones v. Bolles, supra. The judgment is reversed, with instructions to overrule the demurrer to the answer of the defendants Corbin and the Indian Valley Mining Company.

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[1] This case, filed September 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

McKinstry, Ross, and Thornton, JJ., concurred.

Sharpstein, J. I dissent. It appears that the mortgage sought to be foreclosed was executed by the defendants Corbin and Handy to plaintiff's assignor, G. P. Cornell, and that after the execution of the mortgage, and before the commencement of this action, the mortgagors conveyed the mortgaged premises to the defendant corporation. That being so, I think it to be well settled that the defendant who took and holds the premises subject to the prior mortgage is estopped from questioning the consideration or validity of it. Freeman v. Auld, 44 N. Y. 50. In New York it was repeatedly held that one who took title subject to a usurious mortgage, which by a statute of that state was absolutely void, was estopped from questioning its validity. Sands v. Church, 6 N. Y. 347; Murray v. Judson, 9 N. Y. 73; Hartley v. Harrison, 24 N. Y. 170; Dix v. Van Wyck, 2 Hill, 522. And I think it equally clear that the defendant Corbin, one of the mortgagors, after conveying his entire interest in the mortgaged premises to the defendant corporation, cannot in this action attack the validity of the mortgage on the ground that it was obtained from him through fraud. No personal judgment is sought against him for any deficiency there may be after applying the property to the debt. The pleadings show that he had no title or interest in the mortgaged premises to be affected by the decree. His being a stockholder in the defendant corporation would not in any conceivable case entitle him to set up a defense which the corporation could not. Nor do I think that he could have the matters set up in the cross complaint, which the court refused him leave to file, litigated in this action. The relief which he demanded was a judgment against his codefendant Handy for the sum of $300,000, and to have the plaintiff adjudged to be an involuntary trustee of the notes and mortgage executed by him (Corbin) and Handy for the benefit of him, (Corbin.) In the language of Comstock, C. J., in Insurance Co. v. McKay, 21 N. Y. 191: "I do not see that anything was in litigation between him and the plaintiff, or that any judgment could be rendered against him, except one for costs for interposing a groundless defense to the suit. According to the answer, no cause of action existed against him. The complaint claimed nothing against him personally, and stated no facts as the foundation of such a decree. The answer showed that he had no title or interest in the mortgaged premises to be affected by the decree." The plaintiff seeks to have the mortgage foreclosed, and alleges facts sufficient to entitle her to that relief. The only other party interested in the question is the defendant who purchased the mortgaged premises subject to the mortgage. I am unable to discover how defendant Corbin, who, according to his answer, has no interest in the mortgaged premises, can thrust himself into a case in which the sole question is whether the plaintiff is entitled to a judgment which will affect nothing except the mortgaged premises. How he is going to litigate in this action the question whether he has been defrauded by his codefendant Handy, and other persons who are not parties to the action, is to me incomprehensible. If Chater v. Sugar Refinery Co., 19 Cal. 220, or Shorb v. Beaudry, 56 Cal. 446, sustains the contention of the appellants, I must confess my inability to see it. I am unable to discover that any such question was involved or considered in either of those cases. I think the judgment and order appealed from should be affirmed.

(64 Cal. 204)

SWAMP-LAND DISTRICT NO. 121 v. HAGGIN.[1]

(*Supreme Court of California.* Dec. 27, 1882.)

SWAMP LANDS—DRAINAGE—ACTION FOR ASSESSMENTS.

In an action by a swamp-land district to recover reclamation assessments, the complaint averred that the district had been a corporation since 1870, and was established by order of the county board of supervisors. *Held*, that these averments showed that the district acquired its rights under Act 1868, and as this was before the adoption of the Political Code, under the provisions of which the action was brought, a demurrer to the complaint was properly sustained.

In bank. Appeal from superior court, Kern county.

Action by swamp-land district No. 121 against James B. Haggin to enforce an assessment levied for purposes of reclamation. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Stetson & Houghton, for appellant. *Louis T. Haggin*, for respondent.

McKINSTRY, J. The action is brought to enforce liens for assessments upon tracts of land belonging to defendant within a swamp-land district. A demurrer to the complaint was sustained in the court below, and, plaintiff having declined to amend, final judgment was entered in favor of defendant, from which judgment plaintiff has appealed. It is contended by respondent that it appears in the complaint the district was created and organized under the act of March 28, 1868, while the further averments show that the assessments were attempted to be made under the provisions of the Political Code. Inasmuch as it is not alleged that plaintiff was organized under section 3478 of the Political Code, the demurrer was properly sustained, if respondent correctly construes the complaint. Reclamation Dist. v. Kennedy, 58 Cal. 124. The averments of the complaint with reference to the creation and existence of plaintiff as a reclamation district are as follows: "That, as plaintiff is informed and believes, plaintiff, swamp-land district number one hundred and twenty-one, is, and ever since the 22d day of December, 1870, has been, a municipal corporation, to wit, a swamp-land district, or reclamation district, created, organized, and existing under and by virtue of the laws of the state of California, claiming in good faith to be a corporation, and a swamp-land or reclamation district, and as such doing business and exercising corporate powers, and the powers of a swamp-land district, under the laws of the state of California; that said district was established by an order of the board of supervisors of the county of Kern, in the state of California, which order, as plaintiff is informed and believes, was duly given and made," etc.

No force can be given to the allegation that plaintiff claimed "in good faith" to be a corporation. It is urged by appellant, however, that, if it was a corporation *de facto* when the assessment was levied, defendant can neither object that it had no legal existence, nor that the assessment was not levied in accordance with the statute in force, and applicable to the particular district. But the action is not brought to determine the right of plaintiff to property owned by it in ordinary proprietorship, or to enforce a contract entered into with a third person. It is an attempt to enforce a burden imposed *in invitum* upon the property of another, and can be maintained only in case the authority to impose it was conferred by statute. 2 Dill. Mun. Corp. (3d Ed.) 763, 769. If the mode of levying the assessment must be found in the statute, and if the mode differs in case the corporation was formed under one statute from that which may be pursued by a corporation formed under another statute, it would seem to follow that a complaint is insufficient unless it appears from it that the corporation was formed under the law which authorizes the levy of the assessment in the manner in which it is alleged to have been levied. The power is measured by the mode, since the statute under which the corporation exists limits the exercise of the power to the mode therein provided. The right to proceed under any particular act is jurisdictional, and must be pleaded. Reclamation Dist. v. Kennedy, supra.

But here it appears affirmatively that the corporation was organized under the act of 1868. It is said by appellant, the averment that the reclamation district was "established" by order of the board of supervisors is not the equivalent of an averment that plaintiff was incorporated by such order, and that the board alone could not incorporate a district. Further, that the averment of corporate existence "ever since December, 1870," is immaterial; the only material allegation being that the district, existing as a corporation, levied an assessment. But this is a refinement which we cannot recognize as relieving the plaintiff of the natural purport of the words employed. There are manifest and apparently sufficient averments that the district was established by an order of the board of supervisors

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[1] This case, filed December 27, 1882, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

"duly given and made," and that the plaintiff has been a corporation since December 22, 1870. The district, therefore, was established by order of the board of supervisors; that is, the judgment of the board, which, followed by other statutory steps, clothed the district with the powers of a corporation, was had and made prior to the adoption of the Political Code. The order was made while the act of 1868 was in force, and prior to the adoption of the Political Code there was no statute under which the board of supervisors could make such an order, except the act of 1868. It would seem plain that the averments of the complaint, fairly construed, show the plaintiff to have acquired the rights of a corporation as a swamp-land district under the act of 1868. The averments with respect to the mode of assessments are unmistakably averments of the acts required by the Political Code. The complaint follows exactly the language of section 3456 et seq. of that Code concerning the levying of assessments. It would extend this opinion unnecessarily to enter into details, but a comparison of the averments of the complaint with the act of 1868, and with the Political Code, clearly shows that, wherever the requirements of the former differ from those of the latter, the act of 1868 has been ignored.

It is urged by appellant that the district may claim to exist under the act of March 27, 1874, (St. 1873-74, p. 721.) That act recognizes the existence of the district, but does not in terms refer its origin to any particular act of the legislature. It does, however, in express terms, require that swamp-land district No. 116 (claimed by plaintiff to be the district now known as No. 121) shall have an extended time to complete its works of reclamation "in accordance with an act to provide for the management and sale of the lands belonging to the state, approved March 28, 1868."

Judgment affirmed.

Morrison, C. J., and Ross, Sharpstein, and Myrick, JJ., concurred.

ON REHEARING.

(September, 28, 1883.)

Ross, J. For the reasons given in the opinion delivered when this case was last before this court, (10 Pac. Coast Law J. 604,) the judgment of the court below must be affirmed. It is true, as said by counsel for appellant, that the district in question in the case entitled "Reclamation Dist. v. Kennedy," 58 Cal. 124, referred to in the opinion then delivered, was formed under a law in force prior to May 28, 1868, and could have reorganized (but did not) under the provisions of the Political Code, while the present appellant was formed under the act approved March 28, 1868, and was not permitted by the provisions of the Political Code to reorganize thereunder. But it is obvious that, if it be true that the act of 1868 was unrepealed by the provisions of the Political Code, the applicability of the Kennedy Case to the one at bar is strengthened by the circumstance alluded to by counsel. In Reclamation Dist. v. Goldman, 61 Cal. 205, it was distinctly decided that the act of 1868, in relation to the reclamation of swamp and overflowed lands, was not repealed by the provisions of the Political Code. It is now suggested that that decision is in conflict with the case entitled "Hagar v. Board," 51 Cal. 474. There is an apparent, but no real, conflict between the two cases. In Hagar's Case the question was as to the validity of an order made by the board of supervisors appointing commissioners to levy an additional assessment to pay for work which had already been done. After referring to sections 33 and 34 of the act of 1868, the learned justice who delivered the opinion of the court erroneously said that the law as there written so remained up to the time of the adoption of the Political Code; and, taking up the amendment to section 3459 of that Code, enacted March 30, 1874, by which authority was given for the levy of an additional assessment to pay for work which had already been done, as well as that which was to be done, sustained the validity of the order of the board of supervisors. Attention does not seem to have been attracted to the fact that by an act approved March 28, 1872, (St. 1871-72, p. 668,) section 34 of the act of 1868 was so amended as to authorize an additional assessment to pay for work which had already been done, as well as for that which was to be done. Indeed, the amendment of March 28, 1872, to the act of 1868, and the amendment of March 30, 1874, to the Political Code, are identical in substance, and almost in form. The language, therefore, upon which the decision in Hagar's Case was based, was a part of the act of 1868, under which the district then before the court was organized. The statement in the opinion in that case, to the effect that the provisions of the Political Code had superseded the act of 1868, was therefore not only unnecessary to the decision of the case, but was based on a misapprehension of fact. In Goldman's Case the question was distinctly presented whether or not the act of 1868 was repealed by the provisions of the Political Code, and it was held that it was not. Strength is given to the conclusion there reached by section 3478 of the Political Code, which reads: "Districts formed under laws in force prior to May 28, 1868, may reorganize under the provisions of this chapter," to wit, chapter 1, tit. 8, Pol. Code. Express grant of authority to districts formed under laws in force prior to May 28, 1868, to reorganize under the provisions of the Political Code, may fairly be taken as somewhat indicative of the intent on the part of the legislature to exclude districts formed under laws subsequent to the date named from that privilege; and when, in addition, provision was inserted in the Political Code by which, as was held in the Goldman Case, the act of 1868 was continued in force, the question must be regarded as settled.

There is nothing in People v. Haggin, 57 Cal. 579, at all inconsistent with what is here said, or with what was said in Reclamation Dist. v. Goldman. In People v. Haggin the counsel for the plaintiff distinctly stated in their brief that the action was brought under and pursuant to the provisions of the Political Code to collect an assessment levied thereunder, and the court, accepting the statement of counsel in that behalf as true, proceeded to point out the difference between the provisions of the Political Code and the act of 1868, in so far as the point then under consideration was concerned, and rightly held that actions brought under the provisions of the Code to collect an assessment levied thereunder must be brought in the name of the real party in interest, to wit, the reclamation district. There is, we repeat, no conflict between the cases alluded to by counsel, except an apparent one between the Goldman and Haggin Cases, which, however, is not real, as has already been shown. Judgment affirmed.

McKinstry, Sharpstein, McKee, Myrick, and Thornton, JJ., concurred.

64 Cal. 213

Hubert v. Mendheim.[1]

(*Supreme Court of California.* Oct. 10, 1883.)

Official Bonds — Improper Payee — Deputy Treasurer — Re-election of Treasurer — Liability of Sureties.

1. A bond for the faithful discharge of his duties, executed by a deputy county treasurer to the treasurer, and not to the state, as required by Pol. Code, § 958, which declares that official bonds must be made payable to the state, is nevertheless an official bond, and may be sued on as such under section 963, providing that, if an official bond does not contain the conditions required by law, the party and sureties are equitably bound to the state or a party interested.

2. Under Pol. Code, § 963, which provides that, if an official bond is defective in not containing the conditions required by law, a party interested may by action suggest the defect, and recover against the officer and his sureties, it is a sufficient suggestion of the defect to attach a copy of the bond to the complaint in an action on the bond.

3. Under Pol. Code, § 878, which provides that an office of which the duration is not fixed by law is held at the pleasure of the appointing power, the continuance in office of a deputy during the second term of the official who originally appointed him is equivalent to a reappointment.

4. A county treasurer appointed a deputy, who executed an official bond, and the county treasurer, being re-elected, continued the deputy in office. *Held*, under Pol. Code, § 959, providing that an official bond is obligatory during the time the officer discharges the duties of or holds the office, in an action against the sureties, that the bond was not a continuing obligation, and did not extend to breaches committed after the expiration of the first term of the treasurer.

In bank. Appeal from superior court, city and county of San Francisco.

Action by Charles Hubert against H. Mendheim, surety upon an official bond. From a judgment sustaining a demurrer to complaint, plaintiff appeals. Reversed in part.

J. P. Hoge, for appellant. *Cope & Boyd* and *Lloyd & Wood*, for respondent.

McKinstry, J. The objection taken under the demurrer to the third cause of action as stated in the complaint is that the bond therein mentioned is not an official bond, and is therefore void. The objection to the first and second counts is that they do not allege moneys to have been misappropriated by Cassebohm, deputy, during the term for which he was appointed deputy; it being averred that plaintiff was treasurer for more than one term. It is not necessary to decide that the bond is good as a common-law obligation. It is proper to observe, however, that it is by no means a corollary from the proposition that plaintiff might have been compelled by *mandamus* to require an official bond from his deputy that a private obligation of defendant, which he chose for a consideration to assume, would be void. No principle of public policy would seem to prohibit an officer from requiring for his personal protection security beyond the official bond, which protects also the state and third persons.

1. We think the third count of the complaint contains a statement of a cause of action. The demurrer to the third count, as well as the general demurrer to the whole complaint, should have been overruled. If the bond sued on is an official bond, the obligors are bound to the extent and to the persons that others are bound who execute official bonds. Nor, in presence of the averments of the complaint, at least, can the plaintiff add to the liability of the defendant by treating the instrument as a common-law bond. The sections of the Political Code which bear upon the point presented under the demurrer to the third count of the complaint are as follows: "Sec. 958. All official bonds must be in form joint and several, and made payable to the state of California in such penalty, and with such conditions, as required by this chapter, or the law creating and regulating the duties of the office. Sec. 959. Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein for any and all breaches of the conditions thereof committed during the time such officer continues to discharge any of the duties of or hold the office, and whether such breaches are committed or suffered by the principal officer, his deputy, or clerk. Sec. 960. Every such bond is in force and obligatory upon the principal and sureties therein for the faithful discharge of all duties which may be required of such officer by any law enacted subsequently to the execution of such bond, and such condition must be expressed therein. Sec. 961. Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein to and for the state of California, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity; and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof. Sec. 962. No such bond is void on the first recovery of a judgment thereon; but suit may be afterwards brought, from time to time, and judgment

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[1] This case, filed October 10, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

recovered thereon, by the state of California, or by any person to whom a right of action has accrued, against such officer and his sureties, until the whole penalty of the bond is exhausted. Sec. 963. Whenever an official bond does not contain the substantial matter or conditions required by law, or there are any defects in the approval or filing thereof, it is not void so as to discharge such officer and his sureties; but they are equitably bound to the state or party interested; and the state or such party may, by action in any court of competent jurisdiction, suggest the defect in the bond, approval, or filing, and recover the proper and equitable demand or damages from such officer and the persons who intended to become and were included as sureties in such bond." "Sec. 985. Every officer or body appointing a deputy, clerk, or subordinate officer may require an official bond to be given by the person appointed, and may fix the amount thereof." All the sections of the Political Code above recited, except section 985, are re-enactments of provisions of the statute of 1850, which were in force when the decisions were made by the supreme court of the state,—hereinafter cited,—to the effect that, where an officer is chosen for two successive terms, his bond given at the commencement of his first term only covers his conduct during such term.

The bond executed by Cassebohm is none the less an official bond because it is made payable to plaintiff, and not to the state of California. Section 963. Every bond demanded of and given by a deputy for the faithful discharge of his duties (however, in other respects, it may fail to comply with the form directed by the Code) is an official bond. It may be sued as such by the state or any person interested, and the same damages recovered as if there were no defects of form. Section 963. True, section 963 directs that the plaintiff shall "suggest the defect in the bond." But the bond, although it "does not contain the substantial matter or conditions required by law," is nevertheless an official bond. Section 963. Of course, the words last quoted do not authorize the courts to change a writing entirely irrelevant into an official bond. The writing as to which the suggestion is to be made must be a bond given by an officer or his deputy to secure the discharge of his duties. But, being such, it is an official bond. Any defect in its form must appear on the face of the instrument. The action provided for in section 963 is not a bill to reform the instrument so as to make it conform to the provisions of the Code. It is only necessary that the defect be suggested, and thereupon, if the breach is proved, the court is authorized to render a judgment, precisely as if the bond conformed in every respect to the statutory requirements. Conceding, for the purpose of the argument, that the suggestion of the defect should be made in the complaint, the mere omission of a formal averment that the plaintiff "suggests" that the bond is defective, in that it is not in terms made payable to the state of California, authorizes neither the plaintiff nor defendant, in the case at bar, to deny that the bond is an official bond. If the section of the Code requires a technical suggestion on the record with reference to the defect, for the purpose of calling the attention of the court to it, no particular form of words is necessary to accomplish that object. It is difficult to suppose that a sufficient complaint could be framed in an action brought for damages arising from the breach of the bond, which would not suggest its defects in form; since in every such action the bond should be set forth *in hæc verba*, or its substantial parts averred in their legal effect. However this may be, in the case at bar a copy of the bond is attached to the complaint. By the record the attention of the court was called to the fact that the bond sued on was an official bond, defective as to certain matters of form. By thus suggesting the defect in form, the plaintiff, a person injured by the default of Cassebohm, and authorized to bring suit upon his official bond, is estopped from claiming that the bond is not an official bond. On the other hand, the defendant cannot say the bond is unofficial, because he has executed an instrument which could be and has been declared upon as an official bond, and which he must have known could be so declared upon when he executed it.

2. The bond being an official bond, do the first and second counts of the complaint, respectively, state a cause of action? By section 4112 of the Political Code the treasurer is authorized to appoint as many deputies as he may deem necessary, but it would seem that provision has been made by law for the payment of salaries to but two deputies. Act 1869-70, p. 122. Section 878 of the Political Code refers to deputies, as well as to principal officers whose appointment is not elsewhere provided for. In section 876 deputies are called "subordinate officers." Section 878 reads: "Sec. 878. Every office of which the duration is not fixed by law is held at the pleasure of the appointing power." The power of appointing deputies, however, is in the principal officer, and not in the man; and the official existence, past and present, of the principal officer must be regarded, during a term, as limited by the commencement and end of such term. The powers of the principal officer, including his power to appoint, must be regarded during a term, as in like manner limited. If the principal officer is chosen for a second term, he is not, during the second term, the appointing power which nominated deputies during the first term, any more than would another person if elected to the second term constitute the appointing power which had named the deputies of his predecessor in office. If the same man shall be elected for two successive terms, and shall retain into the second term a deputy appointed for the first,—even without formal reappointment in writing or requiring of him a second bond,—he (the officer) must be held to have reappointed the deputy, and may then indulge the pleasure of removing him, because, under section 878, the second appointment of the deputy, like the first, is

at the pleasure of the appointing power. The deputy of an executive officer is an assistant empowered by law to act in the name of the officer. He is appointed by the principal officer, but his authority is derived from the statute which permits his appointment. His functions are those of the officer in whose stead he discharges them. He is not the private agent of the individual who holds the office. So far as we are informed, it has been the uniform practice—certainly it is the duty—of the ingoing officer, if he desires to continue any deputy of his predecessor, to reappoint him. A contract extends only to the things concerning which it appears the parties intended to contract. Upon his re-election to the office of treasurer the plaintiff was required to give a new official bond, and the deputy whom he continued in place should also have been required to give a new official bond. Both the plaintiff and defendant knew this when the bond before us was executed. It cannot be presumed that defendant contemplated the plaintiff's probable re-election, and, in case of re-election, that plaintiff would fail to demand new security of his deputy, and thereupon defendant be bound by the instrument he had executed as a continuing obligation. Suppose, at the commencement of the second term, Cassebohm, on demand of plaintiff, had given a new official bond, would defendant still be bound by the present instrument for subsequent wrong conduct of the deputy? Why not? The execution of the second would not of itself operate as a substitute for the first, and release the defendant. If the law does not authorize two official bonds, covering the same period of time, and if the first covered the second term, the last, and not the first, would be invalid as an official bond. The argument would lead to the result that an officer who "succeeds himself" cannot demand a new bond from a deputy whom he may desire to continue in place. The legislature did not intend that the officer who is commanded to require of his deputy an official bond, and "to fix the amount thereof," should employ his discretion in that regard by reference to the possible employment of the deputy for an indefinite period beyond the expiration of his own present term. Experience has shown that he can hardly hope he will himself continue to be the recipient of popular favor for more than a single term.

In Virginia the term of office of the sheriff was one year. The condition of a bond given the sheriff by a deputy recited that he had undertaken the duties of deputy "for and during the term the sheriff may continue in office." It was a common-law undertaking, and not an official bond. CARR, J., said: "The contract of the sheriff and his deputy, being a private contract, not regulated as to its continuance by law, might be for more than one year,"—the sheriff having been reappointed, and the deputy continuing to act as such; and added: "The question is whether the parties intended to be bound for only one year." No opinion was rendered in Royster v. Leake, 2 Munf. 280, but it was apparently held that a bond reciting, "If, therefore, the said James Vaughn, [a deputy sheriff] shall truly and faithfully discharge," etc., "during the time of his continuance in office of deputy sheriff," etc., bound the obligors for acts done by the deputy during a second term of the sheriff. But the marginal epitome of the case is not well expressed. The bond was dated November 15, 1802, and conditioned for the faithful performance of his duty by the deputy "during his continuance in office until November court, 1804." See note to Munford v. Rice, 6 Munf. 81. And the same court, in the case just cited, held that a deputy sheriff's bond, conditioned for faithful performance, etc., "during his continuance in office," without specifying the length of time, was binding for the transactions of one year only. Munford v. Rice was followed in Tyler v. Nelson's Adm'x, 14 Grat. 214.

In North Carolina, where the sheriff's term was one year, a sheriff was reappointed, and continued to serve several successive years, retaining the same deputy. At the commencement of the first term the deputy gave bond for faithful conduct, etc., "during his continuance in office." The supreme court said: "A deputation of necessity expires with the office on which it depends," and held that the words "during," etc., should be restricted to the first year. Banner v. McMurray, 1 Dev. 218. The same thing was decided in Thomas v. Summey, 1 Jones, Law, 554.

In Curling v. Chalkeen, 3 Maule & S. 502, decided in 1815, it was held that a bond given by a collector appointed by the church wardens and parishioners of a certain parish covered any misconduct of the collector while he remained such. Lord ELLENBOROUGH said: "I find nothing to show that his appointment is to have an annual commencement, or is to terminate at the expiration of the year." And, LE BLANC, J., pointed out that the collector was not the deputy of any annual officer; and, further, that he did not derive his appointment from any annual officer.

In Leadly v. Evans, however, decided in 1824, it was adjudged that the bond of a collector appointed by the church wardens and overseers of a parish, pursuant to an order of the vestry, (the church wardens and overseers being annual officers,) which was conditioned for his producing to them "and their successors" a just and true account, did not make the sureties liable for any sum collected after the expiration of a year. 9 Moore, 102.

Hughes v. Miller, 5 Johns, 167, is worthy of much consideration, because the decision in that case has the sanction of the honored name of Chief Justice KENT. There the bond was given to the sheriff by a deputy, conditioned for the due execution of the office of deputy sheriff during his continuance in such office. The sheriff, having taken on himself the office on the 16th of September, 1801, pursuant to an appointment in August, was reappointed in March, 1803. The defendant pleaded that the sheriff had sustained no damages in consequence of any act of defendant previous to his taking upon himself the office under his reappointment in 1803. It was held the plea was no answer to the declaration. The court said the deputy was equally in office as such after as before the reappointment of the plaintiff; that the deputy had no concern with the renewal of the plaintiff's commission so long as there was an unbroken continuation of the plaintiff's authority. As we have seen, this view of the question does not accord with that taken by other courts. But it is enough to say that the bond was not an official bond, and the decision simply interprets a private contract, holding that the parties intended that the obligors should be bound during the time the deputy continuously acted as such.

In the case before us the bond is an official bond, and an official bond is given for and has reference to a particular official term. People v. Aikenhead, 5 Cal. 106; Brown v. Lattimore, 17 Cal. 93. Here there is a recital that the plaintiff "treasurer" has appointed Cassebohm deputy, and has required him to file a bond in a certain sum, which should be referred to the requirement commanded by section 985 of the Political Code. A treasurer cannot appoint a deputy to hold for a longer term than his own. If the treasurer shall be re-elected, and the deputy continue, the retention of the latter by the former may be construed, as against the treasurer, to be a reappointment, but the deputy holds his place by virtue of the implied reappointment, and not under his original appointment. The condition of the bond before us is, "if the above-bounden William Cassebohm shall well and truly execute the duties of chief deputy," etc., which naturally and necessarily refers to the appointment he had received.

Counsel for appellant places much stress upon the language used by the court of chancery of South Carolina in Commissioners v. Greenwood, 1 Desaus. Eq. 450. There a treasurer was reappointed, but gave no new bond. The court held that the bond given at the commencement of the first term did not cover his acts during his second administration. In the course of his opinion the chancellor said: "This cause is altogether different from that of the deputy postmaster. He was continued in office under the original appointment by the person who first appointed him." This reference to some cause, the title of which is not given, (but which had probably been mentioned by counsel in argument,) is not rendered more definite by the argument, for the argument of counsel is not reported. The South Carolina case was decided in 1795, and the case referred to by the court is probably an English case. If we were permitted an effort to identify the "Deputy Postmaster's Case," we should hazard the conjecture that it was Lord Arlington v. Merricke, *temp.* Car. II., which Patteson and Williams, in a note to the report of it, say has been considered a leading case on the subject ever since. 2 Saund. 414. Lord Arlington v. Merricke was brought upon the bond of a deputy postmaster, the condition of which recited. "Whereas, the above-named Henry Lord Arlington, postmaster general to the king's most excellent majesty, by his sufficient instrument or writing under his hand and seal, bearing date," etc., "has deputed the above-bounden Thomas Jenkins to be his deputy postmaster of the stage of Oxen above said, to execute the said office from the 24th day of June next coming for the term of six months following: Now, if the said Thomas Jenkins, his deputies, servants, and assigns, do and shall, for and during all the time he, the said Thomas Jenkins, shall continue deputy postmaster of said stage, well, truly, faithfully, and diligently do, execute, and perform all and every the duties belonging to the said office of deputy postmaster of the said stage, * * * then this obligation will be void," etc. "For the matter of law," HALE, C. J., said that "the condition shall refer to the recital only by which the defendant was bound only for six months, and not longer, and that for the reason above alleged by Saunders; and of such opinion was the court. And Twysden cited a case between Horton v. Day, which is entered in this court in Mich. 22 Car. 1 Rot, 468 or 408, [Style, 18,] where, in a condition of an obligation, it was recited that a sheriff had appointed the defendant bailiff of a hundred within his county, 'if, therefore, the defendant shall duly execute all warrants to him directed, that then,' etc., it was adjudged that the words 'all warrants' should be intended to be only all warrants which were directed to the defendant as bailiff of the said hundred, and not other warrants. And so here the words 'during all the time' shall be intended but only during the six months recited in the condition." "The reason above alleged by Saunders" is found on the preceding page, where it appears Saunders, as counsel for defendant, argued: "The defendant, by the intention of the condition, was not to be responsible for Jenkins for any longer time than for the said six months, although the words are that Jenkins, during all the time that he shall continue deputy postmaster, indefinitely, shall observe and perform, etc., yet this time, which is indefinite in itself, ought to be construed only for the said six months for which the condition recites that Jenkins was appointed to be deputy postmaster, and the rather because Jenkins cannot continue deputy postmaster for any longer time than for the said six months, unless he be appointed anew, and have a new deputation for a longer time. And he said that by the construction which the plaintiff's counsel would put upon it the defendant would be tricked; for it appears that the defendant intended to be bound for Jenkins for the due execution of the said office only for six months; but the plaintiff would have the defendant bound during the whole life of Jenkins, which is unreasonable to suppose." If Lord Arlington v. Merricke is the case referred to by the South Carolina chancellor, it certainly, as he remarked, differs from the case before him. It does not, however, sustain the position of appellant in the case at bar. The cases in which bonds given to individuals or private corporations have been construed are not authoritative adjudications with reference to the question before us. Such matters are subject of private contract, by which the parties may bind themselves in any manner or to any extent, not violative of public policy or positive statute.

The first and second counts do not state a cause of action, because they do not allege a defalcation or misappropriation by Cassebohm during the period for which alone the obligors, who executed the instrument sued on, became his sureties. The judgment of the superior court is reversed. The cause is remanded, with direction to the court below to set aside the order sustaining the defendant's demurrers, and to enter an order or orders overruling defendant's demurrer to the complaint as a whole, and overruling the demurrer to the third count of the complaint, and sustaining the demurrer to the first and second counts thereof.

SHARPSTEIN, MYRICK, THORNTON, ROSS, and McKEE, JJ., concurred.

95 Cal. 539

SWITZER v. BAKER. (No. 14,732.)

(*Supreme Court of California*. Aug. 6, 1892.)

GUARANTY.

In an action to recover on a contract for services it appeared that plaintiff wrote to defendant making inquiry regarding the financial standing of a person unknown to plaintiff, who wished to employ him, to which defendant replied, "You may rest assured that you will get your pay for all work done." *Held*, that this did not constitute a contract on which defendant was liable as guarantor.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; J. B. CAMPBELL, Judge.

Action by U. D. Switzer against A. F. Baker to recover on a contract for services. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

N. O. Bradley, for appellant. *Geo. B. Graham*, for respondent.

TEMPLE, C. This appeal is from a judgment upon demurrer, plaintiff declining to amend. The action is to recover value of services for harvesting a crop of grain, and it is averred that defendant owned the land upon which the grain was raised, and had leased it to one Traver, who cultivated and put in the grain; that defendant owned an interest in the crop. The complaint then proceeds as follows: "That on or about the 9th day of June, 1889, said A. Traver spoke to this plaintiff about heading said crop of grain, and plaintiff being unacquainted with said Traver, and not knowing anything about his financial standing, wrote to said defendant, in effect, that said Traver desired this plaintiff to head said crop of grain, and inquiring of defendant as to whether he, plaintiff, would be paid for his work if he cut said grain, and thereupon, in due course of mail, plaintiff received an answer from defendant, of which the following is a true copy: 'Fresno, Cal., June 17, 1889. Mr. Dan Switzer: Your letter received to-day. You may rest assured that you will get your pay for all work done. Yours, truly, A. F. BAKER.'" It is also charged that the labor was reasonably worth the sum of $900, $250 of which was paid by defendant, leaving still unpaid $650; that Traver was at the time and ever since has been wholly insolvent.

The demurrer is general, on the ground that the complaint does not state facts sufficient to constitute a cause of action. The plaintiff must base his claim solely upon the proposition that Baker's letter in reply to his inquiries amounted to a guaranty. Whether it does or not must depend upon the contents of the letter to which it was a response. That letter is not given, even in substance, but in effect is said to be that, uncertain of Traver's financial standing, he wrote informing defendant that Traver desired him to cut the grain, and inquiring "as to whether he, plaintiff, would be paid for his work if he cut said grain." The reply was simply a very positive assurance that he would get his pay. The suit assumes a contract on the part of defendant to pay,—to become responsible for Traver's liability. There is here, however, only an assurance that if he worked for Traver he would get his pay; and this in response to inquiries in regard to Traver's financial standing. Any one who had full confidence in the financial ability and the integrity of Traver would have answered in the same way. Even if the language used be capable of a different construction, still it does not exclude the inference above drawn, which is at least equally reasonable. We cannot infer an agreement to pay the debt of another from such doubtful language. It was incumbent upon the pleader to make out his case affirmatively, and we must assume that he has stated the facts as favorably as possible. We advise an affirmance of the judgment.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

95 Cal. 494

WILLIAMSON v. CUMMINGS ROCK DRILL CO. (No. 14,524.)

(*Supreme Court of California.* Aug. 18, 1892.)

OPENING DEFAULT—DISCRETION OF TRIAL COURT.

1. An order denying or granting a motion to set aside a default, on the ground of excusable neglect, rests in the discretion of the trial court, and will not be reversed on appeal, except in a plain case of abuse of discretion; and where the motion is based on the fact that, when defendant's attorney received the summons and copy of complaint from defendant, he indorsed thereon a wrong date for answering, an order refusing to set aside the default will not be disturbed.

2. Under Code Civil Proc. § 410, providing that summons may be served by the sheriff or by any other person over the age of 18 not a party to the action, the affidavit of service need not show that service was made by a white male citizen of the United States.

Department 1. Appeal from superior court, city and county of San Francisco; W. T. WALLACE, Judge.

Action by one Williamson against the Cummings Rock Drill Company. From an order denying a motion to set aside a judgment by default, defendant appeals. Affirmed.

Ash & Mathews, for appellant. *W. Rigby*, for respondent.

PER CURIAM. The summons herein was served on the defendant April 9, 1891, and on April 21, 1891, the defendant having failed to appear and answer the complaint, judgment by default was entered against him by the clerk on motion of the plaintiff's attorney. Two days thereafter the defendant moved the court to set aside the default and judgment upon the ground of excusable neglect, and in support thereof presented an affidavit of merits, and also an affidavit of its attorney showing that there were several causes between the same parties, and that when he received the summons and copy of complaint herein from the defendant, he marked the papers, "Answer due April 23, 1891." Upon the hearing the court denied the motion, and the defendant has appealed. Applications of this nature are addressed to the sound legal discretion of the court below, and the order of that court, either in granting or denying the motion, will not be disturbed by this court, unless the appellant shall make it appear to have been so clearly erroneous as to amount to an abuse of discretion. Bailey v. Taaffe, 29 Cal. 422; Coleman v. Rankin, 37 Cal. 249; Watson v. Railroad Co., 41 Cal. 20; Garner v. Erlanger, 86 Cal. 62, 24 Pac. Rep. 805. In Reidy v. Scott, 53 Cal. 69, it was shown that, at the time of the service of summons upon him, the defendant was sick and unable to attend to business, and that as soon as he was able to be out he delivered the summons to his attorneys, and stated to them that he had received it on the 26th of April, as he then believed, whereas, in fact, the service was on the 25th of April. Judgment by default was entered against the defendant before 9 o'clock on the morning of May 7th, (the 6th being Sunday,) and shortly after 9 o'clock on the same day, without any knowledge or notice of such judgment, his answer setting up a meritorious defense was filed with the clerk, and upon this showing it was held that the court should have set aside the default. In the present case, however, it does not appear that there was any mistake on the part of the defendant as to the day when the summons was served upon it, or that the attorney was not properly informed of that day, nor did the attorney give any reason why he marked the papers, "Answer due April 23d;" and the only reason presented for his not having filed the answer is "his mistake in marking said papers as aforesaid, and owing to the fact that there were so many cases against said defendant." This cannot be regarded as excusable neglect. The contention of the appellant that the judgment cannot be sustained for the reason that the affidavit of service fails to show that the individual by whom the service was made was a white male citizen of the United States, or that he served a certified copy of the complaint, is sufficiently met by the terms of section 410, Code Civil Proc., which authorizes the service to be made by the sheriff, "or by any other person over the age of eighteen, and not a party to the action," and which does not require that the copy of the complaint shall be "certified."

The judgment and order are affirmed.

95 Cal. 652

DUNTON v. NILES. (No. 14,609.)

(*Supreme Court of California.* Aug. 5, 1892.)

ACTION ON CONTRACT—PLEADING—CONSIDERATION.

1. A complaint stated that defendant, knowing the rights of plaintiff's assignors, purchased and excavated a lot adjoining and extending a few feet under a building occupied as tenants by plaintiff's assignors as a warehouse; that such excavating was so negligently done as to undermine the building, and cause the floor and goods therein to fall into the excavation, and damage the latter; that plaintiff's assignors notified defendant that the excavation would damage their goods, and defendant promised he would stop the work, but that he continued the same, and carried away the earth from under the warehouse; that plaintiff's assignors "demanded from defendant that he settle and pay the damage, which he promised to do as soon as the damage should be fully ascertained;" that afterwards plaintiff's assignors and defendant agreed on a compromise by which defendant was to take certain of the damaged goods at a price named, and sort over and return other goods, and pay the damage for such as were not returned; that plaintiff's assignors delivered and defendant re-

ceived the goods defendant was to have for his own use, and also such goods as were to be sorted; that part of the latter had been returned by defendant, and part were so unskillfully sorted that plaintiff's assignors refused to receive them under the agreement; and defendant has failed to pay any part of said damages. *Held*, that the complaint stated a cause of action on the oral agreement of the defendant to pay the damages caused by the excavation, and it was not defective for uncertainty.

2. Nor did the complaint state several causes of action, but the several matters of damage were distinct items, for which payment was to be made under the agreement.

3. Defendant purchased a lot from the owner of a warehouse situated partly thereon, while the warehouse was occupied by plaintiff's assignors as tenants, and the owner authorized him to erect a party wall on the line so as to make it necessary to dig under the warehouse, and remove one of its walls. In excavating under the building the floor fell, damaging the goods in the warehouse, and defendant agreed to pay plaintiff's assignors the damages. *Held*, that there was sufficient consideration for defendant's promise.

4. In an action for damages caused by defendant's excavating under a warehouse occupied by plaintiff's assignors, there was evidence that defendant had promised plaintiff's assignors to so conduct the work of excavating as to save them from inconvenience; that, after the floor of the warehouse and goods therein had fallen into the excavation, he said he would make it all right and satisfactory, and would fix whatever the damage was. *Held*, that there was evidence to support a finding that defendant promised to settle and pay the damage.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Charles H. Dunton against William Niles to recover for breach of contract. From a judgment for plaintiff, defendant appeals. Modified.

Chapman & Hendrick, for appellant. *Brousseau & Hatch* and *Waldo M. York*, for respondent.

Temple, C. Plaintiff, as assignee of W. W. Montague & Co., sues to recover damages for the breach of an alleged contract whereby defendant agreed to settle and pay to W. W. Montague & Co. certain damages to their goods, wares, and merchandise, caused by an excavation made by defendant adjoining and under their warehouse at Los Angeles, and also for certain tin sold and delivered to defendant. The complaint is demurred to: (1) Generally for insufficient facts. (2) Uncertainty, in that it cannot be ascertained from it whether the action is brought to recover damages for the negligent excavation of the land adjoining the warehouse, or upon a contract to pay such damage, and a contract to pay for certain tin plate, or whether it is brought to recover the value of certain rivets, taken by the defendant and not returned. (3) Several causes of action are improperly united, to wit: A cause of action for damages for negligence and unskillfulness in excavating adjoining the property of W. W. Montague & Co. with an action upon a contract to pay such damage; and said two causes of action with an action upon a contract to pay for tin plate, and for labor in sorting and boxing rivets; and all of said causes of action, and each of them, are improperly united with an action for damages for failure to sort certain other rivets; and, further, that said several causes of action are not separately stated.

The complaint charges that on the 1st day of October, 1884, W. W. Montague & Co. rented from one Mills the premises known as "110 Upper Main Street," and lands adjoining thereto, for two years, with the privilege of an extension of two years. That Mills, in pursuance of the covenants of the lease, built a warehouse on the premises, which W. W. Montague & Co. took possession of, and where they stored a large amount of merchandise. The firm continued to occupy the premises until July, 1887. While W. W. Montague & Co. were so in the possession, defendant purchased the adjoining land from Mills, well knowing the rights of W. W. Montague & Co. While the lessees were so occupying the premises defendant commenced to excavate upon the adjoining lot purchased by him from Mills, and continued so to excavate up to May 28, 1887. May 25, 1887, W. W. Montague & Co. notified defendant that his excavation, if continued, would undermine their warehouse and damage their goods, and defendant then promised "that he would stop his said work of excavating and discontinue the same; but, notwithstanding his said promise so to discontinue said work, said defendant continued to excavate in a negligent, unskillful, and careless manner, and in so excavating took and carried away the earth and soil from said land so as aforesaid acquired by him (defendant) from said Mills and his grantees, and next and adjoining said property, * * * and negligently and unskillfully carried away the earth and soil from under said warehouse until the defendant had excavated to a depth of sixteen feet below the ancient surface of defendant's said land, and below and under said warehouse, and was so carelessly and negligently excavating on the 28th day of May, 1887, when by reason of said excavation so as aforesaid carelessly and negligently made by defendant under said warehouse, and on said lands adjoining thereto, the earth and soil under said warehouse gave way and fell into said excavation, and the floor of said warehouse fell through, and goods, wares, and merchandise of said firm of W. W. Montague & Co. then stored therein fell into said excavation, and were damaged thereby in the sum of one thousand dollars." On the 28th of May, thereafter, W. W. Montague & Co. demanded from defendant that he settle and pay the damage, which he promised to do as soon as the damages should be fully ascertained. Thereafter, about June 15, 1887, W. W. Montague & Co. and the defendant agreed upon a compromise of the said claim for damages, whereby defendant was to pay $100 for certain tin plate which defendant should take, and for certain labor in boxing it, and was to take away certain rivets, and sort the same, and return such as could be sorted and placed in as good condition as they were in before the damage occurred, and then was to pay all damage to the firm for the rivets which should not be so returned. That, previous to said agreement, the said firm delivered to defendant and defendant received the tin plate which he was to have for his own use, and also all the rivets which had been damaged, to be sorted. That some rivets were sorted by defendant and returned, but some were so unskillfully sorted that the said firm refused to receive and accept them under the agreement. That the residue have never been sorted or returned. That the rivets were so damaged as to be of no value as rivets whatever, and that before the damage they were worth $520. That defendant has not paid the $520 damage or the said $100 for said tin, or any part of either sum, and the whole is due and unpaid.

The contention that the complaint does not state facts sufficient to constitute a cause of action is principally upon the claim that the action is for damages resulting from excavating upon an adjoining lot, and appellant contends that, under the circumstances stated, defendant is not liable for injury to the building or goods of W. W. Montague & Co. It does not appear that the land, unburdened by the building, would have fallen in because of the excavation, and want of notice is not averred, but, on the other hand, knowledge of the excavation is shown; and, on the theory that the action is for the breach of an oral contract to pay the damage, it is contended there is no consideration for such promise. Both these propositions are sufficiently answered by the suggestion that there is a distinct charge in the complaint that defendant not only excavated on the adjoining lot, but also excavated and removed the earth from under the building, thereby causing it to fall. It is not a question, therefore, of liability for an excavation made by a coterminous owner upon an adjacent lot. The action is clearly for the breach of the oral agreement to take certain tin, and pay certain expenses and damages, and the previous recitals are simply matters of inducement. In this view the uncertainty specified does not exist, nor are there several causes of action united in the complaint. The agreement of compromise specifies several distinct items or payments to be made, but they do not constitute different causes of action. I think, therefore, the demurrer was properly overruled.

The court having found for the plaintiff, defendant applied for a new trial, which having been refused, he appeals from the judgment and order. It appears from the evidence that, prior to the commencement of the excavation, defendant notified W. W. Montague & Co. of the intended excavation, and of the agreement between defendant and Mills to erect a party wall which would render it necessary to remove one side of the warehouse, also that the building extended some eight inches upon defendant's lot. Plaintiff, who was then managing for W. W. Montague & Co., objected, and pointed out the danger to the building and goods. Defendant assured him that he would move the goods and do everything necessary to prevent injury and inconvenience to W. W. Montague & Co.; whereupon plaintiff, as agent, consented to the work being done. After the work had proceeded for some time plaintiff noticed that the excavation was deep, and extended under the building and called defendant's attention to the danger. Defendant then agreed to stop work at the point of danger, but did not, and in consequence the bank caved, and the building gave way, and the damage resulted. These facts I think take the case entirely out of the rule laid down in section 832, Civil Code. There was a consideration for the promise on the part of defendant, in that Mills, the owner of the building, authorized the erection of a wall on the line for a party wall, and that it was necessary to dig under the warehouse, and remove one of its walls. And then the agreement to cease work would of itself excuse plaintiff's assignors from shoring up their own building.

Appellant contends that the evidence does not justify the finding that defendant promised that he would settle and pay the damage. As to the tin plate, Dunton's testimony seems quite sufficient, and in fact hardly controverted by defendant, except as to the delivery of the tin to him. As the testimony on this point is conflicting, we must accept the evidence which sustains the finding. I think this, including Dunton's evidence in rebuttal, shows a delivery. As to the rivets, there is very little except the testimony of Dunton, and that is not as definite as it might be. This inquiry, however, must commence at the beginning. Niles, aware that he was attempting something which required the assent of plaintiff's assignors, had promised to so conduct the work as to save them from any inconvenience. As soon as he saw the condition after the cave, according to the witnesses Ford and Hanes, he said he would make it all right; that he would make it satisfactory; would fix it, whatever the damage was. Dunton seems to have been under the impression that Niles was to take the rivets and pay for them. Such is not the allegation in the complaint, nor the statement in the findings. Except the confident assumption of the witness, I find no evidence of any such arrangement. It appears from this testimony, as I think is substantially averred and found, that the agreement was that plaintiff would waive damages as to such rivets as would be sorted, and defendant would, after his attempt to sort them, pay whatever the damage to them might be. This did not make Niles the owner of the rivets, and, if they were worth anything in their damaged condition, Niles would not be charged with their full value. I understand plaintiff in his testimony to admit that they were worth $100. In that case the amount of damage found was excessive in just that amount. The other specifications of insufficiency need not be discussed. They are either practically answered by what has already been said or are immaterial. I think there is evidence which tends to prove that, notwithstanding the contract with Mendoza, defendant still continued to manage and control the work of excavation; and, further, that under the peculiar circumstances of this case, defendant would remain liable for damage resulting from the excavation. I think the judgment should be reversed, unless plaintiff, within 20 days after filing the *remittitur*, shall stipulate to a reduction of $100 on the judgment, in which case the judgment, so modified, should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with instruction to the court below to modify the judgment by allowing to the plaintiff the sum of $520 instead of $620, with interest thereon from December 12, 1887, with costs of suit, if the plaintiff shall within 20 days after filing the *remittitur* stipulate that such reduction be made; but, if he does not so stipulate, the court is directed to set aside the judgment, and order a new trial.

95 Cal. 524

BLANC v. PAYMASTER MINING CO. (No. 14,599.)

(*Supreme Court of California.* Aug. 5, 1892.)

FOREIGN CORPORATION — FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE — PARTIES — ATTACHMENT.

1. Where a creditor of a corporation seeks to subject to his claim property fraudulently conveyed by it to an officer, and by him to a third person, who is made defendant, neither the corporation grantor nor the officer is a necessary party defendant.

2. Where findings are waived, and there are none in the record, the lower court will be presumed to have found all the facts necessary to support its judgment; and, if the evidence is insufficient to justify the finding of a necessary fact, such implied finding may be excepted to in the same manner and with the same effect as if it were an express one.

3. A clerk in a store belonging to a mining corporation, who has charge of certain funds, keeps the pay roll, and pays the miners, is not an "agent" of the corporation, within the meaning of Code Civil Proc. § 542, subd. 5, providing that personal property, not capable of manual delivery, must be attached by leaving with the person having such property in his possession, or with his agent, a copy of the writ, and a notice that the property in his possession belonging to the defendant is attached.

4. Where an action against a nonresident corporation is begun by an attachment of its property, a money judgment general in its terms will uphold a sale of the attached property, and, in an action on such judgment, the attachment, if it does not appear from the judgment, may be otherwise shown.

5. Where the officers and stockholders of one corporation form another, and convey all the property of the former to it in fraud of creditors, the latter corporation will be regarded as a continuation of the former, and a court of equity will hold the assets of the latter liable for a debt of the former, though there has been no recovery of judgment for the debt, and return of execution unsatisfied, as required by Civil Code, § 3441, which declares that "a creditor can avoid the act or obligation of his debtor for fraud only when the fraud obstructs the enforcement by legal process of his rights to take the property affected by the transfer or obligation."

6. Where a complaint alleges the formation of such new corporation, and conveyance of property to it by a former corporation, and that the latter is in possession of all the property of the former without having paid anything therefor, that the latter was formed to take the property of the former as part of a scheme to defraud plaintiff and others, and that before the transfer the former corporation became indebted to plaintiff, as against a general demurrer and after judgment, the complaint may be regarded as sufficiently averring that such indebtedness to plaintiff is still unpaid.

Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by one Blanc against the Paymaster Mining Company. Judgment for plaintiff, and defendant appeals. Reversed.

Harris & Gregg, for appellant. *Hunsaker, Britt & Goodrich* and *J. E. Wadham*, for respondent.

DE HAVEN, J. The complaint in this action alleges, in substance, among other matters, that the Esperanza Company, a foreign corporation doing business in Arizona, became in February, 1884, indebted to plaintiff upon two promissory notes, one for the sum of $1,000, payable on demand, and the other for the sum of $5,000, payable February 12, 1885; that thereafter the said Esperanza Company became indebted to its various stockholders, and a pretended assignment was made of all its property to its "acting managing officer and agent," one Blaisdell, for the alleged purpose of paying the debts of such corporation, and the said Blaisdell made a pretended sale of such property at public auction, at which sale "he claims to have become the purchaser of the tools, machinery, stamp mills, engines, and boilers belonging to the said Esperanza Company, all of the value of $75,000, at a purely nominal sum, to wit, the sum of $50," and thereupon said Blaisdell, "together with the principal officers, agents, and stockholders of the said Esperanza Company, proceeded to organize the defendant," and turned over to it all of the said property, for the purpose of cheating and defrauding plaintiff and other creditors of the Esperanza Company; and in this connection the complaint further charges "that the said the Paymaster Mining Company, defendant, was so organized by the said Blaisdell, the officers and agents and stockholders of the said Esperanza Company, with the view of taking and receiving said property, as a part of said plan for defrauding the creditors of the Esperanza Company, and particularly the plaintiff," and that said defendant never paid any consideration whatever for said property. It is also alleged that, the Esperanza Company having failed and refused "to pay the just demands of this plaintiff," he instituted a suit against said company in one of the superior courts of this state "for the collection of the said sum of $6,000" and interest, and a writ of attachment was issued therein, and the property before referred to was attached, etc., and judgment was duly given in his favor and against said Esperanza Company, for the sum of $7,784.74 and costs, and that nothing whatever has been paid on said judgment. The prayer of the complaint is "that the pretended sales of the said Blaisdell to the defendant be declared void," and "that it be adjudged * * * that the said defendant holds the said property charged with the payment of the plaintiff's claim of $7,784.74, with interest and costs," and that the same be sold to satisfy the same, and for general relief. To this complaint the defendant interposed a demurrer, upon the general ground of insufficiency of the alleged facts to constitute a cause of action, and upon the further ground that there is a defect of parties defendant, because of the failure to make the Esperanza Company and Blaisdell defendants. The demurrer was overruled. Upon the trial findings were waived, and a judgment rendered in favor of plaintiff in accordance with the prayer of the complaint. The defendant appeals.

It is argued by the appellant here that the court erred in its ruling upon the demurrer to the complaint, and also that certain implied findings are not justified by the evidence.

1. The demurrer to the complaint was properly overruled. The complaint states a cause of action, and the Esperanza Company and Blaisdell were not necessary parties to the action. Upon the facts alleged in the complaint, neither of them has any interest, either legal or equitable, in the property, and neither could be prejudiced by the judgment which the plaintiff seeks to obtain; and the omission to make them defendants did not in any manner preclude the defendant from interposing any defense which it may have had to the matters alleged in the complaint, and therefore the defendant cannot complain that they were not made parties defendant. Fox v. Moyer, 54 N.Y. 130; Potter v. Phillips, 44 Iowa, 353; Coffey v. Norwood, 81 Ala. 512, 8 South. Rep. 199. In Potter v. Phillips, supra, the court, in answer to the objection that the fraudulent grantor was not made a party defendant in an action to subject to the lien of plaintiff's judgment the property alleged to have been fraudulently conveyed, say: "While a proper party, we do not see wherein he can be regarded as a necessary party. Whether the conveyances were fraudulent or in good faith, the property has irrevocably passed beyond his control. In no way can he be prejudiced, in a legal sense, by a determination which subjects the property to the payment of his debts." And in Coffey v. Norwood, supra, the supreme court of Alabama reach the same conclusion, saying: "Neither the debtor, if living, nor, if he be dead, his personal representatives, can enjoy any of the fruits of a successful prosecution of the suit to set aside the fraudulent conveyance: for, after the complaining creditor's demand is satisfied, the remainder of the fund goes to the fraudulent grantee. The debtor, therefore, has no interest, legal or beneficial, either in the property sought to be subjected, or in the litigation having reference to it, except remotely or indirectly. Nor can the grantee be prejudiced in any manner by omitting to join the grantor, or his personal representative, as he can make any defense to the complainant's demand which the grantor or personal representative could do if he were a party to the suit."

2. The appellant contends that the evidence does not justify the implied finding of the court that in the action of the plaintiff against the Esperanza Company, mentioned in the complaint, an attachment was levied upon the property sought to be reached by this action, and that the evidence is also insufficient to justify the further implied finding that in the action referred to a judgment was rendered in favor of this plaintiff, and against the Esperanza Company, for the sum of $7,784.70. It is claimed by respondent that inasmuch as findings were waived, and none are to be found in the record, there are no findings to which exception can be taken, and nothing to which appellant's specifications of insufficiency of evidence can relate. We do not think this is a correct view of the law upon this point. There are no express findings in the record, but it is the presumption of law that the court found all the matters of fact in issue, and necessary to support its judgment in favor of the successful party. Such findings are implied, and, if the evidence is insufficient to justify the court in finding any material or necessary fact, such implied finding of fact may be excepted to in the same manner and with the same effect as if it were an express finding. The practice pursued by appellant in this respect is proper.

3. The Esperanza Company is a foreign corporation, and had no managing agent or other officer in this state upon whom service of summons was or may have been made in the action which plaintiff brought against it to recover the amount due upon the notes referred to in the complaint. This being so, the only valid judgment which could have been rendered in that action was one in the nature of a judgment *in rem*, against such property as could have been seized under a writ of attachment therein. Anderson v. Goff, 72 Cal. 65, 13 Pac. Rep. 73; Pennoyer v. Neff, 95 U. S. 714; Cooper v. Reynolds, 10 Wall. 308. The judgment as rendered in that action was general in its terms, for the recovery of money only, and made no reference to the fact that any property had been attached therein; but it was not for this reason void, if in fact such attachment was made. In such case the judgment would be held to have the effect of perpetuating the attachment lien, and would be regarded as "so far in the nature of a proceeding *in rem* as to uphold a sale of the attached property, and considered for that purpose and to that extent is not void." Anderson v. Goff, supra; Cooper v. Reynolds, supra. It follows necessarily, from this view of the law, that in considering whether the court below was justified in finding that plaintiff recovered against the Esperanza Company the judgment alleged in the complaint, it must be first determined whether the evidence is sufficient to sustain its other implied finding, that the property in controversy here was attached in that action. If such property was not attached in that action, then, under the law as above stated, the court was without jurisdiction to pronounce any judgment therein which can be enforced against such property. It is shown that the writ of at-

tachment was issued in the action referred to, and it further appears, from the return of the officer in whose hands it was placed for service, that he attached "all moneys, goods, effects, * * * or any other personal property belonging to the (Esperanza Company) defendant named therein, in the possession and under the control of the Paymaster Mining Company, by delivering to and leaving with Cyrus Wheeler, the acting managing agent of said Paymaster Mining Company, personally," a copy of said attachment, etc. This return is not conclusive in this action, and we are of opinion that the evidence shows that the property in controversy was not in fact attached. The Paymaster Mining Company was in possession of this property, and, assuming that it was not capable of being taken into manual possession, then, under subdivision 5 of section 542[1] of the Code of Civil Procedure, in order to effect its attachment it was necessary to serve a copy of the writ of attachment, and a notice that the property was attached in pursuance thereof, upon the president or other head of that corporation, or its secretary, cashier, or other managing agent thereof. Kennedy v. Savings & Loan Soc., 38 Cal. 151. It is not claimed that Wheeler, upon whom the writ of attachment was served in plaintiff's action against the Esperanza Company, was the president or secretary of the Paymaster Mining Company, and the evidence does not show that he was a managing agent thereof. On the contrary, it appears that he was only employed by that corporation in the capacity of a clerk in a store belonging to it, and although he had the custody of money belonging to the corporation, and it was a part of his duty to keep the accounts of the men employed in the mine from *data* furnished him by the superintendent, and to pay them, this did not constitute him the "cashier" of the corporation, as that word is employed in section 542 of the Code of Civil Procedure, or a managing agent of such corporation. The word "cashier" in that section refers to an executive officer of a corporation,—as the cashier of a bank,—and not to a simple employe, who is not a managing agent of the corporation. Upon the evidence, we think it must be held that in the action referred to there never was any valid attachment of the property of the Esperanza Company, and, as it was not personally served with summons in this state, the judgment alleged in this complaint to have been recovered by plaintiff against that corporation was void. The implied finding of the court, therefore, that such judgment is valid and is a lien upon the property in controversy, is not sustained by the evidence.

4. The remaining question to be considered is whether, in view of the other allegations of the complaint, and found by the court to be true, the plaintiff is entitled to the relief which he asks, notwithstanding his failure to obtain a valid judgment against the Esperanza Company for the amount of the claim which he holds against that corporation. The general rule (to which, however, there are some exceptions) is that a creditor must first have recovered judgment against his debtor, and execution thereon be returned unsatisfied, before he is entitled to resort to an equitable action to reach property fraudulently transferred by his debtor. 3 Pom. Eq. Jur. § 1415; Bump, Fraud. Conv. p. 522. And this general rule is embodied in section 3441 of the Civil Code, which declares: "A creditor can avoid the act or obligation of his debtor for fraud only when the fraud obstructs the enforcement by legal process of his rights to take the property affected by the transfer or obligation." It is claimed by the appellant that the present case falls within this rule, and that, as plaintiff has never recovered a valid judgment against the Esperanza Company, the foundation of his right to maintain this action is gone. But we are unable to agree to this proposition. As already stated, the complaint charges that the Esperanza Company is wholly insolvent, and that defendant is now in possession of all its property, without having paid any consideration therefor, claiming to own the same by virtue of the fraudulent transfers before mentioned, and that the defendant was organized by the officers and stockholders of the Esperanza Company for the purpose of taking and holding the property of the Esperanza Company, and as part of a scheme to defraud and cheat the plaintiff and other stockholders of the former corporation. These facts are all clearly alleged, and, we think, as against a general demurrer and after judgment, the complaint may also be regarded as sufficiently averring that the notes executed to plaintiff by the Esperanza Company, as evidence of its indebtedness to him, are still unpaid. These are all material allegations, and upon this record, express findings having been waived, it must be presumed that they were all found to be true by the court below. We think, upon this state of facts, a court of equity will regard the defendant as a mere continuation of the former corporation under a different name, and will hold it liable for the indebtedness of the Esperanza Company, at least to the extent of the value of the property which it received from it without consideration, and under the circumstances stated. Nominally, the two corporations may be different, but, as viewed in equity, they are the same, and the plaintiff is not prevented from asserting such identity in fact. This was so substantially held in the case of Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co., 13 Fed. Rep. 516. In that case, upon a state of facts similar to that disclosed by this record, McCRARY, circuit judge, after referring to the fact that it was doubtful whether any service of process could be made upon the old company, so as to secure a judgment

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[1] Code Civil Proc. § 542, subd. 5, provides that "personal property, not capable of manual delivery, must be attached by leaving with the person * * * having in his possession or under his control such * * * personal property, or with his agent, a copy of the writ, and a notice that * * * the credits or other personal property in his possession or under his control belonging to the defendant are attached in pursuance of such writ.

at law against it, proceeded to say: "A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all his property for a fair consideration, if the transaction is *bona fide*, and the buyer will not be required to take care that the seller provides for and pays all his debts. A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but may deprive itself of corporate existence, and place itself beyond the reach of process of law. At all events, equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts." TREAT, district judge, in a concurring opinion in that case, said: "A mere change of name cannot avoid obligations. The new corporation took all the property of the old; went forward with its business; had the same stockholders, except a few formal ones; was, in short, the old corporation; and now seeks to escape the obligations of the old, rescuing the property of the latter from the demands the former was bound to meet. Can this be so? The old corporation and its property were liable to the demands of the plaintiff. The new corporation must respond to the extent of the property acquired, and possibly to the full extent; that is, if property sufficient therefor is in its possession. This is a proceeding in equity, wherein mere colorable pretenses are to be disregarded. Shiftings of corporate names cannot defeat positive rights, any more than the change of the name of a natural person can absolve him from his personal obligations." The principle of this decision, which we regard as eminently just, was also approved by the supreme court of Pennsylvania in Web Co. v. Dienelt, 19 Atl. Rep. 428. It follows from these views that plaintiff is entitled to satisfy the demand against the Esperanza Company out of its property now held by the defendant, and that, too, without first recovering a nominal judgment against the Esperanza company. The complaint does not allege the rate of interest the notes there referred to bear, but the court recites in its judgment that such rate is 8 per cent. per annum. But the judgment does not declare that the amount unpaid on such notes is a lien upon the property in controversy, but that the judgment referred to in the complaint constitutes such a lien, and directs a sale of the property to satisfy the same. The amount of this judgment, including, as it does, costs of the former action, and interest upon the interest which had accrued upon said notes at the date of its rendition, exceeds the amount of the principal and interest of said notes, and is therefore erroneous. The court should ascertain the amount due upon the notes, and direct a sale of so much of the property in controversy as may be necessary to pay the same, and costs of the action and of making the sale. Judgment and order reversed, with directions to the superior court to find the amount due the plaintiff from the Esperanza Company upon the notes referred to in the complaint, and thereupon to render judgment in accordance with this opinion.

We concur: McFARLAND, J.; SHARPSTEIN, J.

(3 Cal. Unrep. 526)

BARROWS *et al.* v. FOX *et al.* (No. 14,643.)

(*Supreme Court of California.* Aug. 6, 1892.)

WATER RIGHTS—WASTE.

1. Under Civil Code, § 1411, providing that an appropriation of running water, to give a right to its use, must be for some useful or beneficial purpose, and that when the appropriator ceases to use it for such a purpose the right ceases, where it is adjudged that plaintiffs are entitled to a certain amount of water from a stream, and that defendants are entitled to the balance, and it appears that plaintiffs have always used the water by means of a defective flume, the court may direct them to carry the water to which they are entitled by flume and pipe, so that the balance may not be wasted.

2. Where, in an action to establish right to water in a stream, a court of equity finds, on sufficient evidence, that the parties have each certain rights in the stream, it may secure enjoyment of those rights by proper regulation of the use of the water.

3. Where, in an action to establish a water right in a stream, defendants, claiming as appropriators, ask for an injunction to restrain plaintiffs from taking any water from the stream, it is permissible for defendants to show the effect on their lands, as to value, of a deprivation of water as asked by defendants, and that there is no other available water supply, since this might be necessary to entitle them to the relief asked.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Action by Thomas Barrows and others against Lewis C. Fox and others. From a judgment adjusting the rights of the parties, and an order refusing a new trial, plaintiffs appeal. Affirmed.

Blackstock & Shepherd, (*Chapman & Hendrick*, of counsel,) for appellants. *H. L. Poplin*, for respondents.

FOOTE, C. The plaintiffs claim to be the owners and tenants in common, and entitled to the possession, of a certain "water ditch, conduit, flume, and water way," by means of which certain waters flowing from a spring in what is called "Brunson Canyon" are conducted, together with the right of way for the same, over certain lands of which description is given. They also claim, in connection with the right to this water way, that as tenants in common they own, as prior appropriators for use for "stock, domestic, and irrigating and other useful purposes," all the water flowing from the spring in question, to the extent of 200 inches of water, under a 4-inch pressure. They assert that they have thus used these waters, for about 13 years, adversely to the whole world. That the defendants about the 15th of July, 1890, took and appropriated all the waters of the natural stream which came from the spring above the plaintiffs' ditch, and prevented the plaintiffs from enjoying the use of the waters they had appropriated, and that the defendants threaten to continue to deprive the plaintiffs of their rights in the premises, and will do so if not re-

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[1] Reversed in banc. See 32 Pac. 811, 98 Cal. 63.

strained by injunction. Damages are asked for in the sum of $2,000; that the court will decree that the plaintiffs are the owners of the water right claimed, and entitled to the right of way set up for the water ditch, etc.; and that the defendants be restrained from all wrongful acts, etc.

The defendants deny the claim of the plaintiffs to the water right set up in the complaint, and allege that the defendants are entitled to the use of the waters of the spring flowing by a natural water course through their lands, which waters are less in quantity than 50 inches, measured under a 4-inch pressure, and that they, claiming themselves to be the owners of the waters in dispute, did appropriate them for necessary beneficial purposes of irrigation and domestic use. The court found in the first finding, in effect, that the plaintiffs were entitled to use their ditch, flume, etc., to convey the waters necessary for the useful purposes for which the plaintiffs had appropriated them, and to the right of way for the ditch, etc.; but in the third finding found that the appropriation for beneficial use by plaintiffs was not 200 inches of water as alleged in the complaint, but that, as owners and tenants in common of the right to use the waters of the stream in controversy for irrigation upon their lands, they were the owners and entitled to the use of the waters for that purpose "during the months of June, July, August, September, October, and November of each year, such months being the season for irrigation in that locality, for the period of fifteen successive days only of each of said months, from the first to the fifteenth days thereof, both inclusive, to the amount of one hundred and sixty thousand two hundred and ten United States gallons per day, equal to eleven inches, measured under a four-inch pressure." And that they were the owners and entitled to the use of the waters in controversy for domestic and stock purposes only "to the amount of water that will flow through a pipe three quarters of an inch in diameter, under a four-inch pressure, laid from the place of diversion on said stream to the land aforesaid of plaintiffs, continuously each day, or so much thereof as is reasonably necessary on said land for such purposes." But that they were not the owners of any greater water rights in the waters flowing from the spring and in the natural water course in question. The court in finding 4 further found that the defendants first, by closing up the plaintiffs' ditch, wrongfully deprived them of these water rights; but in finding 7 it found that one of the defendants, Mr. Fox, had, as a subsequent appropriator to plaintiffs, perfected his appropriation of 50 inches of the waters in controversy, which rights he held, of course, subject to that of plaintiffs; and in the eighth finding that the lands of defendants Fox and Crouch are those of riparian proprietors, and that they are entitled, as subsequent appropriators to the plaintiffs, to the use of the waters of the stream flowing in its natural course through such lands for purposes of irrigation and domestic use, subject only to the right of plaintiffs as above defined; that Fox is entitled to thirteen sixteenths of this restricted water right; that the waters are necessary alike for the beneficial uses of both parties to the action, their lands being agricultural, and that no damage has resulted to either party. The conclusions of law follow, based upon these findings, and the judgment is given and made in substantial accord therewith.

The main contention of the plaintiffs for a reversal of the judgment and order refusing a new trial is that the judgment is not sustained by the findings, in respect that the court has undertaken to direct them, contrary to principles of equity pertinent to the facts of the case, to substitute a pipe for a ditch or flume in which to carry the waters necessary for the purposes of the beneficial use to which they have applied the waters. They say that, as they have used these waters by ditch or flume for 13 years, they have the right still to use them in that way, even if these conduits leak and waste all the water over and above that necessary for their beneficial use; that inasmuch as they have thus used the water, and had the right of way for the same by ditch or flume, the court can place no restriction on these uses which will prevent them from wasting all the water by a leaking flume or ditch, over and above what the findings show they have appropriated for beneficial uses.

We do not perceive that the court has required the plaintiffs to use a pipe in place of the flume or ditch. It has only required that, whichever the means shall be that they employ to conduct the water, whether "flume or pipe, as plaintiffs may elect," they shall divert no more than the findings show that they have appropriated to a beneficial use, and that such use shall be at the times set out in the findings and decree. It would be no hardship on the plaintiffs to allow them to use a pipe in place of a flume which they had used; and it cannot be successfully contended, if the findings show that a ditch or flume owned by the plaintiffs, and for which they have the right of way, is in such condition that a large part of the waters of the stream is wasted on their lands before it reaches that of the lower riparian proprietor and subsequent appropriator, that then the court has not a right to order the prior appropriators so to conduct and use the water they have appropriated, either in a flume as originally carried, or a pipe, as they may elect, that the balance of the water shall not be wasted by leakage, and shall go down the stream to those having the right to it. To say otherwise would be to nullify the provisions of section 1411 of the Civil Code, which reads thus: "The appropriation must be for some useful or beneficial purpose, and, when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases."

The evidence was sufficient, as we think, to show that the court was justified in finding the extent of the plaintiffs' appropriation for beneficial uses; and that the defendants had acquired certain water rights for beneficial uses also subject to those acquired by plaintiffs. This being so, it was the province of a court of equity to secure each of the contending parties in the enjoyment of their rights acquired under the provisions of the law governing such a case. Frey v. Lowden, 70 Cal. 550, 11 Pac. Rep. 838. We conclude that the judgment is supported by the findings, and that the evidence is sufficient to support them.

It is further claimed as error that evidence was permitted, on the part of defendants, as to the effect upon their lands, as to value, by a deprivation of water, and that there was no other water supply for them. In this case it seems that the defendants had, upon the facts set up by them, claiming as appropriators, asked in their answer for an injunction against the plaintiffs to prevent them from taking water, to which the defendants made claim for the beneficial use of the same on their lands. Unless the defendants could show that the waste of water by plaintiffs would be hurtful to their rights as subsequent appropriators, it might be that they could not get the relief they asked. So it would seem there was no prejudicial error committed in the ruling. Upon consideration of all the points made we perceive no prejudicial error, and advise that the judgment and order appealed from be affirmed.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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95 Cal. 541

Churchill v. Baumann *et al.* (No. 14,443.)

(*Supreme Court of California.* Aug. 6, 1892.)

Diversion of Water—Estoppel—Pleading.

1. In an action for the diversion of water by the building and maintenance of a dam by defendants, where it appears that plaintiff assisted in maintaining the dam and diverting the water, he cannot recover.

2. Such participation in the diversion of the water need not be specially pleaded, but may be proved under an issue raised by defendants' denial that plaintiff was injured by the diversion of the water. De Haven, J., dissenting.

3. Where there is nothing in the record to show that plaintiff withdrew such consent to the diversion of the water before the commencement of the action, an averment in the complaint that defendants threaten and intend to continue the acts complained of is not to be construed as meaning that they intend to do so without plaintiff's consent, and he is not entitled to an injunction to restrain such diversion.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county; G. F. Harris, Judge.

Action by Jerome Churchill against H. Baumann and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Spencer & Raker and *C. A. Raker*, for appellant. *F. D. Goodwin* and *Jenks & Claflin*, for respondents.

Vanclief, C. This action was commenced on the 1st day of April, 1889, to recover $8,800 damages from the defendants—seven in number—for the alleged diversion of water from a natural stream,—Pine creek,—in Modoc county, during the years 1887 and 1888, to the injury of plaintiff's riparian and appropriated water rights, below the point of diversion; and also to enjoin such diversion *pendente lite*, and, upon the hearing, perpetually. Judgment passed for defendants, and plaintiff appeals from the judgment roll, and without a bill of exceptions.

The court found that in the early part of spring the stream affords 3,000 inches of water under a four-inch pressure, but in the dryest part of the year only 1,000 inches. That in June, 1882 the defendants and one J. Thad. Jones constructed a dam across the creek above plaintiff's riparian lands, and above all the points from which plaintiff diverted water, by which they divert from the creek 550 inches of water into a ditch, constructed by them, through which they conducted that amount of water to certain lateral ditches connected therewith, through which the water in the main ditch was distributed among the owners in proportion to the quantity of land to be irrigated thereby, viz., 50 inches of water to 160 acres of land. None of the land irrigated by this water was riparian to the stream. J. Thad. Jones owned 160 acres of land, and was entitled to use, and did use, 50 inches of water from the main ditch, to irrigate his land, until October, 1885, when he conveyed his land and water right to the plaintiff. "That after said J. Thad. Jones conveyed said land to the plaintiff, and particularly during the years 1886 and 1887, plaintiff participated with and assisted the defendants in maintaining said dam, and in keeping said dam and ditch in repair, and acted in connection with them in diverting said amount of 550 inches of water from said stream by means thereof. And plaintiff, during the irrigating seasons of said years 1886 and 1887, did use the water so diverted from Pine creek by means of said dam and ditch for irrigation upon said land [purchased from Jones] to the extent and amount theretofore claimed and used upon said land by his said grantor, J. Thad. Jones." It was further found that plaintiff was in possession of all his riparian lands prior to 1882, and has been ever since; and that he had full notice of the construction of said dam, and of the diversion of 550 inches of water by the defendants and their grantors in June, 1882, and thence until October, 1885, when he purchased the interest of Jones, and during all that time had notice that defendants diverted the water under a claim of right; yet it does not appear that he ever objected to the construction of said dam, or the diversion of the water, until he did so by the commencement of this action.

As conclusions of law, the court found, among other things, that plaintiff is a tenant in common with the defendants in the dam, ditch, and water right; and that, by his participation and assistance in maintaining the dam and diverting the water, he is estopped from maintaining this action.

Counsel for appellant make the point that no estoppel was pleaded by defendants, and therefore the findings of facts from which the conclusion of an estoppel is drawn are outside of the issues. Conceding that there was no issue as to estoppel, it does not neccessarily follow that the findings of fact from which the court drew the conclusion that plaintiff was estopped were not within other material issues; nor does it follow that those findings do not warrant the general conclusion of law that plaintiff was not entitled to recover in this action. The facts found necessarily imply that, from and after October, 1885, until after all the alleged injurious acts of the defendants had been done, the plaintiff consented to those acts, and consequently was not injured thereby,—*volenti non fit injuria.* In commenting upon this maxim, Mr. Broom says: "It is a general rule of the English law that no one can maintain an action for a wrong where he has consented to the act which occasions his loss," (Broom, Leg. Max. side p. 265;) and section 3515 of our Civil Code is to the same effect,—"he who consents to an act is not wronged by it." Says Judge Cooley: "Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced He is not injured by a negligence which is partly chargeable to his own fault. A man may not even complain of the adultery of his wife which he connived at or assented to. * * * But in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds." Cooley, Torts, (2d Ed.) p. 187; Corwin v. Railroad Co., 13 N.Y. 49; Lyon v. Tallmadge, 1 Johns. Ch. 187. It is alleged in the complaint that defendants forcibly and wrongfully diverted all the water from the creek during certain specified months in the years of 1887 and 1888, to the damage of the plaintiff in the sum of $8,800. The defendants denied that they ever diverted more than 550 inches of water, and on this issue the court found in their favor. They further denied that by the diversion of 550 inches the plaintiff was injured or damaged at all. Upon this issue they were entitled to prove the facts found, viz., that the plaintiff was interested with them in the dam and ditch and, for his own purposes, co-operated with and assisted them in repairing and maintaining the same, and in diverting water from the creek, since he thereby necessarily consented to all the acts complained of. This was not such new matter as is required to be specially pleaded, since neither its purpose nor effect was to discharge or avoid a cause of action theretofore existing, but to prove that the alleged cause of action never did exist, by showing that the material allegation of injury and damage to plaintiff was not true. Bliss, Code Pl. § 352 et seq. and authorities cited. An affirmative finding of facts inconsistent with an averment, and from which it necessarily follows that the averment is not true, is a sufficient finding that the averment is not true, (Coveny v. Hale, 49 Cal. 552; Water Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379; Miller v. Luco, 80 Cal. 257, 22 Pac. Rep. 195;) and it is well settled that an affirmative allegation may be traversed in pleading by an affirmative averment inconsistent with it, (Miller v. Brigham, 50 Cal. 615.) In the case at bar, however, the averment of injury to plaintiff was specifically denied, and the facts found, being wholy inconsistent with the averment, are equivalent to a direct negative thereof, and are sufficient to support the judgment.

As there is nothing in the record tending to show that plaintiff withdrew his consent before the commencement of this action, the averment in the complaint, that defendants threaten and intend to continue the acts complained of, should not be construed to mean that they intend so to continue without his consent; but only that they intended to do as they had done theretofore, as found by the court. Therefore, conceding that plaintiff might have been entitled to an injunction on the ground of mere threats, without any actual infringement of his rights, (as to which I express no opinion,) there is no averment or finding that defendants have threatened or intend to divert water otherwise than they had done, viz., by plaintiff's assistance and consent. The finding of the court is "that the defendants threaten and intend to continue to divert and use the waters of said stream to the extent and in the manner hereinbefore found." And it is thereinbefore found only that the diversions complained of were made to the extent of 550 inches, and with the active co-operation and assistance of the plaintiff and partly for his benefit. This finding, therefore, does not mean that the defendants threatened or intended to divert more than 550 inches, nor any quantity, without plaintiff's consent, and consequently does not show a threatened injury. It is contended, however, that the finding that plaintiff assisted in repairing and maintaining the dam and ditch, and in diverting the water, etc., is inconsistent with another finding, (24,) to the effect that "defendants and their associates" erected and maintained the dam and ditch and diverted their several portions of water upon their respective tracts of land ever since the month of June, 1882. But viewed in connection with the finding that J. Thad. Jones was one of the "associates" of defendants from June, 1882, until October, 1885, and that plaintiff succeeded Jones as an associate in October, 1885, the alleged inconsistency does not appear. If the foregoing views of the case are correct, all other points urged by appellant are immaterial. As to what may be the rights of the parties independently of plaintiffs' consent to the acts complained of, it is not necessary nor intended to express or intimate an opinion. I think the judgment is justified by the finding that the acts complained of were done with plaintiff's consent, and that it should be affirmed on that ground.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

De Haven, J., *(concurring.)* I concur in the judgment. The finding of the court below, that plaintiff participated with defendants in the maintenance of the dam and diversion of the water of which he complains, is a defense to the action. I do not, however, concur in so much of the foregoing opinion as holds that evidence tending to prove such defense was properly admitted under the denial that plaintiff sustained damage by reason of the matters alleged in his complaint. I think that such defense should have been specially set out in the answer. But this appeal is upon the judgment roll without any bill of exceptions, and upon this record the presumption is that the evidence by which this defense was established was received without objection, and that the case was tried by consent of the parties, as if such defense had been specially alleged. This being so, appellant should not be permitted to urge here for the first time that no such issue was made in the court below. Horton v. Dominguez, 68 Cal. 642, 10 Pac. Rep. 186. The court below ought to have directed an amendment of the answer so as to conform to the proofs, but the judgment ought not to be reversed because such formal amendment was not made. I do not understand that the case of Ortega v. Cordero, 88 Cal. 221, 26 Pac. Rep. 80, is necessarily opposed to these views. In that case the question was, what effect should be given to a finding which was inconsistent with a fact admitted by the pleadings, and it was in relation to this that the court said that there could be no presumption that the parties consented to treat admitted facts as in issue; that a judgment which was in conflict with a fact admitted upon the record could not be sustained; and that upon such a record there was no presumption that a party waived the benefit of an admitted fact. The question here is different. The finding which is claimed to be outside of the issues does not contradict any fact admitted upon the record, but simply avoids what would otherwise be the effect of matters alleged in the complaint and found by the court to be true. If the plaintiff made no objection to trying such an issue, the court committed no error in admitting the evidence to prove it. If, upon the other hand, such issue was tried and evidence admitted against the objection of appellant, the fact should have been made to appear by a bill of exceptions. Error cannot be presumed for the purpose of reversing a judgment.

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95 Cal. 535

Jefferson *et al.* v. Hewitt *et al.* (No. 14,663.)

(Supreme Court of California. Aug. 6, 1892.)

Subscription to Stock—Inducement—Opinion as to Future Events.

Honest expressions of opinion as to the happening of future events affecting the business of a corporation, made by a stockholder and officer of the company, as an inducement to others to give a note for stock in the corporation, do not render the note voidable on the failure of the events to happen, when the happening of the events is not made a condition of payment.

Department 1. Appeal from superior court, Orange county, J. W Towner, Judge.

Action by one Jefferson and others against one Hewitt and others on a note. From a judgment for defendants, plaintiffs appeal. Reversed.

C. C. Hamilton and *Houghton, Silent & Campbell,* for appellants. *Ray Billingsley* and *Jas. G. Scarborough,* for respondents.

Paterson, J. On July 14, 1888, the defendants executed and delivered to the Santa Ana, Fair View & Pacific Railroad Company their nonnegotiable note for the sum of $5,000, payable four months after date, which was assigned to the Fair View Development Company, and by the last-named company assigned to these appellants. The court found that the note was given for 50 shares of the capital stock of the company first above named, but that it was made and delivered "upon the sole consideration and inducement of the promise and assurance of said company that it would complete its railroad from Fair View to the Pacific ocean before the maturity of said promise in writing, to wit, within 60 or 90 days from said date; that the said company failed to complete its railroad, or any part thereof, * * * within the said time, * * * and that no part of said railroad between said last-named points has at any time been commenced and constructed or completed; that by reason of such failure the consideration of defendants' agreement to take said stock, and of their promise in writing set out in the complaint, has wholly failed;" but that the note "was not delivered upon the express condition that the railroad * * * would be completed * * * within sixty or ninety days from its date, nor upon condition that if said road was not so completed defendants would not have to pay said instrument, or any part thereof. The court further found that the defendants notified the company of their failure to complete the road within the time specified, demanded the return of their note, and afterwards on answering herein brought the certificate of stock into court, and deposited it with the clerk for the plaintiffs. The defendant R. E. Hewitt testified that on July 10, 1888, Dr. Bailey stated to him that he was a stockholder, secretary, and director in the railroad company, and that there was a limited amount of the capital stock not sold, "less than $15,000 of the original $60,000 issue, and that he was authorized to dispose of part of this to his friends;" that the company was going to increase the stock to $200,000 or $300,000, and place it on the market at once; "that the railroad was going right on from Fair View to the beach within sixty or ninety days at the furthest, and that he would take the stock if he could; that he held now a large amount of stock in the company;" that on the 13th the doctor came to his house, and said that "the engine and rolling stock of the company was paid for, but that the road was not doing much more now than paying expenses, but that it would be on a good, paying basis as soon as it was extended to the beach, and that everything was ready to do this;" that on the 14th the doctor said he could rely implicitly upon his statements as a friend; that he would not make them unless they were true; and from his position in the company he knew that if defendants did not take the stock they would regret it; that the doctor insisted upon his taking 50 shares or more; that witness said to him he did not have the faith in this enterprise that the doctor had, and unless the road was completed to the beach he would not have the stock as a gift.

The findings of the court show that the statements of Dr. Bailey, testified to by the defendant, were made without any fraudulent purpose; that the defendants were prevented from making any investigation by reason of the statement of the doctor that he was the secretary and director of the company, and owned a large amount of stock therein, and from his position in the company he knew his statements were true, and that defendants could rely upon them; that the defendants believed the statements made by Bailey, and, relying upon them, were induced to make the note, and agree to take 50 shares of the capital stock of the company. We do not think that the facts shown by the record and found by the court constitute any defense to the action. The rule is well settled that statements concerning the happening of a future event cannot be relied upon to avoid subscriptions obtained by an agent of a corporation. Relating, as they do, to the probability or improbability of the happening of a future event, they must necessarily be matters of opinion merely. Morawetz states the proposition thus: "A statement made by an agent obtaining subscriptions for shares in a railroad company, to the effect that the proposed road would be built upon a certain route, or within a certain period of time, would not render a subscription made upon the faith of it voidable, though the statement be made with the intention to deceive, and the road be not built upon the route, or within the time, indicated." 1 Mor. Priv. Corp. § 98. And a large number of cases are cited in support of the text. See, also, Thomp. Liab. Stockh. §121. It is unnecessary for us to indorse the rule thus stated to its full extent, because, as we have seen, the court expressly found that the representations of Dr. Bailey were not fraudulent. The construction of the road to the ocean was no part of the consideration of the note; the findings negative the averment of the answer that the note was given "upon the express condition" that the railroad should be completed within 90 days. The matters relied upon, to be available as a defense, must be shown to have been a condition agreed upon by the parties. There is nothing in the cases cited by respondents inconsistent with the views we have expressed. The fair import of the testimony is that the representations referred to were the mere confident expression of opinion of one member of the board of directors that the road would be completed within 90 days, and that the defendants, placing confidence in that opinion, executed the note in suit. The judgment and order are reversed, and the cause is remanded for a new trial.

We concur. HARRISON, J.; GAROUTTE, J.

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95 Cal. 568

BEALL v. FISHER. (No. 14,776.)

(*Supreme Court of California.* Aug. 9, 1892.)

EVIDENCE—CONTRADICTING DEEDS.

Under Civil Code, § 1625, providing that the execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument, and Code Civil Proc. § 1856, providing that, when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and that the term "agreement" includes deeds as well as contracts between parties, evidence of oral agreements made during negotiations leading up to the execution and delivery of deeds in exchange of land, and contradictory of such deeds, is incompetent.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by J. W. Beall against S. C. Fisher for breach of an oral contract. From a judgment for plaintiff, defendant appeals. Reversed.

Oregon Sanders and *Church & Cory*, for appellant. *H. H. Welsh*, for respondent.

VANCLIEF, C. On May 12, 1890, plaintiff was the owner of 320 acres of land situated in the county of Fresno, subject to a mortgage to secure his debt to the mortgagee, then amounting, principal and interest, to about $5,700. At the same time defendant owned 1,010 acres of land situated in Tulare county, subject to a mortgage to secure his debt for the principal sum of $6,060, on which had then accrued about $118 interest. On that day verbal negotiations were commenced between plaintiff and defendant for an exchange of their lands, and proceeded so far that they supposed they understood each other as to the terms upon which the exchange was to be made. About 10 days thereafter (May 22d) they met at the office of Mr. L. L. Cory, an attorney at law and notary public, for the purpose of executing the deeds and other writings necessary to effect the exchange. Nothing of their previous negotiations had been reduced to writing. Mr. Cory drew the deeds and other papers, which were then executed, consisting of a deed from plaintiff to defendant of the land in Fresno county, subject to the mortgage above mentioned, which mortgage the defendant by the terms of the deed assumed and agreed to pay; also a deed from defendant to plaintiff of defendant's land in Tulare county, which deed contained the following: "This grant is made, subject to a mortgage for $6,060, to the California Savings & Loan Society, which the grantee assumes and agrees to pay;" and also a promissory note of defendant to plaintiff for $3,000, to secure which defendant executed to plaintiff a mortgage on the land in Fresno county which had been conveyed to him by the plaintiff. This action is founded upon what is alleged to have been the verbal agreement on May 12, 1890. Plaintiff alleges that the verbal agreement was to the effect that the defendant was to pay the interest upon his mortgage on the Tulare county land up to the date when the deeds should be executed, and also "to pay said plaintiff upon the day when said conveyance and exchange should be made, as one of the considerations for said exchange, the sum of $360, the difference between $5,700, amount of mortgage upon plaintiff's land, and $6,060, amount of mortgage upon said defendant's land." Plaintiff also claims that defendant is indebted to him in the sum of $20, for interest on the note and mortgage for $3,000, above mentioned. It is alleged that defendant has refused to pay any of these several sums. The defendant denies the alleged verbal agreements, and alleges, in substance, that all verbal negotiations for the exchange of lands were merged in the above-mentioned deeds, note, and mortgage. The court found for plaintiff on all the issues, and rendered judgment in his favor for the amount of the several sums claimed. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

1. Appellant contends that all prior oral negotiations and agreements between the parties were merged in the deeds, mortgage, and promissory note drawn by Cory, and executed by the parties on May 22, 1890; and that the court erred in admitting in evidence, against defendant's objections, such prior negotiations; and this point seems to be well taken. Section 1625 of the Civil Code provides that "the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." And it is provided by section 1856 of the Code of Civil Procedure: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms;" that, as between the parties, there can be no other evidence of the terms of the agreement, except in certain cases, of which this is not one; and further declares that "the term 'agreement' [used in this section] includes deeds or wills, as well as contracts between parties." Nicholson v. Tarpey, 89 Cal. 617, 26 Pac. Rep. 1101; Whart. Ev. §§ 1014, 1054.

In this case the plaintiff was permitted to testify, not only to prior negotiations, but also to alleged prior agreements flatly contradictory of the terms of the deed which he accepted from the defendant; not for the purpose of disputing, correcting, or construing the deed, but for the purpose of compelling the defendant to pay money which, by the plain terms of the deed, he (plaintiff) had assumed and agreed to pay. That the negotiations were continued up to and during the time the deeds were being drawn by Mr. Cory, and that plaintiff accepted the defendant's deed with full knowledge of its contents and meaning, is made clear by his own testimony, as follows: "When the papers were drawn up, Mr. Fisher, G. Frank Abbott, Mr. Cory, and myself were present. I told Mr. Fisher at that time that there was a difference of over $300 due me. I had spoken to him several times of the difference in the mortgages in my favor. Mr. Fisher said that he was not to pay that, that he would not pay it, or something. Don't know exactly what he did say. He expressed himself as not desiring to pay it. Question. Didn't he say that that was not the agreement; that it was all understood, and that was not the agreement; and that he was to give you a mortgage for $3,000? Answer. Just what he said I couldn't tell you. Q. Was not that the substance? A. He said he was not to pay that; was not going to pay it. This took place before the papers passed. After that I took the deed, and accepted the $3,000 mortgage. I could as a matter of fact have refused to have gone on with the trade then. I thought of doing it, but did not. Mr. Fisher had refused to pay me this money. I didn't know that he positively refused to pay it. He said that was not his understanding. He never agreed at any time after that to pay it. At the time the trade was made and the deed and papers passed he didn't agree to it. At that time I told him, I said there was a difference there which was due me. Mr. Fisher said he didn't understand he was to pay it. I didn't say, 'All right, let's go ahead.' After this the papers passed, my deed to Mr. Fisher and his deed to me."

2. As to the count for $20 interest on the mortgage for $3,000, the evidence was not subject to the objection above considered, and, though conflicting, was sufficient to justify the finding upon that count. I think the judgment and order should be reversed, and a new trial granted.

We concur: **Belcher, C.**; **Temple, C.**

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

(95 Cal. 572)

PHELPS v. BROWN *et al.* (No. 13,277.)

(*Supreme Court of California.* Aug. 9, 1892.)

Sale of Real Estate—Abandonment—Recovery of Payment—Agent—Action against.

1. Where a purchaser of real estate defaults before the execution of a deed, and the vendor abandons the contract of sale by reason of such default, the purchaser may recover back the part of the purchase money paid on the land; and this, though it was stipulated that it should be forfeited if the contract should not be performed. Drew v. Pedlar, 25 Pac. Rep. 749, 87 Cal. 443, followed.

2. Where a real-estate agent, employed by the vendor in a sale of land, holds the receipt given the purchaser by his principal for money paid thereon, and afterwards the sale is abandoned by the vendor, and the money returned to the agent, who delivers up the receipt, he is so far acting as the agent of the purchaser in the receipt of the money that the latter may maintain an action against him to recover it.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by one Phelps against Brown &

Ensign to recover back money paid on the purchase price of land. From a judgment for defendants, plaintiff appeals. Reversed.

T. H. Laine and *Laine & Hatch*, for appellant. *Crandall & Biddle*, for respondents.

Beatty, C. J. This is an action by the vendee in a contract for the purchase and sale of lands to recover back the sum of $500, paid at the date of the contract as a forfeit. The decision of the superior court was against the plaintiff, and she appeals from the judgment on the judgment roll. The following are the material facts disclosed by the record: "In June, 1887, one Norton and wife owned a tract of land in Santa Clara county, which was incumbered by a mortgage for $9,000, and the plaintiff, a married woman, owned a house and lot in the city of San Jose. The Nortons wished to exchange their land for the lot of plaintiff, and to negotiate the exchange they employed the defendants, who were real-estate agents doing business in San Jose, as partners under the firm name of Brown & Ensign, and orally agreed to pay them $500, as a commission, if the exchange should be made. The proposition of the Nortons was that they would convey their land to the plaintiff for $20,000, and that in payment thereof she should assume and pay the mortgage on the land, and should convey her lot to them for $6,500, and pay to them the balance of $4,500 in cash, when the deeds should be executed. This proposition was put in writing and given to the defendants, and they delivered it to the plaintiff. She was willing to accept the proposition and make the trade if she could realize $6,750 for her lot, and not otherwise. The defendants then agreed to pay her $250 out of their commissions when the trade should be consummated. This arrangement was satisfactory, and she thereupon drew her check upon a local bank for $500, payable to the Nortons, and handed the same to the defendants, as a deposit or first payment. The defendants on the same day gave the check to the Nortons, who executed a receipt therefor, closing with the words, 'trade to be finished within two weeks from date, or this deposit to be forfeited without recourse. Title to prove good or no sale, and this deposit to be returned.' A few days later the defendants handed back to the plaintiff her check, and she thereupon gave to them, in place of the check, $500 in money, which they at once paid over to the Nortons. Subsequently it appeared from the abstract of title furnished by the plaintiff, that an attachment, issued in an action against her husband, had been levied on her property; and on learning this the Nortons refused to accept her deed, or to carry out the proposed exchange, unless she would have the attachment removed. She offered to give them a warranty deed, but refused to procure the discharge of the attachment. The Nortons were ready and willing to complete the trade, and tendered a deed of their property to plaintiff, but she never offered to convey to them an unincumbered title to her property, and never tendered or offered to pay the balance of the purchase money. Thereupon the Nortons abandoned the trade, and without the knowledge of plaintiff, and without any directions as to the disposition to be made of the money, returned the $500 to the defendants, and the latter returned to them their receipt, with an indorsement thereon as follows: 'Money returned and their receipt is canceled. Brown & Ensign. July 25, 1887. We agree to release the signers of this receipt from any expense, legal or otherwise. Brown & Ensign.'"

Upon these facts two questions arise: *First.* Was the plaintiff entitled to receive her money back when the Nortons abandoned the trade? *Second.* If so, can she recover it back from these defendants?

It is assumed throughout the argument, and we shall so assume without deciding, that the failure or refusal of plaintiff to clear her land of an attachment levied upon it in a suit against her husband was a failure or refusal to do something which her contract bound her to do, and that she thereby placed herself in default exactly as if she had refused to pay an installment of the purchase price when due. But assuming this to be so, and that the Nortons were not in default when they abandoned the trade and put an end to the contract, the plaintiff nevertheless immediately became entitled to receive back the $500 which she had paid, less the actual damage caused by the breach of her contract. This proposition is fully sustained by two recent decisions of this court: Cleary v. Folger, 84 Cal. 316, 24 Pac. Rep. 280, and Drew v. Pedlar, 87 Cal. 443, 25 Pac. Rep. 749. Respondents, however, insist that these decisions are in conflict with later as well as earlier decisions of this court; citing Englander v. Rogers, 41 Cal. 420; Scott v. Glenn, 87 Cal. 221, 25 Pac. Rep. 405; Dennis v. Strassburger, 89 Cal. 583, 26 Pac. Rep. 1070; Easton v. Montgomery, 90 Cal. 307, 27 Pac. Rep. 280; Newton v. Hull, 90 Cal. 487, 27 Pac. Rep. 429; Anderson v. Strassburger, 92 Cal. 38, 27 Pac. Rep. 1095.

It is true that in the case of Cleary v. Folger, which was decided in department, and never brought under review of the court by petition for hearing in bank, it was held, contrary to the earlier and later decisions, that, in case of mutual and dependent stipulations to be concurrently performed, both parties are in default if the time of performance passes without tender of performance on either side, and that the contract is at an end. As to this proposition, that case has been expressly overruled in Newton v. Hull, 90 Cal. 492, 27 Pac. Rep. 429, and the correct rule of the earlier cases restored; but the further proposition involved and decided in that case, and in Drew v. Pedlar, viz., that, when a contract of sale and purchase of lands is abandoned or rescinded by the parties, the vendee, though in default, may recover back installments paid of the purchase money, less the actual damage to the vendor occasioned by his breach of contract, has never been reversed or modified. In Drew v. Pedlar the parties expressly stipulated that $1,000, paid at the date the contract, should be retained by the vendor as liquidated damages in case of failure by the vendee to complete the purchase, and this stipulation was held void under the statute. In Cleary v. Folger it was held, and we think correctly, that a stipulation to forfeit the first payment in case of failure by the vendee to complete the purchase was, in effect, a stipulation for liqudiated damages, and void. In both cases it was held that the vendee could recover subject to the right of the vendor to recoup his actual damage. In this case the plaintiff's right to recover does not depend on the proposition erroneously decided in Cleary v. Folger, for the contract with the Nortons was ended by their voluntary abandonment of it in consequence of her failure to clear the title to the property which she was to convey in the exchange. The contract was at an end, and the Nortons were left with plaintiff's money in their hands. There is no claim in the pleadings or finding by the court that they were actually damaged by the failure of plaintiff to complete the tranastcion; they could not retain the $500 as liquidated damages; and therefore it became their duty to pay it back. There is not the slightest conflict in the decisions of this court as to these points. In each of the several cases cited and relied on by respondents, in which the vendee of land was defeated in an action to recover purchase money, the decision went upon the ground that the vendee was not only not in default, but the contract was still in force. Scott v. Glenn, 87 Cal. 221, 25 Pac. Rep. 405; Dennis v. Strassburger, 89 Cal. 583, 26 Pac. Rep. 1070; Easton v. Montgomery, 90 Cal. 307, 27 Pac. Rep. 280; Anderson v. Strassburger, 92 Cal. 38, 27 Pac. Rep. 1095. The respondents endeavor to distinguish Drew v. Pedlar from this case, upon the ground that there it appeared that the vendee long after he was in default, and the vendor had elected to treat the contract as abandoned and rescinded, had made a tardy offer of performance. But, while the fact was as the respondents claim, the decision did not proceed upon that distinction, but upon the broad ground above stated, as to which this case is practically the same. We are entirely satisfied with the correctness of the decision in Drew v. Pedlar, and upon that authority hold that when the Nortons abandoned their contract the plaintiff was entitled to receive her $500 back.

As to the second question above stated, the respondents claim that there can be no recovery against the defendants, even if the Nortons were liable to refund the purchase money paid, and they rely upon the decision in Bogart v. Crosby, 80 Cal. 195, 22 Pac. Rep. 84. But this case is very different from that. There the defendants were agents for the vendors exclusively, and they claimed the money as their own against both parties to the contract. They did not receive it under any agreement, express or implied, to pay it over to the vendee or to assume the liability of the vendor. Here the facts found by the superior court fully justified its conclusion "that the defendants on receiving the $500 from the Nortons took their place as to the money and assumed all liabilities as to the plaintiff that the Nortons had incurred." But, more than this, the findings show clearly that the defendants received the money as plaintiff's agent and for her use. They held the receipt of the Nortons as her agents, and when they gave it up they canceled it as her agents. Unless they were her agents for that purpose they had no right to deliver up and cancel that receipt on return of the money, and having assumed to represent her for one purpose they cannot be heard to say they did not represent her for the other. The judgment is reversed, and the cause remanded, with directions to the superior court to enter a judgment for the plaintiff on the findings.

We concur: DE HAVEN, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.

(95 Cal. 581)

BAINES v. BABCOCK *et al.* (No. 14,224.)

(*Supreme Court of California.* Aug. 10, 1892.)

CORPORATIONS—ACTION AGAINST STOCKHOLDERS—RETURN OF EXECUTION—RES JUDICATA.

1. A judgment creditor who has had an execution returned unsatisfied against a street railway corporation may maintain an action against its stockholders to recover, for the benefit of all creditors who may desire to be made parties, the amount due upon unpaid subscriptions for stock. 27 Pac. Rep. 674, affirmed.

2. The liability of the stockholders is several, and it is not necessary to make them all defendants. Hatch v. Dana, 101 U. S. 205, followed. 27 Pac. Rep. 674, affirmed.

3. Proof that a creditor has exhausted his legal remedy against the corporation is shown by the judgment and an execution thereon returned unsatisfied. 27 Pac. Rep. 674, affirmed.

4. Evidence that the company owns a large amount of personal property besides its road and franchise is inadmissible. 27 Pac. Rep. 674, affirmed.

5. The judgment is conclusive against the company and its stockholders, and they cannot show that the indebtedness for which the judgment was recovered arose upon a contract which was ultra vires. 27 Pac. Rep. 674, affirmed.

6. One to whom stock is issued, and in whose name it appears on the books of the corporation, is liable to the creditors of the corporation for the unpaid subscriptions, although he is not the owner of such stock. 27 Pac. Rep. 674, affirmed.

In bank. On rehearing. Affirmed. For former decision, see 27 Pac. Rep. 674.

Hunsaker, Britt & Goodrich, Sprigg & Barber, Works & Works, and *Brunson, Wilson & Lamme,* for appellants. *F. W. Burnett, M. S. Babcock, McNealy, Tuppett & Neal,* and *Myrick & Deering,* for respondent.

PER CURIAM. This cause was submitted in department, and a decision was rendered therein affirming the judgment on September 23, 1891. 27 Pac. Rep. 674. Thereafter, on petition of appellants, a rehearing was granted, and the cause was submitted in bank. We have given to the arguments and briefs of counsel, and the cases therein cited, careful attention and consideration, and are satisfied with the opinion and conclusion of department

2. Some of the points might be more elaborately discussed and additional authorities cited in support of the conclusions reached, but we deem it unnecessary to do so. For the reasons given in the opinion of Mr. Justice DE HAVEN in department, the judgment and order are affirmed.

BAINES v. STORY. (No. 14,223.)

(*Supreme Court of California.* Aug. 10, 1892.)

In bank. On rehearing. Affirmed. For former decision, see 27 Pac. Rep. 676.

Hunsaker, Britt & Goodrich, Sprigg & Barber, Works & Works, and *Brunson, Wilson & Lamme,* for appellant. *F. W. Burnett, M. S. Babcock, McNealy, Tuppett & Neal,* and *Myrick & Deering,* for respondent.

PER CURIAM. On the authority of Baines v. Babcock, 30 Pac. Rep. 776, (No. 14,224,) this day filed, the judgment and order are affirmed.

(95 Cal. 578)

POTTER v. DEAR. (No. 14,272.)

(*Supreme Court of California.* Aug. 10, 1892.)

CORPORATE DEBTS—ACTION AGAINST STOCKHOLDER.

1. In an action to compel payment of a corporate debt out of the unpaid subscription of a single stockholder, such stockholder cannot, after trial and judgment, object that the corporation was not made a party defendant.

2. Civil Code, § 322, giving to a corporate creditor a right to sue one or more stockholders for a proportionate part of his claim, does not exclude the creditor's equitable right to collect his claim from unpaid stock subscriptions, and this right is not dependent on the statutory remedy being inadequate, owing to insolvency or absence from the state of some of the stockholders.

Harrison, J., dissenting.

27 Pac. Rep. 676, affirmed.

In bank.

On rehearing. Affirmed. For former decision, see 27 Pac. Rep. 676.

J. E. Deakin, (*A. Brunson,* of counsel,) for appellant. *A. E. Cochran* and *Byron Waters,* for respondent.

PATERSON, J. Many of the questions discussed by counsel were considered in Baines v. Babcock, 30 Pac. Rep. 776, (No. 14,224,) this day filed, and upon the authority of that case must be determined adversely to the contentions of appellant herein. In this case the corporation was not made a party. No objection on the ground of nonjoinder of the corporation as a party defendant was made in the court below by demurrer or by answer. The defect was therefore waived. Section 434, Code Civil Proc. Doubtless the corporation should always be made a party to the suit; but it is not an indispensable party, unless the object of the action is to secure an adjudication of the rights and liabilities of all the parties, and a final settlement of the affairs of the company. When the purpose of the suit is to compel payment of a debt out of the unpaid subscription of a single stockholder, the corporation, if not made a party, cannot be prejudiced by a judgment against the stockholder, and, if he sees fit to go to trial and judgment without objecting to the nonjoinder of the corporation, he will not thereafter be heard to complain. It is not claimed in this case, as it was in Baines v. Babcock, that all the stockholders were necessary parties defendant. It is contended by appellant that the Santa Rosa Land & Improvement Company is similar in its nature to the South Mountain Consolidated Mining Company, the mining corporation considered by Judge SAWYER in 8 Sawy. 366. It is a sufficient answer to this contention to state the purposes for which the corporation under consideration was organized, viz., "for the purpose of acquiring real property by purchase or otherwise in the county of San Diego, state of California, buying and selling the same, building hotels, street railroads, and otherwise developing lands." It stands upon the same basis as the "banking, railroad, insurance, and like commercial corporations, having a subscribed capital stock," referred to by Judge SAWYER. It is claimed that there is another distinction between this case and the case of Baines v. Babcock. It is said that the complaint in the latter case showed that some of the stockholders of the corporation were either insolvent or absent from the state, and that no such claim is made in this case; that there is no necessity shown, therefore, for invoking the powers of a court of equity, plaintiff having a complete and adequate legal remedy, under section 322 of the Civil Code; that the decisions cited by respondent "were all rendered at places or in times when there was no legal remedy available to the creditor except one against the corporation itself;" and that there is no authority for holding that "an equitable remedy can be pursued by a creditor before he has exhausted his legal remedies, both against the corporation and the stockholders," unless by reason of the insolvency or absence from the state of some of the stockholders, as in the case of Baines v. Babcock, the legal remedy afforded by the statute would not be adequate. We do not think there is any materiality in the distinction pointed out, or any merit in the contention made thereon. It is true in Baines v. Babcock the complaint alleged that some of the stockholders were "nonresidents or insolvent persons," which allegation was denied, but the court treated the issue as an immaterial one, and found that the stockholders referred to were not necessary parties to the action, and this view was sustained here. In Morawetz on Private Corporations it is said that a judgment creditor, after the return of his execution *nulla bona* may maintain an action "to compel the shareholders to contribute so much of the capital subscribed by them as will be sufficient to satisfy the claims of the plaintiff and other creditors who may come in for payment. Such a proceeding may be maintained, although the creditors have a statutory right to proceed against the shareholders directly at law." Section 866. The error of the appellant arises from his failure to consider the unpaid subscriptions as a corporate asset, which a creditor has the undoubted right in equity to follow wherever the same may be found, when his remedy at law against the corporation has been exhausted. The corporation and the stockholder are as distinct and separate debtors, with different undertakings, as if they had never had any business relations with each other, and we know of no rule which requires a creditor to exhaust his legal remedies against all his debtors before he can in equity pursue the assets of one of them against whom he has exhausted his legal remedy. Mr. Thompson, in his chapter on "The Forum: Law or Equity," says: "The elemental rule of equity jurisprudence, that a court of this character will deny its aid to a suitor who has an adequate remedy at law, except in cases of concurrent jurisdiction, applies to this subject only so far as that these courts withhold their aid to a judgment creditor of a corporation in respect of the liabilities of shareholders, when there are legal assets of the corporation within reach of his execution. The general rule is that, although a creditor has a concurrent remedy against a shareholder at law, this does not oust the jurisdiction of the courts of equity." Thomp. Stocks, § 265. Judgment and order affirmed.

We concur: De Haven, J.; Sharpstein, J.; McFarland, J.

I dissent: Harrison, J.

3 Cal. Unrep. 531

Gwin v. Sweetser *et al.* (No. 14,857.)

(*Supreme Court of California.* Aug. 10, 1892.)

Sale of Land—Description.

Where a contract is made to sell a certain ranch, and the deed executed in pursuance thereof conveys all the land that the vendor has pointed out to the vendee as constituting the ranch, or has proposed to sell to him, and all that the vendee understood to be included in the agreement at the time it was executed, the vendee cannot afterwards claim that an adjoining tract belonging to the vendor, and of which another person had possession under a contract of sale, should have been conveyed to him under the agreement as part of the ranch.

Commissioners' decision. Department 1. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by S. R. Gwin against A. I. Sweetser and others for specific performance. Judgment for defendants, and plaintiff appeals. Affirmed.

Horace Hawes, for appellant. *Geo. A. Lamont* and *J. M. Gregory*, for respondents.

Vanclief, C. On February 11, 1888, a written agreement was executed between the plaintiff and defendants, whereby the defendants, among other things, agreed to convey to plaintiff, on or before March 15, 1888, a clear title to "the Andrew Sweetser ranch, in Solano county, Cal., said ranch being situated about one mile northwest of Cordelia, said ranch consisting of about eight hundred and twenty (820) acres, the same being the ranch on which the said Andrew Sweetser now resides." On February 28, 1888, the defendant Andrew I. Sweetser conveyed and delivered to plaintiff the ranch in Solano county on which he resided, consisting of 810 acres, and known as the "Andrew Sweetser Ranch." After residing upon that ranch about a year, the plaintiff claimed to discover, for the first time, that Sweetser had not conveyed to him all the land described in the agreement, but had intentionally omitted an adjoining tract of 69 acres, which, he claims, was a part of the Andrew Sweetser ranch, at the dates of the agreement and the deed of conveyance. The object of this action is to enforce specific complete performance of the agreement on the part of the defendants by a decree of the court requiring Sweetser to convey to plaintiff the adjoining tract of 69 acres. The trial was by the court, and judgment passed for the defendants. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The principal ground upon which appellant asks a reversal of the judgment is that the evidence was insufficient to justify the findings of fact. Upon a careful reading of the evidence, which occupies 73 pages of the transcript, I think it so plainly and satisfactorily sufficient that no detailed statement of it here is necessary. Plaintiff's testimony shows that he examined the ranch, with the view of purchasing it, before the agreement was executed, when the boundaries thereof, as described in the deed, were shown him by Sweetser; and that the only reason he had for claiming the additional 69 acres was that, upon examination of the county records, about a year after the execution of the deed, he discovered that the record title of the 69 acres stood in the name of Andrew Sweetser, and hence he inferred that it must have been a part of the Andrew Sweetser ranch, named in the agreement, although it had not been pointed out to him as such by Sweetser before the execution of that agreement; and he admits that the deed executed to him by Sweetser describes all the land that Sweetser pointed out or proposed to sell, and all that plaintiff understood to be described in the agreement at the time it was executed. Furthermore, the undisputed evidence on the part of the defendants shows that Sweetser contracted to sell the 69 acres in dispute to one E. W. Hitchins in 1885, and then gave Hitchins possession of the land and a bond for a deed thereof on payment of the purchase money, on or before January 1, 1890, which bond was duly recorded in 1885; and that Hitchins resided upon, improved, and cultivated that tract continuously from 1885 until after February, 1888. It was also proved, and plaintiff admitted, that he had proposed to purchase that tract from Hitchins after the execution of the deed from Sweetser. Finally, the effect of the whole evidence is to prove clearly and satisfactorily that defendants fully performed their part of the written agreement according to its true meaning as understood and intended by both parties. There is nothing in appellant's objections to the admission of evidence offered by respondents requiring special consideration. I think the judgment and order should be affirmed.

We concur: Haynes, C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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95 Cal. 601

Reclamation District No. 124 v. Gray.

(No. 14,725.)

(*Supreme Court of California.* Aug. 12, 1892.)

Reclamation Districts — Legislative Recognition.

In an action for an assessment levied on defendant's land by the commissioners of a reclamation district, evidence of legislative recognition of the district is conclusive proof that the district existed from the time of such recognition, and it cannot be contended that the assessment, made after such legislative recognition, was invalid, on the ground that the district was not legally organized.

Commissioners' decision. Department 2. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

Action by Reclamation District No. 124 against R. A. Gray. Judgment for plaintiff, and defendant appeals. Affirmed.

H. M. Albery, for appellant. *Adams & Adams*, for respondent. *W. G. Dyas*, *amicus curiæ*.

Foote, C. This action was brought to recover an assessment levied upon the land of Mr. Gray by the commissioners of assessment of an alleged reclamation district in the county of Calaveras. The complaint was demurred to on the grounds that the plaintiff had no authority to sue, because it had never been legally formed or organized by the board of supervisors, to whom the petition for said formation had been presented, in that the said board, in approving the petition, found that certain lands embraced in the proposed district had been improperly included therein, and that therefore such approval was void. The second ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action, because it appears from the face of the complaint that the reclamation district was never legally formed or organized, for the reason that, upon the petition presented to the board of supervisors, that body found that certain of the lands embraced in the petition for the formation of the district were improperly included, and because of such finding of improper inclusion the approval of the petition by the board "in the manner and in the terms set forth in said complaint was without authority of law, illegal, and void;" that an act of the legislature purporting to legalize and validate the reclamation district only validated, if at all, the district as of the date of the approval of the act, and validated no act of the board of supervisors or of the board of trustees of the district done anterior to the passage of that act, and particularly the acts of the trustees with reference to making by-laws, employing engineers to survey, plan, locate, and estimate the cost of the works necessary for reclamation, and in reporting such estimates to the board of supervisors, and asking for the appointment of commissioners of assessment, and also that the order of the board of supervisors in appointing such commissioners was illegal and void, etc.; that the assessment sought in this action to be enforced was based upon the plans and estimates of the board of trustees presented to the board of supervisors, and upon an order of that board appointing commissioners of assessment anterior to the approval of the creation or validating act of the legislature set out in the plaintiff's complaint. This demurrer was overruled, and the defendant declining further to answer, judgment as prayed for was given and made for the plaintiff, from which this appeal is taken. The appellant contends that the board of supervisors had no right to approve the petition as they did, that the statute did not authorize such an approval, that the action of the board amounted to no approval at all, and that such approval was jurisdictional in its nature, and that hence there was no corporate existence *de jure* or *de facto* as to the reclamation district; that if there was no jurisdiction in the board of supervisors to organize the district, then the legislature did not validate its organization by the act passed, approved March 30, 1874; that, assuming such act of the legislature did validate the organization of the reclamation district as of the date of the passage of the curative act, such act could not validate the prior proceedings of the board of trustees and commissioners relative to the assessment on the lands of the reclamation district.

It may be conceded here, but not decided, that the action of the board of supervisors was illegal in approving the petition as they did, and yet it would not necessarily follow that the defendant here could impeach the validity of the organization of the reclamation district, or the acts of the board of trustees and commissioners as to the assessment of the lands in the district now under consideration. To do that is in the nature of a collateral attack on the organization of this district, and the acts of the trustees and commissioners. The question to be decided then is, was this reclamation district in existence as a public corporation *de jure* or *de facto* when the assessment was made, and was the assessment valid? The district certainly was a public corporation from the date of the legislative act, for it was said in People v. Reclamation Dist. 108, 53 Cal. 348, in relation to a matter similar to that raised here: "A corporation of this character is, as already stated, a public corporation. Such a corporation can be created, not only by the means and in the manner provided by the general law, but also by special act or by implication of law. Legislative recognition of a corporation is, in many cases, sufficient proof of its existence." It is clear, at least, that, by the passage of the act of March 30, 1874, the reclamation district in question has received the recognition of the legislature as such; and in such a proceeding as this such action must be conclusive proof, not to be gainsaid, that the corporation existed from the time of such recognition. The assessment which it is sought here to enforce was made after that date, and seems to have been made in accordance with the statute having reference to the organization of such district. If the board of trustees and commissioners used *data* furnished by surveys, estimates, and reports made before that time, this was in the nature of evidence considered by them, but does not invalidate their acts, otherwise legal, in levying the assessment. The cases cited by appellant to the effect that, if it appear from the complaint that no reclamation district *de jure* or *de facto* is shown to have existed when the assessment was made, a demurrer such as here involved should be sustained, are not in point, as we think. For these reasons we advise that the judgment be affirmed.

We concur VANCLIEF, C., BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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95 Cal. 606

BALL v. KEHL. (No. 14,696.)

(*Supreme Court of California.* Aug. 12, 1892.)

WATER RIGHTS—ADVERSE USER—FINDINGS OF COURT.

1. In an action to enjoin defendant from closing a waste gate in his canal, it appeared that for 12 years plaintiff had used, for irrigation and domestic purposes, "all water discharged through such waste gate at a certain point above defendant's mill, "whenever said mill was not being run or operated;" that at times when the mill was not running defendant permitted plaintiff to so use it, and at other times plaintiff had taken and used the water without express permission; that after so using it for six years plaintiff posted a notice on said waste gate, claiming "all the waste water flowing from the mill race," and the right to divert and use it as "heretofore done." The evidence did not show that defendant or his grantors ever saw such notice, or knew that plaintiff claimed the right to so divert and use the water without permission, or that plaintiff had so taken and used it for a continuous period of five years. *Held*, that plaintiff acquired no prescriptive right to such water by adverse user.

2. As the record in such case contained written findings of fact and law, and there was no finding on the issue as to adverse user, a waiver of such finding must affirmatively appear, and will not be presumed.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by Johanna Ball, as administratrix of the estate of N. H. Ball, deceased, against Peter Kehl, for an injunction. From a judgment for plaintiff, defendant appeals. Reversed.

Willis, Cole & Craig, (*R. E. Houghton*, of counsel,) for appellant. *H. C. Rolfe* and *Rowell & Rowell*, for respondent.

VANCLIEF, C. The object of this action is perpetually to enjoin the defendant from closing a certain waste gate in his canal during all such times as he may not be using the water flowing in the canal for the purpose of propelling his gristmill; the plaintiff claiming a prescriptive right to divert the water from the canal through the waste gate, for the purpose of irrigating his land, whenever the water is not being used by defendant for the purpose of propelling his mill. It is alleged in the complaint that, about 30 years before the commencement of this action, the grantors of the defendant constructed a canal about one mile in length, through which they diverted water from Warm creek, and conducted the same to their gristmill, in the county of San Bernardino, for the purpose of propelling the machinery of said mill, but, until within a few days before the commencement of this action, never claimed or used the water for any other purpose; that, subject to the right of defendant to use the water for all purposes of running said mill, the plaintiff, during 12 years before the commencement of this action, appropriated, claimed, and used adversely to defendant, for irrigating his land, all the water discharged from said ditch through said waste gate, at a point about 100 yards above said mill, "whenever the said mill was not being run or operated;" and also alleged that plaintiff "is the owner of the right to the use and flow of water from said canal for irrigation, agricultural and domestic purposes, as aforesaid, whenever the same is not needed for running said mill as aforesaid, and of the right to turn said water from said canal at the place of diversion, as hereinbefore stated." The complaint then proceeds as follows: "That heretofore, to wit, on or about the 10th day of August, 1888, the defendant, without right, and while said mill was not being operated, nor the water of said canal needed or used for operating or running the same, closed the said gates in the side of said canal, and caused the said water to flow down said canal, and away from plaintiff's said premises, and deprived plaintiff of the use thereof; and defendant has ever since said last-named date caused said gates to be closed, and deprived plaintiff of the use of any of said water, notwithstanding a great portion of the time the said water has not been used or needed to run said mill, and said mill has not been run or operated, and defendant threatens to continue so to deprive plaintiff of the use of any of said water at all times, even when said mill is not being run or operated, nor said water needed for running or operating the same." After further alleging irreparable injury as the consequence of being deprived of the use of said water, the plaintiff prays "that defendant be perpetually enjoined from closing said gate, and from depriving plaintiff of the use or flow of the water of said canal through said opening, except at such times as said water may be needed and actually used for running and operating said mill." The answer of defendant specifically denies each allegation of the complaint, except that defendant's grantors constructed and owned the canal and mill, and specifically denies any adverse appropriation or user of the water by the plaintiff or his grantors. Upon certain issues of fact the court found for the plaintiff; and, as a conclusion of law, found that plaintiff is the owner of the right to use water "from said canal through the first waste gate on the west side of said canal, about one hundred yards above the defendant's gristmill, at such times as the accustomed flow of the water in said canal is not used for the propulsion and operation of said gristmill, or for purposes incidental to or necessary for the propulsion and operation of said gristmill;" and thereupon awarded the perpetual injunction prayed for. Defendant's motion for new trial, made on a statement of the case, was denied, and he has appealed from the judgment and from the order denying his motion.

1. Appellant contends that the court erred in denying his motion for nonsuit, made at the close of plaintiff's evidence in chief, on the ground that such evidence did not tend to prove any appropriation or user of the water in question adverse to the defendant or his grantors. The cause of action stated in the complaint, if any, is based upon plaintiff's alleged right to take water from defendant's canal without defendant's permission and against his will; and the burden of proving such right was upon the plaintiff, since, so far as alleged in the complaint, such right was denied. It is admitted in the complaint that the vendors of the defendant constructed the canal and appropriated the water of Warm creek to run their mill, and it is not claimed and does not appear that the capacity of the canal is greater than necessary for that purpose while the mill is running. But it is claimed by plaintiff that the mill has not run all the time, and that, while it was not running, the defendant and his grantors had generally turned the water from the canal through a waste gate about 100 yards above the mill, and thence returned it to the creek through a ditch dug by themselves for that purpose, and all this appears to be true. But there was no evidence introduced by either party, before or after the motion for nonsuit, tending to prove that the plaintiff or his grantors ever, to the knowledge of defendant or his grantors, raised the waste gate, or took a drop of water from the canal without permission of the owner of the mill. It appears, however, that on some occasions, when the mill was not running, the owners permitted plaintiff and others to raise the waste gate and take water from the canal; and plaintiff's intestate—N. H. Ball—testified that on some occasions when the mill was not running, and when he could not find any one of the owners at or near the mill, he had raised the waste gate and taken water from the canal. He said: "I have never been conceded the right to lift the waste gate and turn the water away from the mill when the mill used it, by the previous owners or occupants of that mill. I had raised the gate for years before when the mill was not running. I suppose that was conceded to me as a right. I never asked for permission, and they never gave it. I never asked any one to permit me to do it. I was not forbidden to do it on different occasions, for I never did it when they wanted it at the mill. I would know, because I would ask. I would frequently ask Mr. Davies when he wanted to grind or use the water, and, if he did, I didn't meddle with it. * * * I admit, whenever they are working the mill or working about the premises of the mill, they have a right to use this water, and I claim the right to use it when it is not necessary to run the mill. I suppose that necessity is determined by the owners of the mill; they know when they want to use it. * * * I never constructed any ditch from the waste gate to my premises. I think the water flowed down, whenever they chose to permit it, through the sluice way to the head of the ditch that I now claim, or my reservoir. * * * During the time he (defendant) has been owner there (about four years) I don't know that I ever lifted that gate to let the water down, or lifted it at all. * * * I never asked his permission. I might have told my man to go and see if he wanted to grind, and if he didn't to let the water come down. As I told you before, I didn't want the water when the mill wanted it. * * * I never knew the mill to run on Sunday, and Sunday is all the water I want. If they chose to run on Sunday, I wouldn't expect it. If the population here should increase, and the demand for the products of the mill increase so that it was compelled to run night and day to oblige customers, I would expect no water. I said that I have raised that gate from fifty to a hundred times,—I don't know how many times. It is not the case that on all these occasions I first obtained the permission and informed the parties operating the mill before doing so. I stated I often went to the mill to find out whether they needed the water prior to raising the gate. I often went there to see. I went up there to see if they wanted to use it. It was times when the mill was not running, and Mr. Davies would let the water seep through, to keep the holes from drying up. I went up to see him, and if he didn't want to grind I would use it. If he wasn't there and wasn't grinding I would use it. I didn't claim to take it away from the mill when they wanted it, or claim any right to interfere with the mill."

According to Mr. Ball's testimony, he never claimed the right to take any water from the canal adversely to defendant or his grantors until about 17 days before the commencement of this action. While he admits their right to use the water as they deemed necessary, and also to determine when its use by them was necessary, he does not state that they had notice that he ever took water from the canal without their consent, but only that he sometimes took it when he could not find any of the owners on or about the premises. He always sought the owners, and when he could find them asked them whether they had any use for the water before he took the liberty to raise their waste gate. His own version of the circumstances under which he raised the waste gate when the owners were present unmistakably indicates that he did so only by their consent. His inquiry as to whether they desired to use the water was evidently intended by him, and understood by them, to be a request on his part for permission to use it. Construing his testimony as liberally as possible in his favor, there is nothing in it tending to prove that the defendant or his grantors ever had notice that he claimed the right to take water from their canal without their consent. Mr. Ball further testified that, after having used the waste water more than six years, he posted a written notice on the waste gate, stating that he claimed "all the waste water flowing from the mill race," and claiming the right to divert said water at a point "at the waste gate of said mill race, * * * and to conduct the same through a ditch and ditches to reservoirs, and to and upon said lands, [plaintiff's lands,] as has been heretofore done by me. * * *" This notice was posted March 5, 1883, and Mr. Ball testified: "I do not know what became of that paper. * * * I should judge that it remained there a few months, until the weather took it away, as far as I know." After posting this notice, plaintiff took and used the water as he had done during six years before, and not differently; and he always diverted the water from defendant's "mill race," at a point more than 300 feet below the waste gate. There is no evidence that defendant's grantors ever saw the notice, except the fact that it was posted; and, according to Mr. Ball's testimony, it was destroyed before defendant purchased the property. But, conceding that defendant and his grantors saw it, they were thereby notified only that plaintiff claimed "the waste water from the 'mill race,' to be diverted and used as it had been diverted and used by plaintiff during six years before." The "mill race" mentioned in the notice is the ditch dug by defendant's grantors to conduct the waste water from their waste gate to the creek. Possibly the notice might have had the effect of giving plaintiff a right to all water discharged through the waste gate, and there abandoned by the defendant as waste water; but it contained nothing indicating that plaintiff claimed a right, under any circumstances, to divert water from defendant's canal without his permission. Plaintiff acquired no right to open defendant's canal and take water from it, without defendant's consent, in consequence of the mere fact that defendant was not using the water at the time plaintiff took it. Such an opening of and taking water from defendant's canal was a trespass *ab initio*, until after it had been openly and notoriously repeated and continued during a period of five years, and, indeed, this seems to be the theory of the complaint. The motion for nonsuit raised the question whether or not the evidence substantially tends to prove that the trespass had been so committed and continued for a period of five years; and, as above shown, it would be a heavy strain upon the evidence to say that it substantially tends to prove that plaintiff was ever guilty of taking water from the canal, to the knowledge of defendant or his grantors, without their express or implied permission. However this may be, surely the evidence does not tend to prove that plaintiff continued so to take the water, even while it was not being used to run the mill, during a continuous period of five years. The burden of proving uninterrupted user, with knowledge of the owner, is on the party claiming by prescription. American Co. v. Bradford, 27 Cal. 361. Interruption of adverse user, however slight, prevents acquisition of title by prescription. Cave v. Crafts, 53 Cal. 135; Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645. The use of water by permission of the owner is not adverse. Feliz v. City of Los Angeles, 58 Cal. 74. The plaintiff, having failed to prove any right by prescription, can only have such right as he or his grantors acquired by appropriation of such waste water as defendant may elect to discharge through his waste gate, which right does not include the right to take water from defendant's canal without his consent. Brown v. Mullin, 65 Cal. 89, 3 Pac. Rep. 99. In this connection it is to be observed that there is a plain and substantial distinction between the wrongful taking of water from the ditch or reservoir of another, and the wrongful diversion of it from a natural stream before it enters the ditch or reservoir, (Heyneman v. Blake, 19 Cal. 579; Parks Canal & M. Co. v. Hoyt, 57 Cal. 44,) corresponding with the common-law distinction between trespass *vi et armis* or *de bonis asportatis* and trespass on the case. For the purpose of diverting water from Warm creek, it would not have been necessary to break defendant's canal, nor in any mode to take from it the water therein contained, which, being in defendant's possession and under his control, had become his personal property. Had the plaintiff claimed the right to divert water from Warm creek, instead of the right to divert the water from defendant's canal, probably the relative rights of the parties might have been determined by the rules announced in the cases of Ortman v. Dixon, 13 Cal. 34, and Smith v. O'Hara, 43 Cal. 371. But those cases are only partially applicable to the facts of this case. The plaintiff claims no right to take water from Warm creek, and it is clear that he could have acquired no right to the water in defendant's canal by the mere diversion or appropriation thereof, involving, as it would, a trespass upon defendant's property. The only alleged right of the plaintiff is the right to divert water from defendant's canal, without his consent and against his will, at all times when it is not necessarily used by defendant to run his mill; and, if acquired at all, this right could have been acquired only by uninterrupted adverse user during a period of five years. And conceding, for the sake of the argument only, that there was an adverse user during a part of the period of five years, this fact alone would not sufficiently tend to prove an adverse user during that whole period to entitle the plaintiff to recover.

2. But there is no finding upon the issue as to adverse user, and counsel for appellant contend that for this reason the decision is against law. The only answer to this point by respondent's counsel is that, inasmuch as the record does not show that findings were not waived, it must be presumed that they were waived. But where, as in this case, the record contains written findings of fact and law, the presumption contended for has never been indulged. In this case the judgment roll contains what purports to be findings of fact and law, under the following recitals:

"This case having been heretofore tried and submitted upon the pleadings, evidence, and briefs of counsel, the court finds the following facts." Following this are four paragraphs of findings of fact, and under the heading "Conclusions of Law," all four paragraphs of conclusions of law. Under these circumstances, I think there is no presumption that a finding on the issue as to adverse user was waived. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

95 Cal. 615

SOUTHERN PAC. R. CO. v. DUFOUR. (No. 19,067.)

(*Supreme Court of California.* Aug. 13, 1892.)

PERCOLATING WATERS—APPROPRIATION — DIVERSION — EVASIVE FINDING — FAILURE TO MAKE FINDING.

1. Civil Code, § 1410, provides that the right to the use of "running water flowing in a river or stream, or down a canon or ravine," may be acquired by appropriation. *Held,* that percolating water which seeped into a spring from a swamp, or wet land surrounding the same, was not subject to appropriation.

2. The fact that a person has appropriated water from a stream fed by a spring on another's land cannot prevent the owner of the land from digging trenches for a useful purpose, and thereby diverting the percolating waters which supply the spring.

3. A finding by the court, in the exact language of the complaint, that plaintiff did not on a certain day appropriate "the waters flowing into and from a certain spring, * * * to the extent of five inches measured under a four-inch pressure," as alleged, is evasive, and does not pass on the ultimate issue as to whether or not there was an appropriation, the date and amount of appropriation being immaterial.

4. In an action to enjoin defendant from digging a ditch and diverting certain waters from a spring, plaintiff claimed that it had lawfully appropriated the waters. The court found that the spring was fed by percolating waters not subject to appropriation, and that the digging of the ditch by defendant was for useful purposes on his own land, and above the spring. *Held,* that failure to make a finding on the issue as to whether or not there was an appropriation was immaterial, since percolating waters cannot be appropriated. McFarland, J., dissenting.

5. Where defendant at the close of his case withdraws a special defense which has been set up by him in addition to a general denial, and which is relied on by plaintiff to cure a defect in his complaint, an objection or exception must be taken in order that the withdrawal may be reviewed on appeal.

In bank. Appeal from superior court Kern county; A. R. CONKLIN, Judge.

Action by the Southern Pacific Railroad Company against Frank Dufour for an injunction. From a judgment for defendant, plaintiff appeals. Affirmed.

A. B. Hotchkiss and *C. H. Wilson,* (*Jos. D. Redding* and *J. E. Foulds,* of counsel,) for appellant. *Mahon & Laird* and *J. E. Haralson,* for respondent.

GAROUTTE, J. This is an action to restrain respondent from unlawfully diverting certain waters claimed to have been appropriated by appellant under the provisions of the Civil Code. Judgment went for defendant, and this appeal is prosecuted from the judgment and order denying the motion for a new trial. The findings of the court are not attacked, and the facts of the case may be briefly stated as follows: In the year 1888 Dufour acquired title to section 36 of a certain township and range situated in Kern county. Prior to this event said realty was the property of the state. Upon this tract of land was a small tract of marsh or swamp land, in which the water came to the surface of the ground. As early as the year 1880 plaintiff made an excavation or reservoir some five feet in diameter in this marsh, in which the water collected, and from thence it was transferred in a small underground pipe a mile or more distant to the railroad station of Cameron, where it was applied to the various uses of plaintiff. In the year 1886 plaintiff, in pursuance of section 1410[1] et seq. of the Civil Code, posted a notice at the said reservoir claiming five inches of said waters measured under a four-inch pressure, and it is upon these acts and the foregoing provisions of the Code that plaintiff's rights are based. Prior to the commencement of this action defendant made a tunnel into an adjoining hill, and dug a ditch in connection therewith, (said acts being done upon his own land,) for the purpose of procuring water for irrigation and for his sheep. The action of defendant resulted in plaintiff's reservoir becoming dry, and the water collecting in defendant's ditch, and this litigation followed. The court found "that said spring (reservoir) in the complaint described was on the 7th day of October, 1886, and for a long period of time prior to that date, and ever since such date, has been and now is fed solely by percolating waters which seep into said spring from the swamp or wet land surrounding the same, and such spring is not and never has been fed by any running stream of water." The finding is amply supported by the evidence, which clearly indicates that no stream of water runs into or from the bog or spring other than is conveyed away through plaintiff's pipe line. In the face of these facts it is entirely immaterial whether the steps taken by plaintiff under the statute law of the state were strictly within the provisions of that law or not. There was no water at the spot to which plaintiff could acquire the right of use either by statutory appropriation or adverse user, and this principle is supported by unquestioned authority. In Trustees of Delhi v. Youmans, 50 Barb. 316, the matter is exhaustively discussed, and Justice BOARDMAN there said: "The law controlling the rights to subterranean waters is very different from that affecting the rights of surface streams. In the former case the water belongs to the soil, is part of it, is owned and possessed as the earth is, and may be used, removed, and controlled to the same extent by the owner." After citing many authorities, the opinion continues: "These and other cases establish the principle that no action will lie for injuries caused by cutting off subterranean channels percolating the soil or running through unknown channels, and without a distinct or defined course." The facts of this case place it entirely without any recognized exceptions to the foregoing rule, and bring it directly in line, in all essential particulars, with Hanson v. McCue, 42 Cal. 303, where the principles declared in the case of Trustees of Delhi v. Youmans are fully adopted; and this court went to the extent of saying that, in the absence of any proof that the spring was supplied by any well-defined flowing stream, it would be presumed to be formed by the ordinary percolation of water in the soil. In this case, the court having found that the alleged spring or reservoir was fed by percolating waters alone, and the evidence disclosing that no stream of water whatever flowed naturally from the marsh or spring, it is apparent that title to the land carried title to the water, and plaintiff's acts of attempted appropriation created no right or easement, for no water was present which could be the subject of appropriation.

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[1] Civil Code, § 1410, provides that the right to the use of running water flowing in a river or stream, or down a canon or ravine, may be acquired by appropriation.

In addition to a specific denial of the allegations of the complaint, by way of a special defense defendant set out that the water flowing from said spring formed a natural water course through defendant's land, and that he was entitled to the use of said water as a riparian owner. At the close of defendant's case he withdrew his special defense, and this action of counsel is assigned as error. Upon an examination of the record, we find no objection or exception taken to the withdrawal of this special defense from the answer, and hence do not perceive how it can be a proper subject for review. If plaintiff, relying on the allegations of the defense to cure a defective complaint, was surprised and misled by such action of counsel, upon a proper showing he would have been entitled to a continuance in order that he might amend his complaint or procure additional evidence, but there is nothing to indicate that he applied for such relief.

The complaint states that on the 7th day of October, 1886, the plaintiff appropriated the waters flowing into and from a certain spring (then follows the location of the spring) to the extent of five inches, measured under a four inch pressure. The answer contains a specific denial of this allegation, and the court found as a fact, and in the exact words of the complaint, that plaintiff did not on the 7th day of October, 1886, appropriate the waters flowing into and from a certain spring (then follows the location of the spring) to the extent of five inches measured under a four-inch pressure. If the denial in the answer had been couched in the language of the finding, it would have fallen before objection, and the finding must likewise fall. It is evasive, and passes upon no material facts involved in the case. The pleadings presented the issue whether or not there was an appropriation of water. That was the ultimate fact, the heart of the case, and in response to that issue the court found that there was no appropriation of water upon the 7th day of October, 1886, to the extent of five inches measured under a four-inch pressure. The date of the appropriation and the amount of water appropriated were immaterial, and we are thus left without a finding as to the ultimate fact. Can this judgment stand in the absence of a finding upon the question of appropriation? It was held in Windhaus v. Bootz, 92 Cal. 623, 28 Pac. Rep. 557, that where the finding of a certain fact necessarily controlled the judgment, the omission of the court to find upon other issues would not constitute reversible error, for findings upon such issues might be placed to the credit of the appellant, and still the judgment stand. Upon this principle of law, respondent contends that, the court having found that the spring was sustained by percolating waters only, other findings became unnecessary, for under the authority of Hanson v. McCue, supra, such fact controlled the judgment in favor of respondent. Considered alone, this finding is not sufficient to accomplish such results, for it is not inconsistent with the fact that a natural stream of water flowed from the spring which might be the subject of appropriation. But the finding that the spring was fed by percolating waters, taken in connection with the additional finding that the digging of the trench or ditch by defendant was for useful purposes, upon his own land and above the spring, inflexibly directs the course of the judgment to the respondent. Conceding that a natural stream of water flowed from the spring, which under Ely v. Ferguson, 91 Cal. 187, 27 Pac. Rep. 587, could be the subject of appropriation, still that fact did not create any barrier which would prevent respondent from digging trenches upon his own land, even though the digging of such trenches resulted in the destruction of the spring as a source of water supply. If respondent's alleged diversion had been located by appellant at a point below the spring, and upon a natural stream flowing therefrom, then the principle of law involved would have been entirely different from that now presented. The land where respondent made his excavation was his own land, and the spring was situated thereon, although that fact is immaterial; for as Justice Crockett said in Hanson v. McCue, supra: "If the plaintiff was the owner of the Dixon spring, with a consequent right to the use of all of its waters, the defendant would have the clear right to dig upon his adjoining land for any useful purpose, notwithstanding he might thereby divert the percolations, and thus destroy the spring." The digging of respondent was upon his own land; he interfered with no natural stream of water, either surface or subterranean; the waters were percolating waters,—a part of the soil itself,—and of which the owner had the free and absolute use. Under such circumstances, the owner of the land cannot be disturbed. This principle is settled law. Hanson v. McCue, 42 Cal. 305; Mosier v. Caldwell, 7 Nev. 363; Trustees of Delhi v. Youmans, 50 Barb. 316; Angel, Water Courses, § 112. It follows that the findings are sufficient to support the judgment. Let the judgment and order be affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; DE HAVEN, J.

PATERSON, J. I concur. No order was made striking out the cross complaint, but the court finds it was withdrawn. Assuming, however, that it is still a part of the record, and that the court erred in admitting evidence to contradict the defendant's allegation that the water flowing from the spring formed a natural water course, there are no specifications of error. The appellant's contention, therefore, cannot be considered. The findings support the judgment, and there is no specification as to the insufficiency of the evidence to support any of the findings. The failure of the court to find on all the issues is not assigned as ground for a new trial,—it is not alleged that the decision is against law. As the facts found support the judgment, the failure of the court to find on any issue not necessary to support the judgment cannot be considered on the appeal from the judgment. Winslow v. Gohransen, 88 Cal. 450, 26 Pac. Rep. 504.

MCFARLAND, J., (*dissenting.*) I am not able to concur in the judgment of affirmance. It is true that the pleadings, the objections and exceptions, (and the want of them,) the findings, and certain occurrences at the trial, present such an uncertain, disjointed, and unsatisfactory record that it was difficult to see what was or was not decided in the court below. But I think there should be a new trial, so that, under amended pleadings and proper findings, it may be discovered what the real facts of the case are, and what principle of law is applicable to the rights asserted by the parties; and I think that the deficiencies of the findings are grounds for reversal. In the complaint it is averred, in substance, that "on the 7th day of October, A. D. 1886, the plaintiff appropriated the waters flowing into and from a certain spring, [describing its location,] to the extent of five (5) inches, measured under a four-inch pressure; that it conveyed the said water to Cameron station on its railroad, and used it for supplying its locomotives and employes with water; and that it continued to so use it until the ——— day of February, 1889, when defendant wrongfully diverted it from the pipes and tanks of plaintiff." The answer denies that plaintiff ever appropriated any of said waters at any time, or that defendant wrongfully diverted the same; and avers that since July 31, 1888, defendant has been the owner in fee of certain described land; that the spring is on said land; that "the water flowing from said spring forms a natural water course flowing through defendant's said land," and that defendant, as a riparian owner, uses and has the right to use "said spring and water course" for domestic purposes, watering stock, etc., and that plaintiff, since said July 31, 1888, has, by means of a pipe, tapped "said spring, and the waters flowing therefrom," and diverted them away from defendant's land. It is clear, therefore, from the pleadings, that there is a "water course" having its source at the spring. It is said that defendant "withdrew" that part of his answer which admitted and averred this water course. In my judgment, it certainly was not withdrawn. The part of the answer which contains this averment is called by the parties a "cross complaint." What happened was simply this: After defendant had rested, plaintiff's counsel—for some reason—chose to say that he desired to introduce the so-called "cross complaint" in evidence; whereupon defendant's counsel made the remark, "I desire to say we dismiss the cross complaint." This remark amounted to nothing more than any other expressed desire for something never obtained,—even if any meaning could be attached to the word "dismiss," as therein used. The *status* of the answer was not changed in the least by the remark, and it would not have been changed if counsel had used the word "withdraw." He could not have withdrawn the answer by taking physical possession of the paper on which it was written, and putting it in his pocket, which would have been a much more palpable thing than the mere expression of a desire to withdraw it. The record could not have been changed to suit counsel's desire without an order of court.

The main issue in the case, therefore, was whether plaintiff had appropriated any part of this water course, and the only findings on this issue were that "the plaintiff did not, on the 7th day of October, 1886, appropriate the waters flowing into and from a certain spring, * * * to the extent of five inches, measured under a four-inch pressure;" and "that plaintiff did, from the 7th day of April, 1866, up to the ——— day of February, 1889, enjoy the uninterrupted use of some water taken by it from said spring," but that the amount was less than five inches. Of course, these findings are utterly irresponsive to the said issue; and there were other findings fully as defective as these.

It is said, however, that defective findings on all other issues are immaterial, because the court found (in findings 6 and 7) that the spring was "fed solely by percolating waters," and not by "any running stream of water, and that the water was taken away from the spring and water course by a trench which defendant dug on his own land near the spring, "with a view of securing water for his sheep and stock." I think that finding 7 is entirely too vague and uncertain to form a basis for the application of certain alleged doctrines about percolating waters. I have not been able to find any case in which it has been held that a spring and water course originating in it can be lawfully undermined and destroyed by a trench or tunnel run for that express purpose, to the injury of a vested right in the water course. And the evidence in the case at bar tends strongly to show that defendant's tunnel and trench were run for the express purpose of destroying the spring and water course; and that the main effect was, not to prevent percolating waters from flowing into the spring, but to compel the waters of the spring and water course to flow out, and down into the trench. I think, therefore, that the findings should have been more specific on this point, and should have stated the facts clearly and fully. It may be remarked that a water course is none the less a water course, because it has its source in a spring fed by "percolating" waters. The case relied on by respondent is Hanson v. McCue, 42 Cal. 303. There were two opinions delivered in that case, one of which was based mainly on Wheatley v. Baugh, 25 Pa. St. 528, (the citation in the opinion being incorrectly given as 23 Pa. St.,) and the other upon Trustees of Delhi v. Youmans, 50 Barb. 316. In the Pennsylvania case the facts were that "a mining corporation, in the course of necessary operations in mining minerals from their own land, interrupted the percolations which supplied a spring on an adjoining tract;" and, of course, the court held that where a miner, working his mine in the usual way, interrupts percolating underground water, the result is incidental to the lawful use of his land, and, if it causes loss to an adjoining proprietor, such loss is *damnum absque injuria*. In the case from 50 Barb. the facts do not so clearly appear, but the court say that "if the defendant's excavation or ditch drew the water from the plaintiff's spring, instead of stopping the flow of water from defendant's land to such spring, then the defendant would be liable in this action." In Hanson v. McCue itself the facts were materially different from those in the case at bar. In that case, if there had been a natural water course running from the spring, which Hanson had appropriated years before McCue or his grantors had acquired any estate in the land, and McCue had afterwards diverted any of the water to the injury of Hanson's prior right, then the facts would have been similar to those claimed by plaintiff in the present case. But the facts in that case were that McCue's grantor owned the land on which the spring was as early as 1844, in which year he constructed an artificial ditch, by which he carried the water several hundred yards to a vineyard. This ditch crossed a piece of "unoccupied and unclaimed" land, which Hanson did not acquire until a dozen years afterwards. When McCue undertook to change the course of the water, thus leaving the old ditch dry, Hanson claimed that he had acquired a right by prescription to have the water continue to flow in the old ditch; but the court held that there was no such prescriptive right, because McCue would have no right to complain that the water in the artificial channel, after leaving the spring, was used below by Hanson, and therefore there was no "presumption of the grant of an easement." Therefore, as Hanson had no right to the flow of the water through the artificial ditch, it made no difference what McCue did with it; and that consideration was determinative of the case. But in the case at bar plaintiff claims that it appropriated the waters of the spring and water-course to a useful and most necessary purpose, while the land on which they were situated was public land, and years before the defendant had any interest therein. Nearly all the cases in which the disturbance of percolating water has been held harmless have been cases where the party charged has dug a well, or worked a mine, or made some other excavation, in the lawful enjoyment of the ordinary use of his land, and where the loss to the complaining party was merely incidental to such use, and not the result of a direct intent to cause such loss. Two very instructive and exhaustive opinions upon the subject are to be found in Pixley v. Clark, 35 N. Y. 520, and Dickinson v. Canal Co., 7 Exch. 282. I fear that the affirmance of the judgment of the case at bar, as it now stands, will make a precedent that will be misleading as to some interesting and important phases of the law of water rights. I think that the case should be retried under proper pleadings, and that there should be findings upon all the material issues setting forth clearly and fully the pivotal facts of the case.

(95 Cal. 630)

GUIDERY v. GREEN. (No. 14,474.)

(*Supreme Court of California.* Aug. 15, 1892.)

PLEADING—AMENDMENT DURING TRIAL—PAROL EVIDENCE.

1. Where, on the trial, objection is made to material evidence offered by defendant on the ground that it is not responsive to any issues made by the pleadings, it is error to refuse to permit defendant to file amendments obviating the objection, when the amendments present no new defense.

2. In an action on a written contract, the defense was that it had been superseded and annulled by a subsequent written agreement, which was silent on the question of consideration. *Held*, that oral evidence was admissible to show that the consideration was that the former contract should be canceled, and claims thereunder waived.

3. Where a written contract relates to services to be rendered by one of the parties, but is silent as to the compensation to be paid therefor, oral evidence is admissible to show the compensation agreed upon, as such evidence does not tend to vary the terms of the written contract, but to establish an independent collateral agreement, not inconsistent therewith.

Department 1. Appeal from superior court, Butte county; JOHN W. ARMSTRONG, Judge.

Action by one Guidery against one Green on written contract. From a judgment for plaintiff, defendant appeals. Reversed.

H. V. Reardan, for appellant. *John Gale*, for respondent.

HARRISON, J. The plaintiff's intestate, one Frost, brought this action to obtain certain specific relief for an alleged violation of a written agreement entered into between him and the defendant, January 12, 1885. The defendant set up as one of his defenses to the action that the agreement set out in the complaint had been superseded and annulled by a subsequent written agreement, executed in March, 1885, by the plaintiff and one Threlfall on the one part, and the defendant on the other. Upon the trial of the cause the defendant, aft er having proved the execution of the subsequent written agreement, sought to show that it had been executed upon the consideration and agreement between the parties thereto, that the agreement of January 12, 1885, should be canceled and all claims of the plaintiff against the defendant thereunder waived. The plaintiff objected to this testimony on the ground that it was an attempt by parol evidence to vary and contradict the terms of a written instrument, and also that it was not responsive to any issues made by the pleadings. The court having sustained this objection, the defendant then presented certain amendments to his answer in order to obviate the objection that the evidence was not within the issues, which he asked leave to file. To this the plaintiff objected upon the ground "that it is too late; that it is unconscionable; that it is taking us by surprise; and that it shows gross negligence on their part in not asking to amend before,"—which objections were sustained by the court. If the defendant could establish the facts presented by these amendments to his answer, they would constitute a defense to the plaintiff's demand, (Bank v. Stover, 60 Cal. 387;) and for that reason, if for no other, the court should have allowed the amendments, (Stringer v. Davis, 30 Cal. 321.) If by reason of such amendments the court was satisfied that the plaintiff was taken by surprise, and required further time in which to make suitable preparations for meeting such defense, it could have continued the case or postponed the further hearing until the plaintiff should have reasonable time to make such preparation, and at the same time would impose upon the defendant such terms as would compensate the plaintiff for the expense and delay caused thereby. It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues, or properly presented by his pleading. This rule is especially cogent when the objection to testimony is not that it is then for the first time brought to the notice of the adversary, but that by reason of the language of the pleading it is not within the terms of the issue. The fact sought to be shown by the testimony offered on the part of the defendant was not a defense, then, for the first time presented in the case. The defendant had attempted to set it up as a defense in his original answer, but, by reason of certain phraseology used therein, the court held, upon the objection of the plaintiff, that it did not present an issue that would render the testimony admissible, and, when the defendant asked leave to amend his answer so as to obviate this ruling, the court should have granted his motion. The evidence offered did not purport to vary or contradict the terms of the written instrument set forth in the complaint, nor did it have the effect to add any new term to that agreement. Its purpose was to show that that agreement had been canceled by mutual consent, and had no longer any operative effect. Such evidence is as admissible as is oral testimony that the terms of a written agreement have been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. In either case the object and effect of such evidence is not to change any of the terms of the contract, but to show that the contract has no longer any existence, and therefore cannot be made the basis of an action. The objection that the written agreement could be altered only by an agreement in writing, or by an executed oral agreement, (Civil Code, § 1698,) has no application to the facts offered to be shown. The offer was to show that the subsequent written agreement had been substituted for the original agreement, and the oral agreement, of which proof was offered, was the agreement to make this substitution. It was not an offer to prove an executory oral agreement, but an oral agreement that had been fully executed by the substitution. This, in effect, was an offer to prove a novation. Bank v. Stover, supra Neither did this testimony tend to vary or contradict the terms of the subsequent written agreement, but was merely for the purpose of showing the consideration upon which it was executed. The instrument itself was silent upon the subject of its consideration, and any evidence in reference thereto would not affect its terms or impair their validity. After the defendant had proved the execution of the second written agreement, the witness Threlfall was asked concerning the compensation he and Frost were to receive from the defendant in case they should make the sale therein provided for, and, upon the objection that this testimony would vary or contradict the terms of the written instrument, the court excluded it. The written agreement, however, made no reference to the compensation they were to receive, and the evidence sought was concerning a separate collateral agreement entered into between the parties, and was entirely independent of any of the terms of the written agreement, and the court should have allowed the question to be answered. Proof is always admissible of any collateral parol agreement, or of any independent fact which is not inconsistent with or does not qualify any of the terms of the written contract, even though it may relate to the same subject-matter.

The order is reversed.

We concur: PATERSON, J.; GAROUTTE, J.

(95 Cal. 636)

DE PEDRORENA v. HOTCHKISS *et al.* (No. 14,831.)

(*Supreme Court of California.* Aug. 15, 1892.)

APPEAL — NOTICE — RECORD — MINUTE ORDERS—JUDGMENT BY DEFAULT — ACTION TO CANCEL DEED—PLEADING.

1. Objection that it does not appear that notice of appeal was served, will be disregarded when it is not made and notified to appellant in writing 10 days before the hearing, as required by rule of court.

2. The statute (Code Civil Proc. § 670) does not make "minute orders" part of the judgment

roll, and, although printed in the transcript, questions raised thereon cannot be considered on appeal, in the absence of a bill of exceptions.

3. Where an answer is found in the judgment roll, and a minute order in the transcript shows that defendants were permitted to answer, but the decree recites that judgment was taken by default, the judgment will be presumed to be regular.

4. Where, in an action to cancel a deed, the complaint states that the deed was made without consideration, and procured by undue influence, but further shows that there was sufficient consideration, which had failed, and states no facts in regard to the exercise of undue influence, it is sufficient to support a decree for plaintiff, when advantage of its defects is not taken by special demurrer.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; John R. Aitkin, Judge.

Action by Nellie Burton de Pedrorena against A. B. Hotchkiss and H. T. Christian. From a judgment for plaintiff, defendant Hotchkiss appeals. Affirmed.

A. B. Hotchkiss, pro se. J. E. Deakin, for respondent.

Temple, C. This appeal is from the judgment, without a bill of exceptions, and practically by defendant Hotchkiss alone, for, although the notice of appeal is signed by Hotchkiss, as attorney for the defendants, the other defendant filed a disclaimer in the lower court, and no point is made here in his behalf.

Objection is made by respondent to the jurisdiction of the court to entertain the appeal, on the ground that it does not appear that the notice of appeal was served. The rules of this court provide that "exceptions or objections to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or to its service, or any technical objection or exception to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which can be cured on suggestion of diminution of the record, must be taken and notified to the appellant in writing, at least ten days before the hearing, or they will not be regarded." This was not done in this case, and it is quite evident that the objection is one which may be avoided in the mode pointed out. Respondent's attorney states in his brief that he has filed an affidavit in this court which shows that the defect cannot be cured by a suggestion of diminution of the record. No such affidavit is found here in the record, and I know of no warrant for such practice, nor can I see how any such affidavit could be made which might not be controverted. The consequence of failing to give the notice required by the rule cannot be avoided by making the affidavit.

The judgment is by default entered upon defendant's failure to appear and answer. He therefore had no attorney of record, or, if he had, perhaps the proof of service of the notice of appeal might show due substitution of attorneys, if we conceded that such substitution was necessary to sustain the notice of appeal. Notwithstanding the default, an answer on the part of defendant Hotchkiss is found in the judgment roll, yet it is recited in the decree that judgment was taken against the defendant Hotchkiss upon his default, which had been duly entered. There are two minute orders printed in the transcript, from one of which it appears that the default was set aside and defendant allowed to answer upon certain stated conditions, and from the other that the answer filed was stricken out, because defendant had failed to comply with the conditions upon which the default was set aside, and he was permitted to answer. The statute does not make these minute orders part of the judgment roll. Section 670, Code Civil Proc. They are therefore improperly in the record,—there being no bill of exceptions,—and we cannot notice the points attempted to be made in regard to them. Orders striking out pleadings do not constitute part of the judgment roll. Douglas v. Hutchinson, 46 Cal. 49. We must presume, therefore, in favor of the regularity of the judgment. In this case, however, although there is an answer on file, it appears to have been filed after Hotchkiss had made default, and his default had been duly entered.

It only remains to inquire, therefore, whether the complaint is sufficient to support the decree. The complaint shows that plaintiff's ancestor conveyed to appellant's wife certain real estate for the expressed consideration of legal services to be rendered by appellant; that, contemporaneously with the grant, appellant and wife executed an agreement in writing, in which it was recited that the grantor owned certain lots of land (the same conveyed) the title to which was clouded. Appellant agreed to examine the title to all the properties conveyed, to clear the title to such as the grantor owned at his own cost and expense, and then to reconvey one half thereof to the grantor. The grant and agreement were made in 1880; the suit was brought in 1888. It is averred that appellant has not performed or attempted to perform his agreement; that the title to the property is still clouded; and that the conveyance and agreement were without sufficient consideration, and were procured solely by the undue influence of appellant. It is further alleged in the complaint that the appellant has not only made no attempt to perform the agreement which constituted the sole consideration for the conveyance, but, in violation of the trust created by the transaction, has sold a portion of the property, appropriating the proceeds to himself, and repudiating the obligations of the agreement and the trust, and claims to be the absolute owner of the property. The complaint could not be sustained as against a special demurrer. It is inconsistent, illogical, and insufficiently states the facts. It avers that the conveyance was made without consideration, but shows that there was sufficient consideration for the conveyance, which, however, has wholly failed. It avers that the conveyance was procured by the undue influence of appellant, but states no facts or circumstances in regard to the exercise of such influence. If it be conceded that the facts and circumstances ought to have been specifically detailed, yet it is but the case of an insufficient statement, and not the lack of an essential fact. Counsel quotes section 1566 of the Civil Code, and claims that the conveyance was not wholly void, and that plaintiff ought to have proceeded to rescind, as prescribed in the Code. This suit is practically for that purpose. As appellant, according to the allegations of the complaint, had done nothing in the way of performance, and had parted with nothing, but wholly repudiated the contract and the trust relation, nothing was required of plaintiff in the way of placing him *in statu quo ante*. I therefore advise an affirmance of the judgment.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(95 Cal. 626)

CHURCH v. SHANKLIN *et al.* (No. 14,713.)

(*Supreme Court of California.* Aug. 15, 1892.)

CONTRACTS—PERFORMANCE.

Where a mortgage is given to secure notes made payable whenever plaintiff shall perfect a certain title to the satisfaction of attorneys named in the notes, the mortgage cannot be foreclosed if the attorneys named, in good faith and from no improper motive, withhold their approval of the title, though the title may be good, in the opinion of the court.

Department 1. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by one Church against one Shanklin and others. From a judgment for plaintiff, defendants appeal. Reversed.

Church & Cory, for appellants. *F. Church* and *R. P. Davidson*, for respondent.

PATERSON, J. This is an action to foreclose a mortgage given to secure the payment of two promissory notes, for the sum of $5,000 each, payable by defendants to plaintiff "whenever he perfects the title to lots 14, 15, and 16, in block 85, of Fresno, to the satisfaction of Church & Cory, attorneys. * * * Neither principal nor interest to be due and payable until said title is perfected as aforesaid, nor until one year." The record fails to show that Church & Cory refused to express satisfaction with the plaintiff's title through any fraudulent or improper motive. The learned judge of the court below, in determining the issues between the parties, stated he would assume that the attorneys acted in the best of faith, but held that, if the title was in fact good, the defendants could not refuse to pay the note because their attorneys were not satisfied with the title. In this we think the court erred. The case at bar differs in two very material respects from the cases cited by respondent, namely, there was conceded to be a defect in the title at the time the notes were executed and delivered, requiring action on the part of the plaintiff to cure, and the arbitrators selected were not parties to the contract, but were disinterested persons, chosen for the express purpose of passing upon the title. It was doubtless the object of the parties to avoid disputes and expensive litigation; certainly some effect must be given to the stipulation contained in the agreement. To hold that the opinion of the court, as to the validity of the title, can be substituted for that of the arbitrators, would defeat the intention of the parties, and, in effect, make a new contract for them. This the court has no right to do. The parties saw fit to make Church & Cory the umpires between them, and if the latter exercised their best judgment in good faith, and with an honest intention of determining the question as to the validity of the title, their conclusion is final and binding It cannot be subjected to the revisory power of the courts without doing violence to the plain words of the contract. Suppose that Church & Cory had certified that the title was perfect, could it be maintained that the defendants could defeat a recovery on their notes by showing that in fact the title was no better than when the contract was made? We think not. In Butler v. Tucker, 24 Wend. 449, the court said: "The defendant does not set up that part of the covenant which requires the work to be done to his satisfaction, and in omitting to do so he has acted very properly. As to that, it would probably be enough for the plaintiff to aver that the work was in all other respects completed in pursuance of the contract; for if the defendant was not satisfied with such a performance, it would be his own fault, and, as a general rule, a party cannot insist on a condition precedent when he has himself defeated a strict performance. But when parties fix on an umpire and agree to abide by his decision, neither of them, without the consent of the other, can withdraw the question of performance from the common arbiter for the purpose of referring it to the decision of a jury." In Wallace v. Curtiss, 36 Ill. 158, the court said: "No fraud of the inspector is suggested, and if he was deficient in judgment, not being able properly to discriminate the different classes of lumber, it is the misfortune of the defendants in choosing him. By choosing him they relied on his judgment, and must be concluded by it in the absence of all fraud." See, also, Kihlberg v. U. S., 97 U. S. 401; Doll v. Noble, 116 N. Y. 232, 22 N. E. Rep. 406; Whiteman v. Mayor, 21 Hun, 120; Baasen v. Baehr, 7 Wis. 520; McCarren v. McNulty, 7 Gray, 141; Duplex Safety Boiler Co. v. Garden, 54 Amer. Rep. 711, note; Worsley v. Wood, 6 Term R. 722. The appellant offered to show at the trial that other reputable attorneys did not consider the title perfect, or what is known as a "merchantable title," but on objection of the plaintiff the offer was excluded. It cannot be claimed, therefore, that, in rejecting the title, Church & Cory acted capriciously, which, if alleged and proved, might be taken as a badge of bad faith. As there was no allegation in the complaint that the action of the arbitrators chosen by the parties was controlled by fraud or collusion between them and the defendants, or by undue influence of any kind, we think the demurrer ought to have been sustained. The notes, according to their terms, cannot mature, and no action therein can be maintained, until Church & Cory, acting in good faith, state that in their opinion the title has been perfected, or some sufficient reason is shown why they have not done so. The judgment and order are reversed, and the cause is remanded, with directions to the court below to sustain the demurrer to the complaint.

We concur: Harrison, J.; De Haven, J.

(3 Cal. Unrep. 533)

Austin v. Gagan *et al.* (No. 14,639.)

(*Supreme Court of California.* Aug. 16, 1892.)

Appeal—Review—Presumption.

1. On appeal from an order granting a new trial, where the motion was made on several grounds, including insufficiency of the evidence, and it does not appear on what ground it was granted, it will be presumed, in support of the order, where there was a conflict of evidence on a material point, that it was granted because of insufficiency of the evidence, and the order will not be reversed.

2. An order granting a new trial, when the evidence is conflicting, will not be reversed because the judge who made the order was not the one who presided at the trial.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by one Austin against one Gagan and others. From an order granting a new trial, defendants appeal. Affirmed.

F. T. Nilon and *Chas. W. Kitts*, for appellants. *Thos. S. Ford*, for respondent.

De Haven, J. The defendants appeal from an order of the superior court granting the plaintiff a new trial. The motion for a new trial was based upon alleged errors of law occurring during the trial, and upon the further ground that the evidence was insufficient to justify the decision of the court. The motion was heard upon a bill of exceptions, and the order of the court granting it does not specify the particular ground upon which the order was made.

1. Upon such a record the rule is firmly established here that the order will not be disturbed if the court was justified in granting the motion upon any of the grounds specified in the notice of motion for new trial. Weddle v. Stark, 10 Cal. 302; Oullahan v. Starbuck, 21 Cal. 414; Altschul v. Doyle, 48 Cal. 535; Pierce v. Schaden, 55 Cal. 407; People v. McAuslan, 43 Cal. 55. If there was a substantial conflict in the evidence, and the order is general in its terms, it will be presumed in support of the ruling of the court below that the order was based upon the ground of the insufficiency of the evidence, where that was one of the grounds of the motion. The action in this case was one in form to determine an adverse claim to real property, under section 738 of the Code of Civil Procedure, and the title of plaintiff is an entry of the land in controversy as a homestead under the laws of the United States. This entry or homestead filing was made on April 17, 1886, and it was a material question in the case whether at that date the land was known as "mineral land," within the meaning of the laws of the United States, and so not subject to entry as a homestead. The evidence upon this point was conflicting in a substantial degree, and, this being so, we cannot disturb the order of the court setting aside its findings and granting a new trial.

2. Nor is the rule that this court will not reverse an order granting a new trial, where the evidence is conflicting, changed by the fact, appearing in this case, that the judge who granted the motion was not the one who presided at the trial. Altschul v. Doyle, 48 Cal. 535; Wilson v. Railroad Co., 94 Cal. 166, 29 Pac. Rep. 861. It is unnecessary to pass upon the other questions discussed in the briefs of counsel. Order affirmed.

We concur: McFarland, J.; Sharpstein, J.

(3 Cal. Unrep. 535)

Sirkus v. Central R. Co. (No. 14,482.)

(*Supreme Court of California.* Aug. 17, 1892.)

Record on Appeal.

Where, on appeal from a refusal to grant a motion for a new trial on the ground of newly-discovered evidence, the record does not show the evidence given on the trial of the cause, so that it may be determined whether or not the newly-discovered evidence is merely cumulative, it will be presumed that the lower court found that it was cumulative, and that the order refusing a new trial was correct.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Sirkus against the Central Railroad Company. From a refusal to grant a new trial, plaintiff appeals. Affirmed.

H. B. M. Miller, for appellant. *Frank Shay*, for respondent.

Per Curiam. After a verdict and judgment thereon in favor of the defendant in an action for damages resulting from personal injuries charged to have been caused by the negligence of the defendant, the plaintiff moved for a new trial upon the ground of newly-discovered evidence, and in support thereof presented certain affidavits which he claimed would have produced a different result had the evidence therein disclosed been before the jury. The court denied the motion, and the plaintiff has appealed. The record does not contain any of the evidence which was before the court or considered by the jury at the trial of the cause, and we are unable to determine whether or not the matter contained in the affidavits is cumulative, or whether it so overcomes that evidence that the court below would have been justified in granting a new trial. A motion for a new trial upon this ground is addressed very largely to the discretion of the trial court, and as it is always incumbent upon the appellant to show that error has been committed, so upon an appeal from this order it was the duty of the appellant to make it appear from the record that the court did not properly exercise its discretion. Byrne v. Reed, 75 Cal. 277, 17 Pac. Rep. 201. In the absence of any information respecting the former testimony, we must assume that the judge in passing upon the motion was of the opinion that the matter set forth in the affidavits was cumulative, and would not have changed the result. He was familiar with the testimony that had been given at the trial, and was able to compare the newly-discovered evidence with that testimony, and his action must be assumed by us to have been correct.

The judgment and order are affirmed.

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95 Cal. 640

People v. Choynski. (No. 20,756.)

(*Supreme Court of California.* Aug. 17, 1892.)

Blackmail—Instructions.

1. In a prosecution under Pen. Code, § 523, providing for the punishment of one who, for the purposes of extortion, sends a letter "expressing or implying, or adapted to imply, any threat such as is specified in section 519," an instruction that defendant is guilty if the letter on which the charge is based was adapted to imply "any threat," is erroneous, as only threats such as are specified in section 519 are to be considered.

2. In such a prosecution, where the letter threatens to make a charge against the person to whom it is sent, the truth or falsity of the charge is immaterial.

3. In such a prosecution, when the letter does not on its face express or imply a threat, the question whether it is "adapted to imply any threat" is for the jury, and an instruction which assumes that it is so adapted is erroneous.

Department 1. Appeal from superior court, city and county of San Francisco; J. McM. Shafter, Judge.

I. N. Choynski was convicted of blackmail, and appeals. Reversed.

J. D. Sullivan, for appellant. *J. D. Page*, for respondent.

Garoutte, J. The appellant was convicted of a felony, to wit, sending a threatening letter with intent to extort money, and now prosecutes an appeal to this court from the judgment and order denying his motion for a new trial. The prosecution is based upon section 523 of the Penal Code, which reads as follows: "Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in section 519, is punishable," etc. The letter sent by appellant, and upon which this prosecution was founded, reads: "Office Public Opinion. I. N. Choynski, editor, 137 Taylor street. San Francisco, 20, 2, 1890. O. Livermore, Esq.—Dear Sir: You will please take the matter I have written for and in your behalf, and relieve me of any further responsibility. Respectfully, etc., I. N. Choynski. Will go to press to-morrow, Friday." The demurrer to the information was properly overruled. It is not necessary that a threat should be apparent from the face of the letter, nor even necessary that it should be implied therefrom. The statute says if the language used is adapted to imply a threat, then the writing is sufficient. Parties guilty of the offense here alleged seldom possess the hardihood to speak out boldly and plainly, but deal in mysterious and ambiguous phrases. Mysterious and ambiguous to the world at large, but, read in the light of surrounding circumstances by the party for whom intended, they have no uncertain meaning. In addition to matters of innuendo stated in the information, it is charged in the language of the statute that the writing was "adapted to imply threats," and circumstances showing its adaptation to such purpose were entirely matters of evidence. We pass to a consideration of the instructions of the court.

After reading the section of the Code to the jury, heretofore quoted, the court said: "You will see, gentlemen, that the intent of the statute is to cover every supposable case. It does not require the character of the charge of threatening to be made against the person to be set out. It is not necessary to specify the offense imputed to the person to whom the letter is sent; but if it does express or imply, or is adapted to imply, any threat, the offense is committed." The instruction is too broad, as it tells the jury that, if the letter "is adapted to imply any threat, the offense is committed." The letter must be adapted to imply one or more of those threats specially mentioned in section 519, or the offense is not committed. There was evidence introduced by the prosecution as to the falsity of the charge which was threatened to be made against the prosecuting witness, and the court instructed the jury upon such matters. As the cause must be returned to the lower court for a new trial, we would suggest that, in the character of action here pending, the truth or falsity of the charge is immaterial. It was said in Morrill v. Nightingale, 93 Cal. 456, 28 Pac. Rep. 1068: "Under that kind of menace which consists in a threat of injury to the character of a person, it is entirely immaterial whether such person is guilty or innocent of the crime to be charged. It certainly would be no defense to the accusation of extortion that the charges or publications threatened to be made by the defendant, and by which he obtained valuable property, were true. The truth or falsity of those matters forms no element in establishing the guilt or innocence of a defendant charged with such extortion." The court gave the jury the following instruction: "But if this man is shown guilty of sending this letter, with the motive imputed, he is guilty of this offense, and should be found guilty, no matter as to the consequences, whatever they may be." This instruction is clearly erroneous, for, as we have seen, the letter which forms the foundation of the prosecution does not upon its face either convey a threat or imply a threat; and, in addition to the elements of the offense included in this charge to the jury, as sufficient to justify a conviction, the court should have added that it was not only necessary for the accused to have sent the letter and have had the intent to extort, but the letter must have been such a writing as was adapted to imply a threat. That was a question of fact to be found in the affirmative by the jury before a verdict of guilty could be rendered by them under the law. The charge, taken as a whole, is argumentative; consisting to a great extent of a *resume* of the evidence, and in many respects encroaching upon the rights of the jury by passing upon matters of fact. We had occasion to refer to this subject in People v. Gordon, 88 Cal 422, 26 Pac. Rep. 502, and there quoted with approval, as we again, do, the following language from People v. Williams, 17 Cal. 147: "The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which jurors pay to opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court; a word, a look, or a tone may sometimes in such cases be of great or even of controlling influence. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts." Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: Paterson, J.; Harrison, J.

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3 Cal. Unrep. 536

FREEMAN v HENSLEY, Sheriff. (No. 14,741.)

(*Supreme Court of California.* Aug. 17, 1892.)

FRAUDULENT CONVEYANCES — CHANGE OF POSSESSION—EVIDENCE.

1. In an action of claim and delivery against a sheriff for seven horses taken on attachment against plaintiff's vendor, it appeared that the sale to plaintiff was bona fide, and that there was an "immediate delivery." The evidence showed that soon after the delivery plaintiff employed a man who had been in the service of his vendor, and put him in charge of the horses; that with six of them in a team he and said vendor, with a like team, did a large amount of plowing for a third person; that while doing the plowing one of the horses of plaintiff's team was exchanged, for convenience in working, for one of the horses of his vendor's team. *Held*, that the evidence supported the finding that there was an "actual and continued change of possession" following the sale of the property to plaintiff.

2. In such case, evidence as to whom credit was given for the plowing done by plaintiff's team is immaterial, in the absence of an offer to show that the credit was given by his direction.

3. In such case, a witness having testified in chief that he never heard the vendor, during a certain time, make any statement as to the ownership of the property, it was proper to ask him, on cross-examination, if the vendor did not, in a particular conversation during that time, tell him the horses belonged to plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by John Freeman against John M. Hensley, as sheriff, to recover possession of personal property. From a judgment for plaintiff, defendant appeals. Affirmed.

Church & Cory, for appellant. *Van Meter & Warlow*, for respondent.

Haynes, C. This action. claim and delivery, was brought by respondent to recover certain horses. The horses in question formerly belonged to one Porter, and were purchased from him by Freeman, October 12, 1889, and were afterwards, on October 24, 1889, attached by defendant, as sheriff, as the property of Porter, in an an action brought by Patterson against Porter and Schell. It is conceded by appellant that there was no actual fraud in the sale of the horses by Porter to Freeman, but he contends that there was no immediate delivery of the property to Freeman, and that the sale was not followed by an actual and continued change of possession, as required by section 3440 of the Civil Code. The cause was tried by the court, and findings and judgment went for plaintiff, and, defendant's motion for a new trial having been denied, he appeals from the order denying it.

What constitutes an "immediate delivery" and an "actual and continued change of possession" is held to be a question of fact to be determined by the court upon the evidence presented in each particular case. Godchaux v. Mulford, 26 Cal. 322; Claudius v. Aguirre, 89 Cal. at page 503, 26 Pac. Rep. 1078. In the latter case it was said: "The circumstances connected with a transfer of personal property are so varied that it would be impossible to frame a rule applicable to each case, or to determine in advance what acts would be sufficient to meet the requirements of the statute." The obvious correctness of this statement precludes any very material assistance either to the trial court or this court from adjudicated cases. There was no conflict in the testimony relied upon to show an immediate delivery of the property by Porter to Freeman. The bargain was made in the evening, the consideration being partly an indebtedness of Porter to Freeman, and the remainder was paid in cash by Freeman. The property consisted of seven horses, harness, and wagon. The next morning Porter took Freeman to the corral, and said to him, "There are your horses; there they are." Freeman and one Strimbeck, who was then boarding with him, took charge of the horses, fed and watered and harnessed them, and Porter executed a bill of sale of the property to Freeman. After this Porter informed Freeman that he had promised one Fletcher to furnish two teams, of six horses each, and a man to drive one of the teams, to do certain plowing for Fletcher, and that Fletcher was to pay $69 per month for the team and a man, and asked Freeman if he would let the team go to do that work. Freeman replied that he wanted the team to work, and that if he could get Strimbeck to drive it he would send the team. Freeman thereupon hired Strimbeck, at $30 per month, to drive the team, and put him in charge of it. Porter also got a man and took another team of six horses, and both teams went to Fletcher's. Fletcher not being ready to commence plowing, the teams were put in pasture at Fletcher's for some days, after which plowing commenced, when Strimbeck took charge of and drove Freeman's team. Some testimony on the part of appellant tended to show that, after plowing commenced, changes were made of horses from one team to the other, so that they became mixed, some of Porter's horses being in Strimbeck's team, and some of Strimbeck's in Porter's. It was testified by respondent's witnesses that one of Strimbeck's horses was too slow for his mate, and one of the horses in the other team was too fast for his mate, and these two were changed for the purpose of making them work better, and this change continued until Porter's team was attached, when they were changed back, and respondent's horses continued in Strimbeck's charge for some days, when they were also attached as the property of Porter. For some time after the two teams went to Fletcher's, he (Fletcher) did not know of any change of ownership, but later, and before the property in question was attached, respondent personally informed him of his ownership, and that Strimbeck was in his employ, and in response to a question as to whether the foreman might discharge Strimbeck respondent said, "No; when the man I put in charge don't suit, send stock and all in."

The principal conflict in the evidence as to the manner in which the teams were used at Fletcher's was in regard to changing horses from one team to another. There was no conflict in the evidence touching the employment of Strimbeck by respondent, nor that he was put in charge of respondent's horses, nor that Porter did not ask or receive any compensation from Fletcher for the services of Strimbeck or the team driven by him. Little weight should be attached to the fact that prior to this transaction Strimbeck had worked for Porter, and had driven horses owned by Porter and Schell, including the horses in controversy. He had, however, been out of Porter's employment for some weeks, and during that time was boarding with respondent. The team did not remain at Porter's, nor was Strimbeck under the control or direction of Porter, but was under the immediate control and direction of Mr. White, the foreman of Mr. Fletcher. I think there was nothing in the temporary change of horses from one team to another, for reasons which probably made each more effective, which should be held to destroy the continuity of the change of possession, especially where it is conceded that the sale was not fraudulent, and where the immediate delivery of the property to respondent was satisfactorily shown; for while it may be true that the burden of showing the actual and continued change of possession was on the plaintiff, and that showing such immediate delivery does not prove the continuance of the change of possession, it nevertheless reflects a light in which the after treatment of the property may properly be viewed by the court. The court did not err in sustaining plaintiff's objection to the question put by defendant to his witness Fletcher, viz., "To whom did you give credit for the $69?" Obviously Fletcher's act could not affect the possession of Freeman or of Porter as a question of fact, nor be evidence of possession in the one or the other, unless made by their direction, and there was no offer to prove such direction. The question put to the witness White by plaintiff upon cross-examination was proper. The witness had testified in chief that he never heard Porter make any statement with regard to the ownership of the property while he was out there. The question on cross-examination called the witness' attention to a particular conversation, when it was asked if Porter did not tell him the team belonged to Freeman. After a careful examination of the evidence, I am of opinion that the court did not abuse its discretion in denying the motion for new trial; and advise that the order appealed from be affirmed.

We concur: TEMPLE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

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95 Cal

FRASER v. OTT. (No. 14,785.)

(*Supreme Court of California.* Aug. 19, 1892.)

DEED—DESCRIPTION.

The owner of a block of land conveyed to plaintiff a portion thereof, "being the north 2 acres of block No. 13 of the W. Company's 4-acre blocks," together with a right of way across "the south half of said block." The block was bounded on the west and south by streets 60 feet wide, and, if the block were measured to the center of these streets, it contained 4.65 acres, but, excluding the streets, it contained only 4 acres. *Held*, that as under Civil Code, § 1112, the title passed by a deed of property abutting on a highway extends to the center thereof, plaintiff's title extended to the center line of the street on the west, but that it was not intended that the two acres conveyed to him should be measured to that line, but that they should be measured exclusive of the street, so as to vest in plaintiff the north half of a block of the same size as the others in that locality.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Action by Thomas Fraser against D. A. Ott. From an order granting a new trial, plaintiff appeals. Reversed.

E. E. Keech, for appellant. *F. O. Daniel*, for respondent.

BELCHER, C. This is an action to quiet the plaintiff's title to a parcel of land, and the material facts, shown by the record, are as follows: On July 29, 1889, one George B. Lyon was the owner of a block of land, situate in the town of Santa Ana East, in the county of Orange, and on that day conveyed to the plaintiff, by a bargain and sale deed, a portion thereof, described as follows: "The same being the north two acres of block No. thirteen (13) of the Western Development Company's four (4) acre blocks in the town of Santa Ana East, as per map of said Santa Ana East recorded in Book 10, pages 43 and 44, of the Miscellaneous Records of Los Angeles county, California; also the right of way, for street purposes only, over 20 feet of land off the east end of the south half of said block 13 in said town of Santa Ana East, aforesaid." Immediately after executing the aforesaid deed, Lyon executed and delivered to defendant, D. A. Ott, a contract by which he bound himself to sell and convey to Ott the balance of the said block upon certain terms and conditions. The block in question is one of 15 adjoining blocks, laid out by the Western Development Company, and is bounded on the west and south by streets 60 feet wide. Measuring to the center of these streets, it contains 4.65 acres, but excluding the streets, it contains 4.04 acres only. Lyon died before this action was commenced, but his contract with Ott remained in full force, and was binding upon his legal representatives and heirs when the case was tried. In his complaint the plaintiff alleged that he was the owner and in possession of the north half of the said block, together with the right of way for street purposes over 20 feet of land off the east end of the south half thereof; that the defendants, D. A. Ott and the executors and heirs of Lyon, and each of them, claimed an estate or interest in the said premises adverse to the plaintiff, but that they had no estate or interest therein, and their said claims were without any right whatever. By his answer the defendant Ott denied that the plaintiff was in possession of, or had any title to, or any estate or interest in, the land and premises described in his complaint, and further denied that defendant's claim to the said land was without right. And for a further and separate answer the said defendant then set up his contract with Lyon, and alleged that under and by virtue of said contract he claimed an interest in all of the said block of land, except the north two acres thereof, and that he claimed no interest or estate of any kind in or to the said north two acres, and no interest adverse to the plaintiff to the right of way for street purposes, while used as such, over twenty feet off the east end of the south half of said block. The other defendants answered, but their answers need not be considered. The case was tried, and the court found as follows: "(1) That the plaintiff, at the time of the bringing of this action and for some time prior thereto, was and still is the owner in fee of that certain parcel of land situate in the county of Orange, state of California, and described as follows, to wit: The north two acres of block thirteen in Santa Ana East, which north two acres do not include any portion of the street adjoining said block on the west side thereof, but containing two acres exclusive of said street. (2) That the defendants, and each of them, claim an estate and interest to a strip on and along the south side of said two acres nineteen feet wide, which claim and interest are adverse to that of the plaintiff. (3) That the claim of the said defendants, and each of them, to the said strip on and along the south side of said two acres, is without any right whatever," etc. In accordance with these findings, judgment was duly given and entered in favor of the plaintiff. The defendant Ott then moved for a new trial upon a statement of the case. Attached to the statement were specifications, in substance, that findings 1 and 2 were not justified by the evidence, because, as shown by the evidence, the plaintiff's north two acres of the block should be measured by extending the same to the center of the adjacent street on the west; that finding 2 was not justified, because there was no evidence upon which it could be based; and that certain errors in law were committed by the court in its rulings upon the admission of evidence. The court granted the motion, but upon what ground does not appear, and from this order the plaintiff has appealed.

The principal question discussed by counsel is as to the location of the west boundary line of appellant's two acres; and while the attorney for respondent claims that, under the pleadings, the trial court had no authority to decree appellant anything more than the north two acres of the block, without any allusion to streets, still he says: "If this court should hold that the pleadings are so framed as to authorize the court to decide the question appellant contends for, *i. e.*, whether or not appellant must go to the center of the street on the west to get his two acres, I will be glad to have this court settle it." At the trial the appellant offered in evidence his deed from Lyon, and the map referred to therein, and then rested his case. This map showed that along the sides of some of the blocks laid out thereon streets were marked out, and that along the sides of others no streets were marked. The respondent introduced in evidence his contract with Lyon, and then called the county surveyor as a witness. The witness testified in substance that he had measured block 13, as shown on the map, and that it contained the number of acres and fractions of an acre above stated, and also that, in order to make this block the same size as the other blocks around which no streets were marked, it was necessary to measure to the center of the adjoining streets. The foregoing was all the material evidence in the case, and upon it the court made its findings and rendered its judgment. Looking, then, at the evidence, the findings, the specifications attached to the statement, and the briefs of counsel, it seems apparent that the real and only controversy at the trial was as to the true location of the appellant's south line, and that this depended upon the location of his west line. Under these circumstances, we think the court was authorized to determine the question contested by the parties, and that the respondent cannot now be heard to object that it was not sufficiently raised by the pleadings. The question, then, is as to the construction to be given to appellant's deed. It is true, as claimed by respondent, that an owner of land bounded by a road or street is presumed to own to the center of the way, (Civil Code, § 831;) and when one conveys land bounded by a highway he passes his title to the center of the highway, unless a different intent appears from the grant, (Civil Code, § 1112.) And it has been held that a deed describing land as bounded "by," "upon," or "along" a street or highway should be construed, if practicable, upon grounds of public policy, as including the land to the center of the street or highway. Moody v. Palmer, 50 Cal. 31. It may be conceded, therefore, that when Lyon conveyed the north two acres of block 13 to appellant, he owned, and, subject to the public easement, passed, the title to the east half of the adjoining street. This being so, respondent contends that, as there are no words in the deed limiting the grant to the east side of the street, the two acres must be measured by going to the center thereof. We do not think this conclusion follows. As we understand it, the tract of land laid out by the Western Development Company was intended to be made an addition to the city of Santa Ana, and the blocks were to be sold and used for residence or business purposes. The subdivisions were all of the same size, and doubtless it was intended that the blocks to be built upon should also be of the same size after the streets, necessary to make them accessible, should be laid out and established. Some of the necessary streets were not marked out on the map, but this we do not consider of any importance. The deed speaks of the blocks as four-acre blocks, and that is shown to be practically the size of the block in question, exclusive of the adjoining streets. Ordinarily no two surveyors exactly agree in their measurements of land, and the variance of four-hundredths of an acre may easily be accounted for in that way. The deed then, by describing the land to be conveyed as the north two acres of the block, in effect described the north half thereof; and that such was the intention of the parties is further shown by the description of the right of way conveyed over the east end of the south half of the same block. One of the definitions of the word "block," given by Webster, is, "A square, or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots;" and this, in our opinion, was the meaning of the word as used in the deed to appellant. The court, therefore, rightly found that appellant was the owner of the north two acres of block 13, exclusive of the street, and that respondent claimed an interest therein adverse to him. We see no error in the rulings of the court complained of. The testimony objected to and excluded was irrelevant and immaterial. It results, in our opinion, that the court erred in granting the motion for new trial, and that the order should be reversed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

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95 Cal. 644

SELLICK v. DE CARLOW *et al.* (No. 14,702.)

(*Supreme Court of California.* Aug. 17, 1892.)

TIME OF FILING BILL OF COSTS.

Under Code Civil Proc. § 1033, which provides that a cost bill must be filed within five days after the notice of the decision of the court, a cost bill filed four days before the judgment is unauthorized, and should be stricken out.

Department 2. Appeal from superior court, Lassen county; W. F. MASTEN, Judge.

Action by James Sellick against C. W. De Carlow and others. From an order denying defendants' motion to strike out the bill of costs, defendants appeal. Reversed.

Spencer & Raher, for appellants. *Goodwin & Goodwin*, for respondent.

MCFARLAND, J. This is an appeal from an order made after final judgment denying defendants' motion to strike out plaintiff's cost bill and its amount from the judgment. The action was for an injunction restraining defendants from diverting certain water, and for damages. Judgment was rendered for plaintiff restraining defendants as prayed for, and for $20 damages. The decision—that is, the findings —and the judgment were filed and entered March 20, 1891; and the cost bill in question was filed March 16th, four days before the decision. Section 1033 of the Code of Civil Procedure provides that a cost bill must be filed "within five days after the verdict or notice of the decision of the court or referee," and it seems quite clear that the cost bill was filed in this case before the time authorized by law, and that the court erred in denying the motion to strike it out. The cost bill involved here amounts to only $113.85, but respondent does not make the point that this court has no jurisdiction of the appeal because the amount is less than $300. Indeed, respondent has no points or brief on file; and, as this court has two or three times entertained similar appeals where the point of jurisdiction was not raised, we do not feel disposed in this case to raise that point, and definitely determine it on our own motion. We deem it proper to say, however, for future guidance, that the question whether or not this court has jurisdiction of an appeal from a separate, independent order made after final judgment, involving money only, and in an amount less than $300, must be considered as, at least, an open question. It is settled, no doubt, that on an appeal from a judgment in an action to recover money alone, the jurisdiction is determined by the *ad damnum* clause in the complaint. Solomon v. Reese, 34 Cal. 28; Dashiell v. Slingerland, 60 Cal. 653. But we do not at present recollect any case in which it has been definitely held that this court has jurisdiction of an appeal from an order made after final judgment, where there was no appeal from the judgment, and where the amount of money which the order put "in controversy" was less than the sum mentioned in the constitution; although, as before stated, such appeals have been entertained in a few instances where the question of jurisdiction was not raised. On the other hand, it was held in department, in Langan v. Langan, 83 Cal. 618, 23 Pac. Rep. 1084, that an appeal from an order allowing $150 to counsel, in a divorce suit, must be dismissed because the amount involved was "too small to give the court jurisdiction:" and in Oullahan v. Morrissey, 73 Cal. 297,[1] the court in bank held that, where the plaintiff dismissed his action, he could not appeal, even from a judgment for costs, because the demand for costs, "being less than three hundred dollars, does not give this court jurisdiction." And we think that a thorough examination of all the decided cases would probably leave as *res integra* the question of the meaning of the constitutional words "demand * * * in controversy," when applied to appeals from motions involving less than $300 made after final judgments. The question is an important one, because, if this court has no jurisdiction of such appeals, its time should not be occupied with them, to the disadvantage of other litigants, whose cases are legitimately before it. The order appealed from is reversed, with directions to the superior court to grant the motion which it denied.

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[1] 14 Pac. Rep. 864.

We concur: De Haven, J. Sharpstein, J.

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95 Cal. 654

People v. Ah Sing. (No. 20,893.)

(*Supreme Court of California.* Aug. 19, 1892.)

Robbery—Sufficiency of Information—Instructions.

1. An information which charges that defendant did "steal, take, and carry away from the person of" the prosecuting witness his personal property, by force and against his will, is sufficient, in the absence of a demurrer thereto, to support a conviction for "robbery," which is defined by Pen. Code, § 211, to be the "felonious taking of personal property in the possession of another from his person or immediate presence."

2. It is not error to instruct the jury that, if they believe that any witness has sworn falsely as to "any fact" in the case, they are at liberty to entirely disregard his testimony.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Information for robbery against Ah Sing. From a judgment of conviction, defendant appeals. Affirmed.

C. C. Stephens, F. B. Guthrie, H. H. Appel, and *Mr. Willis,* for appellant. *James McLachlan,* Dist. Atty., and *Atty. Gen. Hart,* for the People.

Garoutte, J. Appellant was convicted of the crime of robbery, and now asks this court for a reversal of the judgment and a new trial. It is insisted that the information does not state facts sufficient to constitute the crime of robbery, in that it is charged that the defendant did "steal, take, and carry away from the person of one Tom She Bin," etc. "Robbery" is defined[1] to be the "felonious taking of personal property in the possession of another from his person or immediate presence." No demurrer was interposed to the information, and, in the absence of a demurrer, it is sufficient. The information alleges that the property was taken by force from the person of Tom She Bin, and against his will, and was his personal property. These facts fairly show a possession of the property in the prosecuting witness. In framing an information the statute should be carefully followed, and such would have been the better practice in this instance, but we think the present defect more technical than substantial; more apparent than real. This court said in People v. Rozelle, 78 Cal. 84, 20 Pac. Rep. 36: "Under the provisions of the Penal Code, the particularity of averment necessary at common law is not required. It is only necessary that the substantial facts constituting the crime shall be alleged with sufficient certainty to enable the court to pronounce a proper judgment, and the party to defend against the charge. * * * Any defect of form not tending to the prejudice of a substantial right of the defendant must be disregarded." The evidence is amply sufficient to support the verdict. The definition of "robbery" given by the court in its charge to the jury was too favorable to the appellant, and he has no cause for complaint.

It is insisted that the following instruction is erroneous: "If you believe that any witness has sworn falsely as to any fact in this case, then you are at liberty to entirely disregard the testimony of such witness." The instruction is substantially in the language of the Code, and has been approved in many cases. See People v. Treadwell, 69 Cal. 226, 10 Pac. Rep. 502. Even if appellant's contention be true, that the false evidence must be as to material matters, then the instruction still comes within such rule, for it refers to "any fact" in the case. The assignments of error based upon the evidence of impeachment of the defendant, and also upon the matter of *alibi*, are not well taken; neither can we say from the record that the motion for a new trial was improperly denied. There appears to be no merit in the appeal. Let the judgment and order be affirmed.

We concur: Paterson, J.; Harrison, J.

(95 Cal. 671)

In re Backus' Estate. (No. 14,581.)

(*Supreme Court of California.* Aug. 19, 1892.)

Appeal—Time of Taking.

Under Code Civil Proc. § 1715, providing that an appeal in a probate proceeding must be taken "within 60 days after the order, decree, or judgment is entered," an appeal from a judgment refusing to probate a will, taken a year after the judgment was entered, must be dismissed.

Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

In the matter of the estate of James H. Backus. From a judgment refusing a petition for the probate of a will, petitioners appeal. Appeal dismissed.

J. Marion Brooks and *E. W. McKinstry,* for appellants. *Barnes & Selby, Orestes Orr, L. C. McKeely,* and *T. O. Toland,* for respondents.

Sharpstein, J. Appellants, who style themselves "proponents of the last will and testament of James H. Backus, deceased," appeal from a judgment entered May 29, 1890, refusing probate to said will. The notice of appeal is dated May 25, 1891, and on that day was served. Section 1715, Code Civil Proc., provides that the appeal in such a case must be taken within 60 days after the order, decree, or judgment is entered.[2] This appeal was not taken until nearly a year afterwards, and counsel for respondent claim in their points and authorities that it should be dismissed. The question has been repeatedly before this court, and it has uniformly been held that such appeals must be taken within the time prescribed by section 1715, Code Civil Proc. Estate of Burns, 54 Cal. 223; In re Grider, 81 Cal. 574, 22 Pac. Rep. 908; Estate of Wiard, 83 Cal. 619, 24 Pac. Rep. 45; Estate of Fisher, 75 Cal. 523, 17 Pac. Rep. 640; Estate of Harland, 64 Cal. 379, 1 Pac. Rep. 159; Estate of Burton, 64 Cal. 428, 1 Pac. Rep. 702; Estate of Sanderson, 74 Cal. 205, 15 Pac. Rep. 753. Appeal dismissed.

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[1] Pen. Code, § 211.

[2] Code Civil Proc. § 1715, (of the title relating to proceedings in probate courts,) provides that the appeal in such proceedings "must be taken within 60 days after the order, decree, or judgment is entered.

We concur: De Haven, J.; McFarland, J.

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95 Cal. 657

People v. Ah Sing. (No. 20,904.)

(*Supreme Court of California.* Aug. 19, 1892.)

Criminal Law—Information—Time of Filing—Perjury—Evidence.

1. A defendant in a criminal case is not entitled to discharge on the ground that the information was not filed against him within 30 days after he was held to answer, where the depositions and commitment upon which the information is based have not been returned by the committing magistrate.

2. Evidence of false testimony as to facts not shown to be material to the issue on trial in the case in which the false testimony is alleged to have been given will not support a conviction of perjury.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Information against Ah Sing for perjury. From a judgment of conviction, defendant appeals. Reversed.

A. A. Montano, for appellant. *James McLachlan*, Dist. Atty., and *Atty. Gen. Hart*, for the People.

Garoutte, J. The appellant, Ah Sing, was convicted of perjury, and now asks this court to review the judgment and order denying his motion for a new trial. The demurrer to the information was properly overruled, and we cannot say that the motion to discharge the defendant, by reason of the fact that the information was not filed within 30 days after the defendant was held to answer, should have been granted. An information filed by the district attorney against an accused is based upon the depositions and commitment thereon returned by the committing magistrate to the clerk of the superior court. It appears that at the time this motion was made these papers had not been returned to the court by the committing magistrate, and the trial court denied the motion upon that state of facts. It does not appear that such ruling was not made under a proper exercise of judicial discretion. The charge of perjury upon which the appellant was convicted is alleged to have been committed at the preliminary examination of one Ah Wai, who was being examined before a justice of the peace upon a complaint also charging perjury. The complaint against Ah Wai alleged that he committed perjury in swearing to a complaint falsely charging one Kio Kiang with having committed the crime of petit larceny. The false testimony upon which the present charge of perjury is based is set out in the information, but as to the major portion of it the record does not disclose sufficient evidence to support it as a fact, and, if proven, it is quite apparent that under no circumstances could it be material to the issue under examination in the trial of Ah Wai. The only specification of perjury set out in the information which demands our consideration is the following: "That on the 16th day of April, 1891, he, the said Ah Sing, saw one Kio Kiang, a Chinese woman, take a bracelet belonging to one Ah Wai from the house of one Ah Sing, in the city of Pomona, in the county of Los Angeles." Conceding that the record discloses the complete falsity of the foregoing testimony of the accused given at the trial of Ah Wai, still, in order to constitute the offense of perjury, another and additional element is necessary, and that is, it must appear that such testimony was material to the issue on trial. It is an elementary principle that testimony given as to matters collateral to the question at issue cannot furnish the foundation for a charge of perjury, and this principle of law was recognized here by the district attorney in framing the information, and by the court throughout its charge to the jury. Its materiality is not only a necessary element of the information, but it is a fact which must be established by the evidence of the prosecution as fully and completely as any other fact in the case. We find no evidence in the record to indicate that the foregoing testimony of the accused was material to the issue upon trial at that time. We know that Ah Wai was being examined upon an accusation of perjury, in having sworn to a complaint falsely charging one Kio Kiang with petit larceny, and that is the extent of our knowledge upon the subject. As to what property Kio Kiang was charged by Ah Wai with having stolen, there is a total absence of proof. If the charge made against Kio Kiang was for stealing money, then, at the examination of Ah Wai, upon a complaint for perjury in making such false charge, this testimony of the defendant was entirely immaterial, and no conviction for perjury could stand against him for a moment. It is only upon the theory or presumption that the perjury charge against Ah Wai was based upon a false accusation against Kio Kiang in stealing a bracelet, the property of Ah Wai, that the testimony was material at the preliminary examination. But, as already suggested, the burden was upon the people to establish such matter as a fact, and the jury were not entitled to speculate upon theories, or indulge in presumptions and inferences, against the defendant upon a question so important. The evidence in this particular fails to support the judgment. The charge of the court to the jury is full and complete, and we find no just grounds of exception thereto. For the foregoing reasons let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: Paterson, J.; Harrison, J.

96 Cal. 1

CORCORAN v. CITY OF BENICIA. (No. 14,830.)

(*Supreme Court of California.* Aug. 20, 1892.)

SURFACE WATER—NUISANCE—LIABILITY OF MUNICIPAL CORPORATION.

A city is not liable in an action to abate a nuisance and for damages arising from the prevention of the flow of surface water from its own lot by raising the grade of a street in accordance with lawful authority.

Commissioners' decision. Department 1. Appeal from superior court, Solano county.

Action by Elizabeth Corcoran, by her guardian, Jeremiah O'Donnell, against the city of Benicia, to abate a nuisance and for damages. From a judgment for defendant, plaintiff appeals. Affirmed.

J. A. McKenna, for appellant. *L. B. Mizner, Matt Clarken*, and *Mr. Lynch*, for respondent.

FOOTE, C. This is an action to abate a nuisance and for damages. A demurrer was filed to the complaint, one of the grounds of which is that it did not contain facts sufficient to show a cause of action. The demurrer was sustained, and, the plaintiff declining to amend the complaint, judgment was given and made for the defendant, from which this appeal is taken. It is plain that the alleged nuisance in this case arose from the prevention of the flow of surface water from the defendant's lot down to a swamp adjacent to the straits of Carquinez by the raising of the grade of a street of defendant, a municipal corporation. This improvement of the street was made in accordance with lawful authority, unless it be held that the backing up on plaintiff's lot of this surface water, by raising the grade of the street, made the city liable in damages for the creation of a nuisance in the shape of pools of water, which, it is alleged, were thus created on plaintiff's land. It has been held in this state, in Conniff v. San Francisco, 67 Cal. 45, 7 Pac. Rep. 41, that embanking and damming the natural channel for the escape of water so as to force it back upon a private owner's lot would render the city liable; but it was also conceded by the decision in that case, at page 48, 67 Cal., and page 43, 7 Pac. Rep., that such a corporation would not be responsible for damages caused by the gathering of "the surface waters not running in a natural channel, produced by the raising of a street to the grade established by law." So the law is held to be in 2 Dill. Mun. Corp. § 1039; Waters v. Village of Bay View, 61 Wis. 644, 21 N. W. Rep. 811; Henderson v. City of Minneapolis, 32 Minn. 319, 20 N. W. Rep. 322; Stewart v. City of Clinton, 79 Mo. 612; Clark v. City of Wilmington, 5 Har. (Del.) 244,—in which last case it is said: "The collection of water on lots which are below the grades of new streets is inevitable, and, excepting the case of a running stream, the city would have no power, and it is not legally bound, to draw off the water. * * * The nuisance is not in the street, but on the lot, and the remedy is by raising the lot to a level with the street, which the city is not bound to do." From this view of the matter it is clear that the demurrer was properly sustained, and that the judgment ought to be affirmed; and we so advise.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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96 Cal. 13

DANIELS v. CHURCH. (No. 14,822.)

(*Supreme Court of California.* Aug. 22, 1892.)

CHANGE OF VENUE—APPEAL.

If the evidence as to the residence of defendant is conflicting, an order refusing to change the place of trial to the county in which he claims to reside will not be reversed on appeal.

Department 2. Appeal from superior court, San Joaquin county; J. H. BUDD, Judge.

Action by one Daniels against one Church. From an order denying a motion for change of the place of trial, defendant appeals. Affirmed.

Geo. E. Church and *Swinnerton & Rutherford*, for appellant. *J. E. Budd, Nutter & De Vries*, and *John E. Budd*, for respondent.

SHARPSTEIN, J. This appeal is from an order of the superior court of the county of San Joaquin, refusing, overruling, and denying said defendant's motion and application for a change of the place of trial in said above-entitled action, from the county of San Joaquin to the county of Fresno. If at the time of the commencement of the action the defendant resided in the county of Fresno he was entitled to have the action tried in that county. If not, not. It appears by the record that defendant, in support of his motion, introduced the affidavits of several persons who swore that he resided in Fresno county. The plaintiff, in opposition to the motion, introduced several affidavits, in which the affiants swore that defendant resided in Calaveras county. The conflict is apparent, and an order refusing to change the place of trial of an action to the county in which the defendant claims to reside will not be reversed on appeal, if the evidence as to the place of residence of the defendant is conflicting. Hastings v. Keller, 69 Cal. 606, 11 Pac. Rep. 218; Creditors v. Welch, 55 Cal. 469. Order affirmed.

We concur: MCFARLAND, J.; DE HAVEN, J.

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95 Cal. 646

DUSY v. PRUDOM *et al.* (No. 18,024.)

(*Supreme Court of California.* Aug. 18, 1892.)

OPENING DEFAULT—IGNORANCE OF TIME OF TRIAL—MECHANIC'S LIEN.

1. Defendants moved to set aside a judgment by default, on the ground that neither they nor their attorney had notice that the case was set for trial; that they relied upon the belief that they were entitled, as nonresidents of the county, to such notice; that the rules of court specified no time for setting cases for trial; that their attorney had requested plaintiff's attorneys to inform him of the time of trial as soon as it was fixed; and that defendants and their attorney believed that the request would be complied with

Held, that a party, though a nonresident, is bound to know the day fixed for setting cases for trial, and if there is no such day fixed he must ascertain the day of trial from the proceedings of the court or otherwise, and hence the court did not abuse its discretion in denying the motion.

2. Code Civil Proc. § 1185, makes subject to a mechanic's lien on a building the land on which it is built, together with so much as may be required for the convenient use and occupation thereof, if at the commencement of the work or of furnishing materials for the building the land belonged to the person who caused the building to be constructed. *Held*, that where, in an action to foreclose the lien of a material man on a building, and land appurtenant thereto, the complaint recites that all the land is necessary for the convenient use and occupation of the building, and that the person at whose instance the building was erected was at all times the owner of the property, such recitals need not be repeated in the judgment directing the sale of the property.

Department 1. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by one Dusy against one Prudom and others to foreclose a lien for materials. From an order refusing to set aside a judgment by default, defendants appeal. Affirmed.

A. H. Carpenter and *S. J. Hinds*, for appellants. *Webb & Strother*, for respondent.

PATERSON, J. This is an action to foreclose the lien of a material man. The cause was commenced and determined in the superior court of Fresno county. The defendants Frank J. and Charles Prudom, who were residents of San Joaquin county, appeared and filed an answer to the complaint on April 20, 1891. The case was tried on November 4, 1891, and a decree in favor of the plaintiff was entered on the same day. The decree recites that the defendants Prudom failed to appear at the trial of the cause. On November 16, 1891, the defendants Prudom gave notice of an application to set aside the judgment on the ground that it was taken against them through their mistake, inadvertence, and excusable neglect. In support of their motion they filed an affidavit setting forth that neither they nor their attorney had any notice of the fact that the case has been set for trial until after the entry of the judgment; that they relied upon the belief that they were entitled to notice that the case had been set for trial, being nonresidents of the county in which the action was pending; that the rules of the court specified no time for the calling of the calendar and the setting of the cases for trial; that in August, 1891, defendants' attorney sent a letter to the attorneys of plaintiff at Fresno, and requested them to inform him, as soon as the cause was set, of the time when it would be tried, and the defendants and their attorney believed that such request would be complied with, and that no advantage would be taken of their absence. The record does not show how long the case had been set for trial prior to November 4th. We cannot say that the court abused its discretion in denying the motion to vacate the judgment. In Eltzroth v. Ryan, 91 Cal. 587, 27 Pac. Rep. 932, we held that no notice of the setting of a case for trial is required by statute; that parties to an action and their attorneys, whether residents or nonresidents of the county where the case is pending, must watch its progress, and are charged with notice of the fact that it has been set for trial. It is true in that case it appeared that the rules of the superior court fixed a day for the calling of the calendar. They provided that either party might without notice have any case set down for trial, and that all parties would be deemed to have notice of the fact, but that circumstance is immaterial. A party is bound to know the rules of the trial court. If they fix a day for setting causes for trial, he is presumed to know the fact; and if they do not he must govern himself accordingly, and learn from the proceedings of the court when his case is to be heard. This rule may work hardship in some cases, and the court below should be liberal in relieving parties from judgments taken against them where they have acted without negligence and without actual notice of the time fixed for the trial; but, ordinarily, a party will have no difficulty in ascertaining the day fixed for the trial. A request to the clerk, or the attorneys of his adversary, for notice of the fact will rarely be disregarded. There is nothing in the record to show that either the clerk or the attorney for plaintiff promised to notify the defendants. If such a promise had been made and relied on, the facts would present a cogent reason for setting aside the judgment taken against them. The stated rule is inconvenient and troublesome to nonresident litigants, but there is little danger that the results which counsel for appellants apprehends will follow its enforcement. Parties will not be forced to trial without a reasonable opportunity to prepare therefor. If a case has been set for trial at an unreasonably early day, and by reason thereof a party has been unable to be present or to prepare for trial, the court would abuse its discretion in refusing a continuance, or in refusing to set aside a judgment taken against him because of such hasty action.

It is claimed that the judgment should be reversed, because it directs the sale of the land described in the complaint, without adjudging that it was all necessary for the convenient use and occupation of the building.[1] In answer to this contention it is sufficient to say that the complaint alleged that "all of said land is necessary for the convenient use and occupation of said building," and the court found this allegation to be true. It was not necessary to repeat the statement in the judgment. It is also claimed that the judgment is erroneous, because it fails to adjudge that at the commencement of the action the land belonged to the person who caused the building to be constructed, or that it was erected with his knowledge; but here again the appellants overlook the allegation of the complaint and the findings of the court. It is alleged in the complaint that Francis J. Prudom, at whose instance the building was erected, was at all times mentioned the owner and entitled to possession of the property, and that the other defendants claim to have some interest therein, "but the same is subsequent to the lien of plaintiff." These allegations were denied. The court found they were true. Judgment affirmed.

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[1] Code Civil Proc. § 1185, provides that "the land upon which any building * * * is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, * * * is also subject to the lien, if at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building * * * to be constructed."

We concur: Harrison, J.; Garoutte, J.

(95 Cal. 650)

Sachse v. Auburn *et al.* (No. 18,025.)

(*Supreme Court of California.* Aug. 18, 1892.

Mechanic's Lien—Extent of Land — Presumption in Favor of Decree.

Where, in an action to foreclose a mechanic's lien, there was no allegation or finding as to whether or not the land described in the decree was greater in extent than was necessary for the convenient use and occupation of the building, it will be presumed on appeal that it was not, unless it otherwise appears in the record.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by one Sachse against one Auburn and others to foreclose a mechanic's lien. From a judgment for plaintiff, defendants appeal. Affirmed.

A. H. Carpenter and *S. J. Hinds*, for appellants. *Webb & Strother*, for respondent.

Paterson, J. This is an action to foreclose a mechanic's lien. The case differs from Dusy v. Prudom, 30 Pac. Rep. 798, (No. 18,024, this day filed,) in one material respect only. There is neither an allegation nor a finding that all of the land which the decree directs to be sold is necessary for the convenient use and occupation of the building. In Green v. Chandler, 54 Cal. 627, —the case upon which appellants rely,—it appeared that the structure in controversy was built upon a tract of land containing something over eight acres. The court found that the whole of said parcel, with its appurtenances, was required for the convenient use and occupation of the mill, etc. It was held on appeal that this finding was not within any of the issues made by the complaint and answer, and that there was no evidence upon which the court could determine that the whole or any particular part of the land was necessary for the use and occupation of the structure. It was apparent to the court in that case that the court below had decreed the sale of a larger tract of land than that actually occupied by the building upon which the lien was filed, and, as there was no allegation, either in the complaint or in the answer, that all of the land was necessary for the convenient use and occupation of the building, the court held that the finding, being outside of any issue, did not warrant the judgment. In Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. Rep. 932, it did not appear that the plaintiff was claiming any more land than that occupied by the building, and we held that the failure of the court to define the exact amount or extent of the land necessary for the convenient use of the structure did not invalidate the decree that the purchaser would acquire only the land covered by the building. The land actually occupied by the building is necessarily subject to the lien, and it is only where the plaintiff claims that more than that is required for its use and occupation that he must make averments therefor. Steam Mills Co. v. Kremer, 94 Cal. 205, 29 Pac. Rep. 633. There is nothing in the record in this case to show that the land described in the decree is greater in extent than that covered by the building. We have to assume that it is not. Every presumption must be indulged in favor of the judgment.

Judgment affirmed.

We concur: Harrison, J.; Garoutte, J.

(95 Cal. 666)

People v. Lee Kong. (No. 20,901.)

(*Supreme Court of California.* Aug. 22, 1892.)

Assault with Intent to Kill—Evidence.

In a prosecution for assault with intent to kill, it appeared that defendant, the keeper of a gambling hall, shot at a hole in the roof, which he knew had been made by a policeman for the purpose of watching the premises, and at which he supposed the policeman then was. The ball went through the roof at that point, but the policeman was then on the roof at another point, and so escaped injury. *Held*, that this constituted an assault, under Pen. Code, § 240, defining an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another;" and a conviction of assault with intent to kill was warranted.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Charlie Lee Kong was convicted of an assault with intent to kill, and appeals. Affirmed.

C. C. Stephens and *H. C. Grant*, for appellant. *Atty. Gen. Hart*, for the People.

Garoutte, J. Appellant was convicted of the crime of an assault with intent to commit murder, and now prosecutes this appeal, insisting that the evidence is insufficient to support the verdict. The facts of the case are novel in the extreme, and, when applied to principles of criminal law, a question arises for determination upon which counsel have cited no precedent. A policeman secretly bored a hole in the roof of appellant's building for the purpose of determining, by a view from that point of observation, whether or not he was conducting therein a gambling or lottery game. This fact came to the knowledge of appellant, and upon a certain night, believing that the policeman was upon the roof at the point of observation, he fired his pistol at the spot. He shot in no fright, and his aim was good, for the bullet passed through the roof at the point intended; but, very fortunately for the officer of the law, at the moment of attack he was upon the roof viewing the scene of action at an opening some distance from his contemplated point of observation, and thus no substantial results followed from appellant's fire. The intent to kill is quite apparent from the evidence, and the single question is presented, do the facts stated constitute an assault? Our Criminal Code defines an assault to be "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another." It will thus be seen that to constitute an assault two elements are necessary, and the absence of either is fatal to the charge. There must be an unlawful attempt, and there must be a present ability to inflict the injury. In this case it is plain that the appellant made an attempt to kill the officer. It is equally plain that this attempt was an unlawful one; for the intent to kill was present in his mind at the time he fired the shot, and if death had been the result, under the facts as disclosed, there was no legal justification to avail him. The fact that the officer was not at the spot where the attacking party imagined he was, and where the bullet pierced the roof, renders it no less an attempt to kill. It is a well-settled principle of criminal law in this country that where the criminal result of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed. Thus an attempt to pick one's pocket, or to steal from his person, when he has nothing in his pocket or on his person, completes the offense to the same degree as if he had money or other personal property which could be the subject of larceny. State v. Wilson, 30 Conn. 500; Com. v. McDonald, 5 Cush. 365; People v. Jones, 46 Mich. 441, 9 N. W. Rep. 486; People v. Moran, 123 N. Y. 254, 25 N. E. Rep. 412. Having determined that appellant was guilty of an unlawful attempt to kill, was such attempt coupled with the present ability to accomplish the deed? In the case of People v. Yslas, 27 Cal. 633, this court said: "The common-law definition of an 'assault' is substantially the same as that found in our statute." Conceding such to be the fact, we cannot indorse those authorities, principally English, which hold that an assault may be committed by a person pointing in a threatening manner an unloaded gun at another; and this, too, regardless of the fact whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear. Under our statute it cannot be said that a person with an unloaded gun would have the present ability to inflict an injury upon another many yards distant, however apparent and unlawful his attempt to do so might be. It was held in the case of State v. Swails, 8 Ind. 527, that there was no assault to commit murder where A. fires a gun at B. at a distance of 40 feet, with intent to murder him, if the gun is in fact loaded with powder and a slight cotton wad, although A. believes it to be loaded with powder and ball. The later Indiana cases support this rule, although in Kunkle v. State, 32 Ind. 230, the court, in speaking of the Swails Case, said: "But if the case is to be understood as laying down the broad proposition that to constitute an assault * * * with intent to commit felony, the intent and the present ability to execute must necessarily be conjoined, it does not command our assent or approval." In the face of the fact that the statute of this state in terms requires that, in order to constitute an assault, the unlawful attempt and present ability must be conjoined, Kunkle v. State can have no weight here. In State v. Napper, 6 Nev. 115, the court reversed the judgment upon the ground that the people failed to prove that the pistol with which the assault was alleged to have been made was loaded, and that consequently there was no proof that the defendant had the present ability to inflict the injury. It is not the purpose of the court to draw nice distinctions between an attempt to commit an offense and an assault with intent to commit the offense, for such distinctions could only have the effect to favor the escape of criminals from their just deservings; and, in view of the fact that all assaults to commit felonies can be prosecuted as attempts, we can see no object in carrying the discussion of the subject to any greater lengths.

In this case the appellant had the present ability to inflict the injury. He knew the officer was upon the roof, and knowing that fact he fired through the roof with the full determination of killing him. The fact that he was mistaken in judgment as to the exact spot where his intended victim was located is immaterial. That the shot did not fulfill the mission intended was not attributable to forbearance or kindness of heart upon defendant's part; neither did the officer escape by reason of the fact of his being so far distant that the deadly missile could do him no harm. He was sufficiently near to be killed from a bullet from the pistol, and his antagonist fired with the intent of killing him. Appellant's mistake as to the policeman's exact location upon the roof affords no excuse for his act, and causes the act to be no less an assault. These acts disclose an assault to murder as fully as though a person should fire into a house with the intention of killing the occupant, who fortunately escaped the range of the bullet. See Cowley v. State, 10 Lea, 282. The fact that the shots were directed indiscriminately into the house, rather than that the intended murderer calculated that the occupant was located at a particular spot, and then trained his fire to that point, could not affect the question. The assault would be complete and entire in either case. If a man intending murder, being in darkness and guided by sound only, should fire and the bullet should pierce the spot where the party was supposed to be, but by a mistake in hearing the intended victim was not at the point of danger, but some distance therefrom, and yet within reach of the pistol ball, the crime of assault to commit murder would be made out; for the unlawful attempt and the present ability are found coupled together. If appellant's aim had not been good, through fright or accident when pointing the weapon or pulling the trigger, or if the ball had been deflected in its course from the intended point of attack, and by reason of the occurrence of any one of these contingencies the party had been shot and killed, a murder would have been committed. Such being the fact, the assault is established. The fact of itself that the policeman was two feet or ten feet from the spot where the fire was directed, or that he was at the right hand or at the left hand or behind the defendant, at the time the shot was fired, is immaterial upon this question. That element of the case does not go to the question of present ability, but pertains to the unlawful attempt. Let the judgment and order be affirmed.

I concur: PATERSON, J.

HARRISON, J., (*concurring.*) I concur in the judgment upon the ground that upon the evidence before them the jury have determined that the unlawful attempt of the defendant was coupled with a present ability—that is, an ability by the means then employed by him in furtherance of such attempt—to commit murder upon the policeman.

(96 Cal. 7)

HEILBRON *et al.* v. 76 LAND & WATER CO.

(No. 14,460.)

(*Supreme Court of California.* Aug. 22, 1892.)

WATER RIGHTS — CONVEYANCE PENDING SUIT — RIGHT TO CONTINUE — PRESUMPTION—DECREE—MATTERS NOT IN ISSUE —MANDATE OF SUPREME COURT.

1. Where defendant conveyed its canal and water right pending an action to enjoin it from diverting the waters of a stream into and through the canal, it will be presumed, in the absence of a showing to the contrary, that subsequent proceedings in the case are had in defendant's name on behalf of the grantee, and defendant's appeal from a decree against him will not be dismissed.

2. It is not error, in such action, to refuse to provide in the decree that defendant is not enjoined from diverting from the stream into its canal the surplus waters "at times of flood or high water," when no issue was raised by the pleadings as to defendant's right to divert such surplus waters.

3. A statement made by way of argument in the opinion of the supreme court on a former appeal in such case, reversing and remanding it for a decree in accordance therewith, that "there may be times of flood or high water when no one below would be injured if defendant's canal should carry away from the river surplus waters to its full capacity," does not entitle defendant to such provision in the decree, in the absence of such issue by the pleadings.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; W. W. CROSS, Judge.

Action by A. Heilbron and others against the 76 Land & Water Company to enjoin it from diverting waters. From an order denying a motion by defendant to amend the decree, defendant appeals. Affirmed.

W. S. Goodfellow, (*C. C. Wright*, of counsel,) for appellant. *Brown, Daggett & Adams* and *Thompson, Thompson & Thompson*, (*John Chetwood, Jr.*, of counsel,) for respondents.

BELCHER, C. The plaintiffs commenced this action in the superior court of Tulare county to obtain a perpetual injunction restraining the defendant from diverting any of the waters of Kings river into and through a certain canal constructed and owned by defendant. After trial the court granted the injunction as prayed for, and "further ordered, adjudged, and decreed that said defendant forthwith fill up the head of its said canal where it connects with the channel of said Kings river, and close the same so that no water can or will flow from said river into defendant's said canal." From this judgment and an order refusing a new trial an appeal was taken, and, in deciding the questions presented on the appeal, it was, among other things, said by this court, (80 Cal. 189, 22 Pac. Rep. 62.) "It clearly appears that defendant is a riparian proprietor above the plaintiffs. Its lands can be irrigated with water carried through its canal, and irrigation is necessary to make them productive. Being an upper riparian owner, defendant is entitled, as against the plaintiffs, to make a reasonable use of the water of the stream for the purpose of irrigating its riparian lands; and it is only for an unreasonable and unauthorized use that an action will lie. What is a reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case. [Citing authorities.] One of the purposes for which the defendant constructed its canal was to irrigate its lands. And the fact that it has not yet used the water upon its own lands cannot destroy or impair its rights. * * * This being so, we are unable to see how the court could properly grant a perpetual injunction restraining the defendant from ever, at any time, or for any purpose, causing or permitting any water from the river to flow into or down its canal. Besides, there may be times of flood or high water when no one below would be injured if defendant's canal should carry away from the river surplus water to its full capacity. Why should defendant be required to fill up the head of its canal, so that no water at such times can flow into it? From what has been said it is not to be understood that defendant has a right, as against riparian owners further down the stream, to divert water from the river for the purposes of sale, or for use on lands which are not riparian." The judgment and order were accordingly reversed, and the cause remanded, with directions to the court below to enter a decree in conformity with the views expressed in the opinion. Upon the going down of the *remittitur* the court entered a new and modified decree, by which the defendant was forever enjoined and restrained from diverting into or through its canal any of the waters of Kings river for sale, or for distribution or use upon lands not riparian, and also from diverting into or down its canal "any more of the waters of said river than such as are reasonably necessary to be used, and which, when so diverted, are actually used for irrigation and domestic purposes upon" certain tracts of land described and found to be riparian. Thereafter the defendant, after due notice, moved the court to amend the decree "by providing therein that the defendant is not thereby enjoined or restrained from diverting from Kings river into or through or down its canal the surplus waters of said river at times of flood or high water, when the plaintiffs would not be injured thereby," upon the ground that such amendment was necessary to make the decree conform to the views of the supreme court, expressed in its opinion, and remitted to the court below for its direction. At the hearing of the motion the plaintiffs were permitted, against the objection and exception of the defendant, to introduce and read in evidence a deed executed by defendant, and conveying its canal and water right, with certain exceptions, and also certain lands, to another corporation. At the conclusion of the hearing the court denied the motion, and thereupon the defendant appealed from the decree as entered and the order refusing to amend it.

1. The respondents ask that the appeal be dismissed, because, having conveyed away its canal and water right, "the appellant is no longer the party in interest, and is not a party aggrieved by the judgment." We do not think the appeal should be dismissed for the reason stated. After the transfer it was proper that all proceedings in the case, including the appeal, be taken for and on behalf of the grantee in the name of the original defendant; and in the absence of any showing to the contrary, it will be presumed that they were so taken. Malone v. Mining Co., 93 Cal. 384, 28 Pac. Rep. 1063

2. It is argued for appellant that the suggestion in the opinion of the supreme court, that "there may be times of flood or high water when no one below would be injured if defendant's canal should carry away from the river surplus water to its full capacity," constituted a part of the "views expressed" in the opinion, in conformity with which the trial court was directed to enter the new decree, and that the decree as entered wholly ignored the mandate of the court in this regard, and to that extent was erroneous, and should have been amended. It is said that "by the judgment of the supreme court above cited the defendant would be entitled in times of flood or high water, when the plaintiffs would not be injured thereby, to carry away from Kings river the surplus water of said river to the full capacity of defendant's canal; and that under the judgment of the supreme court aforesaid, defendant would at all times be entitled to divert the waters of said river through its canal to the full capacity of said canal whenever the plaintiffs would not be injured thereby;" and also that "during the greater part of the season the flow of water in Kings river is great enough to meet many times over the total demands made upon it; and to hold that in seasons of great abundance the riparian owner shall have the right to prevent the beneficial use of surplus waters is most unreasonable." On the other hand, it is claimed by respondents that the issues tried and disposed of in the case did not involve any question as to the right to divert flood or surplus waters from the stream, but related solely to the riparian rights of the parties, and hence that the clause quoted and relied upon by counsel for appellant had no bearing upon or connection with the point actually decided, and therefore cannot be regarded as one of the "views expressed" in the opinion. In one of the briefs filed for respondents it is said: "Where it appears that there is a surplus of water, no one can doubt that such surplus may properly be appropriated;" and the learned counsel then go on to state that there are statistical tables, showing the amount of water flowing in Kings river at all times during the six years ending in 1883–84, and that, looking at these statistical tables, it appears that the flow of water in the river has not at any time during the years named been nearly large enough to meet the demands which are shown by the county records to have been made upon it prior to the construction of appellant's canal. It is true that by the pleadings no issue was raised as to the right of appellant to divert from the river its flood or surplus waters, and hence that question was not, and could not have been, passed upon or decided by the trial court or by this court on appeal. It is also true that the remark found in the opinion of this court, as to "times of flood or high water," was not made for the purpose of deciding any question arising in the case, but was merely thrown out to show how unreasonable and uncalled for was that part of the decree which required the defendant to forthwith fill up the head of its canal so that no water could ever flow into it. This being so, it is apparent, we think, that the said remark was not intended to, and did not in fact, constitute one of the "views expressed" in the opinion, in conformity with which the trial court was directed to enter a new decree. Under these circumstances, we see no error in the action of the court, and therefore advise that the judgment and order appealed from be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

BEATTY, C. J. Justice DE HAVEN is assigned to department 1 for the purpose of considering this case in place of Justice HARRISON, disqualified.

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96 Cal. 4

READING v. READING. (No. 14,761.)

(Supreme Court of California. Aug. 22, 1892.)

DIVORCE—COMPLAINT—SUFFICIENCY.

In an action for divorce, a count of the complaint which alleges the marriage and proper residence of the parties for the requisite time, and that "defendant for more than five years last past, disregarding his duties as a husband towards the plaintiff, has been guilty of habitual intemperance," is sufficient to support a decree for plaintiff in the absence of a demurrer thereto for uncertainty.

Department 1. Appeal from superior court, Butte county; J. C. GRAY, Judge.

Action by Mary J. Reading against O. B. Reading for divorce. From a decree for plaintiff, defendant appeals. Affirmed.

W. J. Herrin, for appellant. *P. O. Hundley*, for respondent.

Paterson, J. This is an action for divorce, a division of the community property, and for the custody of the children. The grounds upon which plaintiff relies are extreme cruelty and habitual intemperance. In the first count it is alleged that plaintiff and defendant intermarried at Oroville, Butte county, January 8, 1873, and that plaintiff has been a resident of the state of California for more than 10 years prior to the commencement of the action. The plaintiff then proceeds to allege specific acts of cruelty by defendant at their residence in Oroville, extending from May 8, 1884, to December, 1890. For a second cause of action the plaintiff alleges marriage as stated above, residence of plaintiff in the county of Butte, state of California, for more than 10 years immediately prior to the commencement of the action, and that "the defendant for more than five years last past, disregarding his duties as a husband towards the plaintiff, has been guilty of habitual intemperance." The summons was served upon the defendant personally in the county of Butte, but he made no appearance. The court found that all the facts stated in the complaint were true, and a decree was entered in favor of the plaintiff. From this decree defendant has appealed, and the case is before us on the judgment roll alone.

Appellant contends that the judgment is not supported by the allegations of the complaint for the following reasons: (1) In the first count it is not alleged that the plaintiff was "a resident of the county for three months next preceding the commencement of the action," (Civil Code § 128,) and, as there is no reference to the allegations of the second count, no cause of action is stated in said first count; (2) that the second count does not state facts showing that defendant has been guilty of habitual intemperance, the allegation in that regard being a mere conclusion of law. It has been held here that each cause of action set up must be complete in its allegations,—Haskell v. Haskell, 54 Cal. 262,—but that it is sufficient merely to refer to and adopt in one count the allegations made in another count.—Green v. Clifford, (Cal.) 29 Pac. Rep. 331. In this case no reference is made in either count to any allegation made in the other. While the fact is not directly and positively alleged, it is a fair inference from the averments of the first count that plaintiff and defendant resided at Oroville, Butte county, for more than three months immediately prior to the commencement of the action; and the most that can be said against it is that it is uncertain; but whether this be so or not, the allegations of the second count are sufficient to support the judgment. Residence in the state and county for more than the requisite period is averred, and the allegation as to habitual intemperance is good in the absence of demurrer. It is not necessary to set out the particular acts of intemperance, (Forney v. Forney, 80 Cal. 528, 22 Pac. Rep. 294;) and the failure to allege that the defendant was disqualified, by the use of intoxicating drinks, a greater portion of the time, "from properly attending to business," or that his conduct inflicted upon plaintiff "a course of great mental anguish," (section 106, Civil Code,) is not fatal. The objection now urged for the first time should have been taken by demurrer, on the ground of uncertainty. The fact that the court amended the judgment after it was entered by stating the fact that plaintiff was a resident of the county of Butte for more than five years prior to the commencement of the action is not material. The court had already found that all allegations of the complaint were true. But even this was unnecessary, as findings were not required, there being no answer. The judgment is affirmed.

We concur: Garoutte, J.; Harrison, J.

Von Schmidt v. Superior Court. (No. 15,109.)

(*Supreme Court of California.* July 25, 1892.)

In bank.

Original proceeding by A. W. Von Schmidt for writ of prohibition against the superior court of San Francisco county; William T. Wallace, Judge. Application denied.

Pierson & Mitchell, (*A. N. Drown*, of counsel,) for petitioner.

Per Curiam. The application for a writ of prohibition herein is denied, the court being of the opinion that the petitioner therefor does not disclose any excess or threatened excess of the jurisdiction of the respondent.

(64 Cal. 228)

In re Hyde's Estate.[1]

(*Supreme Court of California.* Oct. 11, 1883.)

Right to Administration—Nominee of Nonresident Heir.

A public administrator is entitled to letters of administration in preference to a nominee of a nonresident heir of deceased, under Code Civil Proc. §§ 1369, 1379, which provides respectively that nonresidents shall not be entitled to administration, and that administration may be granted to competent persons not otherwise entitled, "at the written request of the person entitled."

Department 2. Appeal from superior court, Los Angeles county.

Petitions by L. A. Evans, as creditor, and by M. P. Cutler, as public administrator, for letters of administration on the estate of H. E. Hyde, deceased. Letters granted to L. A. Evans. The public administrator appeals. Reversed.

Code Civil Proc. § 1369, provides that no person shall be competent to serve as an administrator who is "not a *bona fide* resident of the state." Section 1379 provides that "administration may be granted to competent persons, not otherwise entitled, * * * at the written request the of person entitled, filed in court."

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[1] This case, filed October 11, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

S. C. Hubbell, for appellant. *Barclay & Wilson*, for respondent.

PER CURIAM. L. A. Evans petitioned, as creditor, for letters of administration. M. P. Cutler petitioned for letters as public administrator. The petitions were heard together, and on the hearing the said Evans produced a written request from the father and heir of the estate that letters be granted to him, Evans. The father was a nonresident of this state. The court made an order that letters issue to Evans, and from this order Cutler appealed. This was error. See sections 1369, 1379, Code Civil Proc.; also Estate of Cotter, 54 Cal. 217; Estate of Kelly, 57 Cal. 81; Estate of Morgan, 53 Cal. 245; Estate of Beech, 63 Cal. 458. The order is reversed, and the cause is remanded for further proceedings.

64 Cal. 229

PEOPLE v. APPLEGARTH.[1]

(*Supreme Court of California*. Oct. 22, 1883.)

SERVICE OF SUMMONS — ACTION TO CANCEL CERTIFICATE OF PURCHASE.

Where the record of a judgment and decree rendered in an action under the Political Code of California to cancel the certificate of a delinquent purchaser of school lands, and foreclose his interest, fails to show personal service of the summons, or an affidavit of publication and order thereon, as required by the Code of Civil Procedure, the judgment and decree will be set aside.

Department 2. Appeal from superior court, Fresno county.

Action against William Applegarth to foreclose his interest in a certificate of purchase of school lands, and cancel the certificate. Judgment for plaintiff by default. Defendant moved to set aside judgment, on the ground that by the record it did not appear that any personal service of summons was made, or any affidavit for publication of summons or order of court therefor. Order refusing to set the same aside. Defendant appeals. Reversed.

W. D. Tupper and *H. S. Dixon*, for appellant. *W. D. Grady* and *J. F. Wharton*, for the People.

PER CURIAM. The service of summons by publication in such a case as this should have been made in accordance with the provisions of the Code of Civil Procedure. The four Codes constitute but one statute, (Pol. Code, § 4480,) and we are of opinion that the provisions of the Political Code must be read in connection with the provisions of the Code of Civil Procedure on this subject. Under these latter provisions there must have been an affidavit for publication of summons, and an order of the court or judge thereon. The judgment and order are reversed, and the cause remanded.

64 Cal. 228

HUTCHINGS v. CLARK.[2]

(*Supreme Court of California*. Oct. 12, 1883.)

POWER OF ATTORNEY—RELEASE OF MORTGAGE.

A written power of attorney "to satisfy mortgages," and to execute all instruments in writing necessary therefor, will not authorize an entry of satisfaction of a mortgage until the debt thereby secured is paid, nor avail a subsequent purchaser of the mortgaged premises as a defense in case of nonpayment and suit to foreclose.

Department 2. Appeal from superior court, Los Angeles county.

Action by Thomas B. Hutchings, administrator, etc., of Hovey, Hutchings, against J. W. Clark, to foreclose a mortgage. Judgment for plaintiff, and order refusing new trial. Defendant appeals. Affirmed.

The mortgage was executed by J. S. Hutchings to Hovey Hutchings, who thereafter gave a power of attorney to J. S. Hutchings, authorizing him to collect moneys due, "and to satisfy judgments and mortgages, and to make, execute, and deliver all and any instruments of writing necessary therefor." Under this power J. S. Hutchings satisfied the mortgage of record, though the note was not paid.

Barclay & Wilson and *Smith & Hupp*, for appellant. *Thom & Stephens* and *W. L. Wicks*, for respondent.

PER CURIAM. The power of attorney did not authorize satisfaction of the mortgage to be entered until the note was paid, and this event never occurred. We find no error in the record, and the judgment and order are affirmed.

Hearing in bank denied.

64 Cal. 230

BARBAIRES *et al.* v. GREGORY, Judge.[3]

(*Supreme Court of California*. Oct. 22, 1883.)

NEW TRIAL—SETTLEMENT OF STATEMENT—NOTICE.

Where an attorney gives notice of settlement of a statement on motion for a new trial and proposed amendments, the filing by him of the statement and amendments, before the day fixed by the notice, does not entitle him to notice that the settlement will be made at the time fixed.

Department 2. Application by Felix Barbaires and others for a *mandamus* to compel John M. Gregory, judge of the superior court of Solano county, to settle a statement on motion for a new trial. Application denied.

L. C. Trusseau, for petitioners. *Geo. A. Lamont*, for respondent.

PER CURIAM. It was admitted on the argument by both sides that the defendants, in the action Mizner v. Barbaires et al., prepared and served their statement on the plaintiff's attorney in due time, and that he prepared and served on the defendants' counsel plaintiff's proposed amendments to said statement within the time prescribed by the Code, and that defendants' counsel, within 10 days after receiving said proposed amendments, gave the plaintiff's attorney notice that his said proposed amendments were not adopted or allowed by the defendants, and that on a day and hour and at a place named in said notice they would present said statement and proposed amendments to the judge for settlement; that at the time and place named in said notice the plaintiff's attorney appeared before said judge, but that no one appeared for the defendants, and the court proceeded to settle said statement. Before the time fixed in said notice for the settlement of said statement and proposed amendments the same had been filed with the clerk of the court. The defendants' counsel insists that the fact of his having so filed said statement and proposed amendments cast the duty upon the court of giving said defendants' attorney notice of the time and place of settlement, and that the court had no power to proceed and settle said statement on the day fixed for its settlement in defendants' attorney's said notice. We think, however, that the court had a right to proceed and settle said statement on the day designated for that purpose, and that defendant's counsel were not entitled to notice that the statement would be settled at the time and place fixed by them for its settlement in a notice given by themselves. Application denied, and proceeding dismissed.

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[2] This case, filed October 12, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[3] This case, filed October 22, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Hearing in bank denied.

64 Cal. 232

SNOW v. HOLMES.[1]

(*Supreme Court of California.* Oct. 22, 1883.)

APPEAL—FORECLOSURE OF MORTGAGE ON PERSONALTY—PENALTY OF UNDERTAKING.

In the absence of special provision to the contrary, the penalty of an undertaking for a *supersedeas* to a judgment foreclosing a mortgage on personal property must be in the sum of $300, being that prescribed by Code Civil Proc. § 941, generally for undertakings on appeal.

Department 2. Application by John F. Snow against C. J. Holmes to foreclose a mortgage. There was a judgment for plaintiff. Defendant appeals, and moves for a writ of *supersedeas*. Code Civil Proc. § 726, prescribes the form of action to foreclose a mortgage, but contains no provision as to the penalty of the bond to be given on appeal. Section 941 provides generally that undertakings on appeal must be conditioned in the penalty of $300. Motion granted.

Langhorne & Miller, for petitioner.

PER CURIAM. This is an application for a writ of *supersedeas*, staying the execution of the judgment pending the appeal, in an action for the foreclosure of a mortgage of personal property. The appellant (mortgagor) has executed the usual undertaking on appeal for $300. The judgment in this case was rendered in accordance with section 726, Code Civil Proc. The Code prescribes no bond in addition to the $300 bond in such a case. Section 949 provides that, in cases not provided for in the sections therein named, the appeal is perfected by giving the undertaking provided in section 941. Such being the statute, we must be governed by it. The motion is granted.

64 Cal. 232

DEAN v. BAKER *et al.*[2]

(*Supreme Court of California.* Oct. 23, 1883.)

INSOLVENCY—DISCHARGE—OMISSION OF ASSETS FROM SCHEDULE.

In an action on a note, it is competent for plaintiff to prove, in answer to defendant's plea of a discharge under Insolvency Act Cal. 1852, that defendant had willfully and knowingly and intentionally omitted certain real property from the schedule annexed to his petition in insolvency, under section 32 of that act, which provides that the insolvent cannot avail himself of his discharge if it appears that he concealed any part of his property, gave a false schedule thereof, or committed any fraud under the act.

Department 2. Appeal from superior court, Merced county.

Action by T. C. Dean against A. D. Barker and ——— Grimes on a promissory note. Defendant Grimes pleaded a discharge in insolvency. Judgment for defendant. Plaintiff appeals. Reversed.

Act Cal. 1852, § 32, provides that "whenever any insolvent debtor has had the benefit of this act, if thereafter at any time it is made to appear that he has concealed any part of his property or estate, or given a false schedule, or committed any fraud under this act, * * * he cannot avail himself of any of its provisions."

Bennett & Wigginton, for appellant. *R. H. Ward* and *Schell & Treat*, for respondents.

PER CURIAM. We are of opinion that, under section 32 of the insolvency act of 1852, the court erred in ruling out the offer of the plaintiff to prove that the defendant Grimes had willfully, knowingly, and intentionally omitted from the schedule of property annexed to his petition in insolvency certain real property held and owned by him at the time of the commencement of the insolvency proceedings; and for this reason the judgment is reversed, and the cause is remanded.

64 Cal. 233

Ex parte REIS, Treasurer.[2]

(*Supreme Court of California.* Oct. 23, 1883.)

STENOGRAPHERS' FEES—SUPERIOR COURT OF SAN FRANCISCO—POWERS.

Act March 13, 1866, provides that the compensation of stenographers in criminal cases shall be fixed by the court, and paid on its order. Act March 28, 1868, authorizes the county judge of San Francisco county to appoint a reporter, to be paid in like manner. The provisions of these acts are embodied in Code Civil Proc. §§ 269–271. By the constitution of 1879 the superior court of San Francisco was created, and the powers of the county court transferred to it; and by article 22, § 11, all laws relative to the then judicial system were made applicable to the system created by the constitution. *Held*, that such court had power to fix and order the compensation of its stenographer in a criminal case. McKee, J., dissenting.

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In bank. Application for *habeas corpus* by Christopher Reis, treasurer of the city and county of San Francisco, adjudged guilty of contempt in refusing to pay the compensation of a stenographer in a criminal case upon an order of the superior court. Application denied.

Wm. Craig and *Oliver P. Evans*, for petitioner. *Clunie & Knight*, opposed.

McKinstry, J. Immediately prior to the adoption of the Codes, the law with respect to phonographic reporters of the courts in San Francisco was contained in the act of March 13, 1866, (St. 1865–66, p. 232,) and in the act of March 28, 1868, (St. 1867–68, p. 425.) The first act authorized the district judges of San Francisco to appoint shorthand reporters, and provided that, in criminal cases, the compensation of the reporter "shall be fixed by the court, and paid out of the treasury of the county on the order of the court." The act of 1868 provided for the appointment of a reporter by the county judge of San Francisco, and the payment of his compensation in like manner. Sections 269–271, Code Civil Proc., as they read originally,—since amended in particulars which do not affect the question we are considering,—authorized each district and county judge in the state to appoint a shorthand reporter, and provided that, "in criminal cases, * * * the compensation of the reporter must be fixed by the court, and paid out of the treasury of the county in which the case is tried, upon the order of the court." The statutes of 1866 and 1868, above referred to, were not "expressly continued in force" by the Code of Civil Procedure. They were therefore "repealed and abrogated," (Code Civil Proc. § 18,) unless kept alive by section 19 of the Political Code. That section reads: "Nothing in either of the four Codes affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of the Codes, except so far as they have been repealed or affected by subsequent laws, (1) all acts incorporating or chartering municipal corporations, and acts amending or supplementing such acts; (2) all acts consolidating cities and counties, and acts amending or supplementing such acts." It is not necessary to decide whether the acts of 1866 and 1868 were acts "affecting" or "amending or supplementing" the consolidation act or charter of the city and county of San Francisco. If, by virtue of section 19 of the Political Code, the acts of 1866 and 1868 were continued in force, the district judges and the county judge, in San Francisco, had power under those acts to appoint reporters, and to fix their compensation in criminal cases, to be paid by the treasurer "upon the order of the court." If, on the other hand, the acts of 1866 and 1868 were repealed by the Code of Civil Procedure, sections 269–271 of that Code conferred like powers upon the district judges and courts and county judge and court. In either case, just before the adoption of the present constitution, the district courts and county court could legally employ the power of appointing a shorthand reporter, fix his compensation in criminal cases, and order such compensation to be paid, and it was the duty of the treasurer to pay the same "upon the order of the court." Section 11 of article 22 of the present constitution reads: "All laws relative to the present judicial system of the state shall be applicable to the judicial system created by this constitution, until changed by legislation." Of course, the former "judicial system" was not made applicable to the judicial system, or series of courts, created by the constitution of 1879, for the latter was substituted for the former. By "laws relative to the present judicial system" was intended laws passed to render the working of the system harmonious and effective, which would include the laws passed to secure the preservation of evidence, and the payment of compensation to the officers through whose agency it was preserved. Either the acts of 1866 and 1868, (if not repealed by the Code of Civil Procedure,) or the sections of the Code of Civil Procedure relating to the same subject, were therefore made applicable to the judicial system created by the constitution now in force. The powers previously conferred upon the district judges and courts and county judge and court, with respect to the appointment and compensation of reporters, were transferred to the superior judges and courts. It follows the superior courts in San Francisco have power to fix and order paid the compensation of the phonographic reporter in criminal cases, and the corresponding duty is imposed upon the treasurer to pay the same upon the order of the court. The petitioner is remanded.

Sharpstein and Ross, JJ., concurred.

Thornton, J,. (*concurring.*) Phonographic reporters were first appointed in this state as adjuncts to courts under the provisions of the act of May 17, 1861. See St. 1861, p. 497. That act authorized the judges of each of the 4th, 6th, 7th, 10th, 12th, and 15th judicial districts to appoint such an officer, and provided *inter alia* (see section 3) "that in criminal cases or capital offenses, when the testimony has been taken down by order of the court, the compensation of the reporter shall be fixed by the court, and paid out of the treasury of the county in which the case is tried, in the same manner as the fees of trial jurors are paid in such cases." In 1862 the third section of this act was amended, but the provision as to the compensation of the reporters was not changed. St. 1862, p. 253. In the first section of the act of 1861, as amended in 1864, (St. 1863–64, p. 521,) this new feature appeared: that the reporters appointed were required, before entering upon their duties, to "take and subscribe the oath prescribed by law for attorneys and counsellors at law practicing in the courts in this state." It is not too much to say that this made such reporters officers of the court. They were to some extent under the order of the court, and subject to its control. They performed their duties under the eye of the court, and became, like clerks and bailiffs, officers of the courts to which they were attached. The act of March 13, 1866, entitled "An act concerning district court reporters," (see St. 1865–66, p. 232,) was the next act on the subject. The third section of this act was amended by the act of March 28, 1868, (St. 1867–68, p. 455.) Each of these last-named acts had the same provision (see the third section) in regard to the payment of the fees of the reporter in criminal cases, in these words: "In criminal cases or capital offenses, when the testimony has been taken down by order of the court, the compensation of the reporter shall be fixed by the court, and paid out of the treasury of the county in which the case is tried, on the order of the court." A change will here be observed from the former acts referred to. The act of 1866 related to the judges of the 4th, 5th, 6th, 7th, 10th, 11th, 12th, 3d, and 15th districts. By the act of March 30, 1868, the provisions of the act of 1866 were extended to the second judicial district, with a proviso of no consequence touching this case. St. 1867–68, p. 668. The act was further extended by act of 1870. St. 1869–70, p. 330. This was all the legislation on this subject-matter prior to the adoption of the Codes.

These acts, and the proceedings under them, had no reference to the act commonly called the "Consolidation Act." They had no more connection with it than they had with the charters of the cities of Sacramento, Stockton, and San Jose. At the time these acts were passed the city and county of San Francisco was embraced within the 4th, 12th, and 15th judicial districts, the city of Sacramento was in the 6th, the city of Stockton was in the 5th, and the city of San Jose was in the 3d. Each of these counties had a board of supervisors, and in no one of them is any reference made to a board of supervisors, or auditor of any political division in the state.

These acts had nothing to do with the municipal government of counties or cities, or cities and counties, so as to be under the control of the governing bodies or officers of such political divisions. They were a part of the judicial machinery of the state, assistants of the judges in the discharge of their responsible functions, and furnishing reliable aid to counsel in the rendition of their professional services to litigants. They expedited the administration of justice, and afforded a means by which the occurrences of a trial could be correctly preserved, for the use and advantage of court and counsel, and giving further assurance to every litigant that no matter of fact or point in his case would be omitted or overlooked. It was specially advantageous in criminal causes, a history of all the incidents of which being written while the events constituting it were occurring. It may be said that the facts were photographed as they appeared, and the negatives of phonographic characters were laid up for future use and reference. The achievements of the reporters under these acts constituted a most valuable part of the administration of justice, and have been, since the first act was enacted, extended so as to apply to nearly all the courts of the state. Thus the legislation continued until the Codes were adopted in 1872, and went into operation on the 1st of January, 1873. The provisions in relation to phonographic reporters are found in Code Civil Proc. §§ 269–271, et seq. By section 269, as it originally passed, the power to appoint such reporter was vested in the judge of each judicial district and in each county judge. 2 Hitt. Codes & St. p. 944, note *a* to paragraph 10,269. This section was amended in 1874, so as to give such appointing power to the judge of each court of record. The provisions as to compensation will be found in section 274. This section was amended in 1874, but in both sections the language as to compensation is the same as in the acts of 1866 and 1868, above quoted. This provision underwent a change in 1880, when by amendment it assumed this form: "In criminal cases, when the testimony has been taken down or subscribed upon the order of the court, the fees of the reporter shall be certified by the court, and paid out of the treasury of the county or city and county in which the case is tried upon the order of the court." See Amend. Codes 1880, p. 55. We see nothing in this change which divests the court of power to fix the compensation of the reporter. The power to fix is implied by the power to certify. The greater power includes the less. The power to fix is a means by which the court reaches the result which it is called on to certify, viz., the amount of the fees or compensation. These provisions of the Code of Civil Procedure, as to reporters, are found in title 4, pt. 1. Part 1 relates to courts of justice, and title 4 of this part to ministerial officers of courts of justice. See "Summary of Contents," (Olney's 4th Ed.) Code Civil Proc. Chapter 3 of title 4 treats of phonographic reporters as ministerial officers of courts of justice in California. In the view of the lawmaking power, these reporters were regarded as official adjuncts of the courts of justice, and we think the testimony of bench and bar would be universal that they are most valuable adjuncts. They are officers of the court, and take an oath as such. Code Civil Proc. § 272. The legislation on the subject shows that the laws relating to phonographic reporters pertain to the judicial system of the state, and are part and parcel of it, and so have been ever since their adoption, at least since the adoption of the Codes. Reference is made to section 19 of the Political Code as bearing on this subject. In that section it is provided: "Nothing in either of the four Codes affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of the

Codes, except so far as they have been repealed or affected by subsequent laws: (1) All acts incorporating or chartering municipal corporations, and acts amending or supplementing such acts; (2) all acts consolidating cities and counties, and acts amending or supplementing such acts." That by these provisions the consolidation act, and the acts amending or supplementing it, were continued in force, except so far as they were repealed or affected by subsequent legislation, there can be no doubt. But the provisions of that act were not enlarged by this section. It recognized it as existing, unrepealed, and unaffected by anything in the four Codes. It remained the same as it was before the passage of the Codes, giving jurisdiction to the officials of the municipality over the same subjects, and the same demands upon the city and county treasury, which it conferred before the Codes became law, and no other. Those demands were defined in the acts referred to, but there was no demand among them relating to the compensation of phonographic reporters. Such a demand was never a part of the municipal business. Although the laws relating to such reporters had been in existence before the adoption of the Codes, allowing their compensation to be fixed by the court and paid out of the county treasuries, by the order of the court, the boards of supervisors had nothing to do with such demands, or, if they did have anything to do in passing on such demands, such action was supererogatory and extrajurisdictional. The order on the treasurer to pay the demand on the *allocatur* of the court was imperative and unqualified, and there can be no doubt that the treasurer was protected by law in making such payment. Section 95 of the consolidation act specifies the demands payable out of the city and county treasury, (see St. 1856, pp. 172, 173,) and we look in vain in it, at any period of its existence, for any provision authorizing the payment of compensation to phonographic reporters. Section 97 of the same act restricts all demands payable out of the treasury of the city and county to those within the powers of the board of supervisors under the act, and section 98 expressly inhibits the payment, at any time, of any expenditure not authorized by the act. The powers of the board of supervisors are enumerated in section 74 of the act, and we cannot find at any period of the existence of this section, or in any phase which it has assumed, any power vested in such board in relation to the compensation of phonographic reporters. That the demands referred to in the consolidation act are those mentioned in and authorized by it is further clearly shown by the language used in section 82, to this effect: "No payment can be made from the treasury, or out of the public funds of said city and county, unless the same be specifically authorized by this act, nor unless the demand which is paid be duly audited, as in this act provided, and that must appear on the face of it." See article 6, Consolidation Act, "Finance and Revenue," and section 68 of same act.

The provisions of the Code of Civil Procedure, above referred to, repeal nothing of the consolidation act. But it may be said, if it does not repeal, it affects, that act. How, it would be difficult to point out. If the provisions of the consolidation act are left untouched, if its officers exercised the same powers and discharged the same functions under this act after as before the Code legislation alluded to, we cannot perceive that the act is affected. That the powers of the officers are changed, or their duties interfered with, nowhere appears. It does not act upon, or produce an effect on, or change (see Webster's definition of "affect") any of the provisions of the consolidation act; and if it does not act on, or produce an effect on, or change, any of the provisions of that act, it can scarcely be held that such act is affected. The Code legislation may, and does, superadd a duty to an officer, the treasurer, which he was not called on to discharge before. It does this by an independent and distinct statute. But this does not affect any power or duty vested in him by the consolidation act. Those duties remain as they were, and another one is added. To say that this additional duty cannot be imposed on any officer of the corporation is to deny to the legislature the power conferred on it by the paramount organic law.

Treating the four Codes as parts of the same statute, (Pol. Code, § 4480,) it becomes the duty of the judiciary, in their interpretation, to reconcile all conflicts, if it can be done. And conceding that the above-cited provisions of section 19 of the Political Code and the sections of the Code of Civil Procedure in regard to phonographic reporters seemingly conflict, they ought to be so construed as to make every word of each have its proper meaning and effect, and this can be easily done by referring the provisions of the consolidated act to the objects for which it was intended and the provisions of the Code of Civil Procedure to the objects for which it was enacted, in accordance with the rule of distributive construction expressed in the Latin maxim, *reddendo singula singulis*. It would be very strange if the compilers of the Codes had inserted a provision in the Code of Civil Procedure conflicting with a statute continued by the provisions of the Code, with a declaration that nothing in the Codes should affect this statute, and that the legislature should have enacted the Codes in the same shape. Certainly, it never was in the contemplation of the framers of the Codes, or of the legislature enacting them, that anything in the Code of Civil Procedure in relation to phonographic reporters had any reference to any provision of the consolidation act or affected any of its provisions. There are other declarations in the Code of Civil Procedure, inserted as rules for its interpretation, which go to show that the provisions as to reporters were never intended to conflict with or affect, and did not conflict with or affect, anything contained in the consolidation act. Thus, section 4 of the Code of Civil Procedure declares: "The Code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." We know no other statute in the state in regard to phonographic reporters than the provisions of the Code of Civil Procedure, and those provisions under the rule laid down in section 4, above cited, establish the law on the subject to which it relates, viz., phonographic reporters. Can it be said, in the face of this clear and distinctive declaration, that the provisions of the Code of Civil Procedure on this matter are in anyway superseded, affected, or changed by any other statute, even by the consolidation act? Again, section 5 of the Code of Civil Procedure provides: "The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." This is in part a rule of construction, and as such its meaning is that words used in former statutes on the same subject have the same meaning in this Code as in the former statute, which statute is repealed, whether consistent with the provisions of the Code or not. Section 18, Code Civil Proc. It would, in our judgment, be a strained construction to hold that the Code of Civil Procedure did not establish the law of this state in regard to phonographic reporters, their compensation and mode and manner of payment. Whether the consolidation act can be changed by general laws enacted by the legislature is a question which does not arise in this case, as there is nothing in the act mentioned relating in any way to phonographic reporters.

But, conceding that such question does arise, it is very easy of determination. The constitution expressly declares that "cities or towns heretofore or hereafter organized, and all charters framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." Const. § 6, art. 11. It would be difficult to use language more plainly and clearly declaring that all cities or towns, whenever organized, shall be subject to and controlled by general laws, and all charters thereof framed or adopted by virtue of the constitution shall also be subject to and controlled by general laws. That this provision applies to the city and county of San Francisco is plainly declared in section 7 of the same article. This could hardly be otherwise under a constitution in which the broad legislative power is vested in a legislature, without restriction on the power of enacting general laws. The restrictions on the legislative power extend only to special and local statutes. There are none in regard to its exercise of the power by general legislation. Now, to hold that a charter of a city, or city and county, is beyond the reach of general laws passed by the legislature, would be to place the power of a part of the state over the power of the whole; to accord a greater power to a particular district, and that a very small district, than to the whole state. The order of things by such a ruling would be reversed, and a beneficial exercise of the central power would be neutralized by a local authority, and the rights of the citizens of the state out of such locality would be affected by a legislation entirely beyond their control, even when acting with all the representatives of the other portions of the state, convened as a legislature in senate and assembly. The evils of local and special laws are not found in general legislation. General laws are enacted by all the representatives of the people. Each representative knows when he casts his vote that such a law will act upon his constituents and himself, and may affect their and his interests. Such is not the case with local and special laws. They only affect a district or class, and the majority of the legislature frequently impose such laws on a minority with a reckless disregard of right, because such laws do not operate upon their constituents nor themselves. Their constituents and themselves are safe from the consequences of such unrighteous laws, and, careless of the rights of others who are a powerless minority, in the spirit of *apres nous le deluge*, the majority enacts laws oppressive of such feeble minority. This law concerning reporters is a general law. The compensation of the reporters is fixed by a judge, elected in the city and county by the same constituents who elect the board of supervisors, and the other officers of the city and county, and all are responsible for misconduct in office to the same constituency. Thus the local influence is as much felt by the judge as by the officials of the city and county, and every guaranty for a faithful and honest discharge of official duty is had in the case of the judicial incumbent as of the board of supervisors. The danger of lack of local influence and local responsibility is no less in the case of the judge than of the officers of the municipality.

There is another consideration which is entitled to be regarded in the discussion of this subject. The law in relation to phonographic reporters appertained to the judicial system of the state, and constituted a part of it. Such laws were kept in existence by the eleventh section of article 22 of the constitution, until changed by legislation. It would be strange if the administration of such a law were committed to boards of supervisors or other officers of a municipality. Some degree of discretion is left to the official administering this law. The compensation must be fixed by the court, or the fees certified by the court. Section 274, Code Civil Proc. Such duty appertains to the court. Would it not be peculiarly strange if a board of supervisors was to be required to supervise the action of a court under a form of government where the judicial, executive, and legislative functions are distinctly separated by the organic law? We think this would be an anomaly in legislation which does not appear in our statutes. That a board of supervisors should review and reverse or modify the action of a court of general jurisdiction would be a thing unheard of in our system. If the board under the city charter can act on such claim, it can disallow it, or it can allow in part. Sections 83, 85, 92, Consol Act. It may cut down the compensation so that no competent reporter can be found to undertake the work. Thus the administration of the law in criminal cases would be embarrassed and impeded. An unseemly and unfortunate conflict between two departments of the government may thus be brought about, which should by all means be avoided. It is no answer to this to say that it is highly improbable that such a conflict will ever occur. Stranger things have happened. It might occur, and an interpretation of the law which might allow it should not be made. What is said above applies to any presentation made to the auditor for his action. Such action is not required. The legislation of this kind is not new. Witnesses in criminal cases were required to be paid, by a provision of the Penal Code, out of the county treasury by the county treasurer upon the order of the county judge. The production of the order, or a certified copy of it, was alone required to make it the duty of the treasurer to pay it. Section 1329, Pen. Code. Such was section 1329 as it was originally framed. It was afterwards modified by amendment in 1876. By this change the court in one case, and the judge of the court in all others, were empowered by written order to direct the auditor to draw his warrant on the treasurer, "in favor of witnesses for a reasonable sum, to be specified in the order, for the necessary expenses of the witness." No intervention of the board of supervisors is required here, nor does it affect the consolidation act for the reasons above set forth. The legislature fixes the mode of audit and payment in this, as in all other, cases, out of county or city, or city and county treasuries, within the constitutional limits, and the law is valid. See, also, the power given to the judges of the courts to create a charge on the county or city and county treasuries by section 144 of the Code of Civil Procedure, where suitable rooms for holding courts and the chambers of judges thereof are not provided in any city and county, or county, by the supervisors thereof. Here a charge is created against the treasuries of the political divisions mentioned in opposition to the action of the board of supervisors. It will be observed that the provision as to payment of compensation to the reporters in criminal cases in the first act passed on the subject (St. 1861, p. 498) was that the compensation should be fixed by the court and paid out of the treasury in the same manner as the fees of trial jurors are paid in such cases. The statute as to the payment of trial jurors may be seen in Parker's Supp. Gen. Laws Cal. par. 8084, p. 160. This payment was to be made, on the certificate of the clerk of the court, out of the county treasury or other county dues. If this should be held to require the action of the board of supervisors or of the auditor, then the change made by the acts of 1866 and 1868 becomes very significant, and plainly indicates that no action of board or auditor is required. I am of opinion that the order of the superior court is within its jurisdiction, the application should be dismissed, and the petitioner remanded to the custody of the sheriff of the city and county of San Francisco.

McKEE, J., dissented.

(64 Cal. 245)

ROSS v. BRUSIE.[1]

(*Supreme Court of California.* Oct. 24, 1883.)

MORTGAGES—DEED ABSOLUTE ON ITS FACE—DECLARATIONS OF GRANTEE.

In an action to redeem from a deed absolute on its face, but claimed to be intended as a mortgage, conversations between the parties subsequent to the deed, relative to its execution, are competent evidence.

Department 2. Appeal from superior court, Stanislaus county.

Bill by F. H. Ross against James Brusie to redeem from a deed absolute on its face, claimed to have been intended as a mortgage. Judgment for defendant, and order refusing new trial. Plaintiff appeals. Reversed.

Scaniker & Branch and *Scrivner & McKinne*, for appellant. *W. E. Turner*, for respondent.

PER CURIAM. We are of opinion that the court erred in sustaining the objection, on the ground of incompetency, to the following question put to the plaintiff while testifying: "Did you at any time within three years have any conversation with the defendant relative to the execution of this deed and bond?" Judgment and order reversed, and cause remanded.

Hearing in bank denied.

(64 Cal. 246)

McAFEE *et al.* v. FISHER.[1]

(*Supreme Court of California.* Oct. 24, 1883.)

ACTION ON DUEBILL—MATURITY—ESTOPPEL IN PAIS.

1. An instrument as follows: "Due Mr. Maurice Dore the sum of five thousand five hundred and ninety-one dollars, in settlement of land purchased in Sutter county, the payment of which to be mutually arranged,"—is not due until the payment has been arranged.

2. The maker of such instrument stated, to one about to purchase the same, that it was valid and binding, and had been delivered in the ordinary course of business, and would be paid. *Held*, that he was not estopped from denying that the instrument had matured.

Department 2. Appeal from district court.

Action by William C. McAfee and another against Morton C. Fisher upon an instrument for the payment of money. Judgment for plaintiffs, and order denying a new trial. Defendant appeals. Reversed.

Vincent Neale, for appellant. *Greathouse & Blanding*, for respondents.

THORNTON, J. This is an action brought by the assignees of the payee, Dore, hereinafter named, to recover upon the following instrument in writing: "$5,591. San Francisco, Nov. 3d, 1877. Due Mr. Maurice Dore the sum of five thousand five hundred and ninety-one dollars, in settlement of land purchased in Sutter county, the payment of which to be mutually arranged. MORTON C. FISHER." It is evident that the time of payment of this money was to be arranged between the maker and payee. If the words, "the payment of which to be mutually arranged," in the foregoing instrument, mean anything whatever, it is that the time of payment was to be thereafter fixed and agreed on by the parties Dore and Fisher. We perceive nothing else open to be "mutually arranged." The amount in money was fixed, and the consideration agreed on and mentioned in the paper, viz., "in settlement of land purchased in Sutter county." It nowhere appears, either in the evidence or the finding, that the time of the payment has ever been arranged between the parties referred to. The action then is prematurely brought, unless it appears that the defendant is estopped to aver that the same was not due when this action was brought. It is found upon this point as follows: "That prior to the 17th day of November, 1877, and before accepting said duebill or obligation, plaintiffs went to said defendant, Fisher, and told him that they contemplated purchasing the same, and asked him if the same was a valid instrument given and delivered for a *bona fide* indebtedness, and would be paid upon demand; and that said Fisher expressly represented to plaintiffs that said instrument was valid and binding, and had been executed and delivered by him to said Dore in the ordinary course of business, and for a full and valuable consideration; and told said plaintiffs that it was all right, and would be paid; and that said plaintiffs thereupon executed and delivered to said Dore a full and complete release and discharge of said Dore of and from all claims and indebtedness due said plaintiffs from him, said Dore, and particularly of and from the indebtedess from said Dore to plaintiffs, in payment of which said duebill or obligation was proposed to be and was thereafter indorsed and transferred to them by said Dore, and took and accepted said Fisher as their debtor, in place and instead of said Dore, whom they then and there released as aforesaid." The facts contained in this finding, while estopping defendant from denying the validity of the instrument, do not estop him from denying that the time of payment had arrived. It is not found that defendant ever told the plaintiffs that the money mentioned in this action was due and payable before action brought. The finding is that "said Fisher expressly represented to plaintiffs that said instrument was valid and binding, and had been executed and delivered to him by Dore in the ordinary course of business, and for a full and valuable consideration, and told said plaintiffs that it was all right, and would be paid." There is no finding here that the instrument would be paid on demand.

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[1] This case, filed October 24, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

According to the finding, Fisher only said "that it was all right and would be paid." He did not say when it would be paid. What he said was perfectly consistent with the purport of the paper, that it would be paid when the time of payment had been mutually arranged, that is, agreed upon by Dore and the defendant. The meaning of the language of the paper is a question of law, and its meaning was, in contemplation of law, as well known to the plaintiffs as defendant. We cannot see, under the facts found, that there was any estoppel by the acts or words of Fisher, by which he was estopped from averring and proving herein that the instrument had not matured for payment when this action was begun. It follows from the foregoing that the judgment and order must be reversed, and cause remanded, and it is so ordered.

MYRICK and SHARPSTEIN, JJ., concurred.

Hearing in bank denied.

(64 Cal. 250)

FAIRBANKS v. ROBINSON *et al.*[1]

(*Supreme Court of California.* Oct. 25, 1883.)

ALLOWANCE TO WIDOW—PURCHASE-MONEY MORTGAGE.

Code Civil Proc. § 1469, providing that, if an intestate's estate shall not exceed the sum of $1,500, the whole thereof shall, after a rule against persons interested to show cause against the same be set apart for the support of intestate's widow and minor children cannot so operate as to divest the rights of a purchase-money mortgagee in real estate forming a part of intestate's estate.

Department 2. Appeal from superior court, Stanislaus county.

Action by Ames Fairbanks against William H. Robinson, administrator of John T. Martin, deceased, and Olive Martin and John Martin, children of said decedent, to foreclose a purchase-money mortgage executed by decedent in his lifetime. The answer of the children alleged that decedent's estate was less in value than $1,500, and that the whole thereof had been assigned them for their support in lieu of a family allowance and homestead. Judgment for plaintiff. Defendants appeal. Affirmed.

Code Civil Proc. § 1469, provides that, if a decedent's estate shall not exceed the sum of $1,500, the whole thereof shall be set apart for the use and support of his widow and minor children. No exception or reservation in favor of creditors, by lien or otherwise, is made, but it is provided that a rule shall issue requiring "all persons interested" to appear and show cause against the setting apart of the estate.

Johnson & Hazen, for appellants. *T. A. Coldwell*, for respondent.

PER CURIAM. This is an action to foreclose a mortgage executed by the intestate Martin to secure a portion of the purchase money of the premises. The answer of the defendants Olive and John Martin avers that all the property of the intestate, including the mortgaged premises, was set apart to said defendants under section 1469 of the Code of Civil Procedure. The answer was demurred to, and the demurrer overruled. We are of opinion that the demurrer should have been sustained. The matters set up in the answer constitute no defense to this action. Judgment reversed, and cause remanded, with instruction to sustain the demurrer to defendants' answer, with leave to amend within 10 days after notice thereof.

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[1] This case, filed October 25, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

64 Cal. 256

PEOPLE v. LANGTREE.[1]

(*Supreme Court of California.* Oct. 26, 1883.)

WITNESS — CROSS-EXAMINATION — COMPETENCY— HUSBAND AND WIFE.

1. On a trial for burglary, a witness, charged with the same offense in a separate information, may be asked on cross-examination whether he expects leniency in his own case in consequence of his becoming a witness for the prosecution.

2. On a trial for burglary, the wife of a party charged with the same offense in a separate information is competent to testify to matters tending to implicate her husband. Code Civil Proc. § 1881, and Pen. Code, § 1322, providing that the wife is not a competent witness for or against her husband, apply only to actions in proceedings in which "one or both are parties."

In bank. Appeal from superior court, city and county of San Francisco.

This was an information against Joseph Langtree for burglary. There was an order refusing to sustain a demurrer to the information and one refusing to set it aside. One Brandon was charged in a separate information with the same offense, and his wife was called as a witness for the defense on the trial of Langtree. Her testimony tended to show defendant's innocence of the charge, and also to implicate her husband. The court refused to allow her to testify to matters having the latter effect. There was a verdict of guilty, and judgment thereon, and orders denying a motion in arrest of judgment and refusing a new trial, from which defendant appeals. Judgment and orders reversed.

Davis Louderback, for appellant. *Atty. Gen. Marshall*, for the People.

SHARPSTEIN, J. It does not appear that Mrs. Brandon, who was called as a witness by the defendant, objected to testifying to all that she knew in regard to the burglary for which he was on trial. Nor does it appear that her husband objected to her testifying. His counsel, Mr. Carson, stated that from the commencement of the trial he had interposed no objection whatever. On being informed by the court that at that stage he had a right to interfere, if he so elected, Mr. Carson replied: "I would much prefer not to have Mrs. Brandon examined." She was a competent witness, and the only question which could possibly arise was whether she could be compelled to testify to any fact which might implicate her husband in the offense with which the defendant was charged. And such evidently was the opinion of the court, which held that the witness might "be examined on any matters touching the case" except those "relating to her husband," but would "not permit her to testify as to any matters in which her husband was implicated in the crime for which the defendant was on trial." It is of this that the defendant complains. There was a separate information pending in the court, in which the husband of the witness was charged with the same burglary for which the defendant was on trial. But said husband was not in any sense a party to the action or proceeding in which his wife was called as a witness. If he had been, his wife could not have been a witness for or against him, unless both he and she consented thereto. Pen. Code, § 1322; Code Civil Proc. § 1881. And it is claimed by the attorney general "that, although the husband of the witness was not a party to the proceedings then before the court, the fact that he was under information for the same offense made his connection with those proceedings such that the testimony of his wife, implicating him in the crime, would have been a breach of confidence repugnant to the policy and intention of the law, and a manifest violation of its meaning." In support of this he cites section 1881, Code Civil Proc., which reads as follows: "A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." This is the provision of the Code upon the subject, and it must prevail: "All statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated." Code Civil Proc. § 18. "A wife cannot be examined for or against her husband without his consent." But when may she be said to be examined for or against him? If examined in an action or proceeding to which he was a party, she would undoubtedly be examined for or against him. Any witness examined in an action or proceeding is examined for one party and against the other therein. No witness is said to be examined for or against any one not a party to the action or proceeding in which such witness is called to testify. And the testimony of a witness is not evidence for or against any one not a party to the action or proceeding in which such testimony is given. If the husband of this witness had been a party to the action on trial she could not have been examined at all without his consent. She could not then have been examined in regard to any matters whatever, because, if relevant, her testimony would be, in some degree, for or against him. Not being a party to the action, her testimony could not be used for or against him. Thus far we have considered the provision of the Code of Civil Procedure as if it were the only one relating to the subject. But it is not. There is a provision of the

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Penal Code on the same subject. It is as follows: "Except with the consent of both, or in case of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties." Pen. Code, § 1322. This is the latest enactment on the subject, and relates exclusively to criminal actions or proceedings. It limits the incompetency of a husband or wife to testify in criminal actions or proceedings for or against each other to cases in which one or both are parties. By section 1102, Pen. Code, the rules of evidence in civil actions are made applicable also to criminal actions, except as otherwise provided in said Penal Code. Therefore, if there be any repugnancy between the provisions of the two Codes on this subject, that of the Penal Code must prevail. We think, upon a fair construction, both mean the same thing, although the Penal Code is more explicit than the other. On this, as on nearly every other subject to which the Codes relate, they are simply declaratory of what the law would be if there were no Codes. State v. Bridgman, 49 Vt. 206; Com. v. Reid, 8 Phila. 385; Same v. Patterson, Id. 609; State v. Briggs, 9 R. I. 361; Insurance Co. v. Noble, 5 Abb. Pr. (N. S.) 55; Rex v. Inhabitants, etc., 6 Maule & S. 194; Same v. Inhabitants of Llangunnor, 2 Barn. & Adol. 616; Reg. v. Halliday, 8 Cox, Crim. Cas. 298; Henman v. Dickinson, 5 Bing. 184; Reg. v. Williams, 8 Car. & P. 286; Higbee v. McMillan, 18 Kan. 136; 1 Greenl. Ev. 342; Rosc. Crim. Ev. 148; 1 Whart. Ev. 425; Warton, Crim. Ev. 396, 402; Schouler, Husb. & Wife, 85. "On the whole," says Schouler, "the prevailing tendency of late years in both England and America is to regard the domestic confidence or the ties of a spouse as of little consequence compared with the public convenience of extending the means of ascertaining the truth in all cases; such facilities being increased, it is believed, by hearing what each one has to say, and then making due allowance for circumstances affecting each one's credibility." Schouler, Husb. & Wife, 85.

On the cross-examination of Patrick Brandon, who, as before stated, was charged in a separate information with the same burglary for which the defendant was on trial, the counsel for defendant endeavored by appropriate questions to elicit from the witness whether he expected, in consequence of his becoming a witness for the prosecution, that he would be favored or more leniently dealt by when his own case should come up. To several questions of this character his answers were evasive. The court, seeing this, should have compelled the witness to give a direct answer. Instead of doing so, however, the court sustained an objection of the prosecution to a question put by the defendant's counsel to the witness as to his expectations. These are the only material errors which the record discloses.

Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY, THORNTON, MYRICK, McKEE, and ROSS, JJ., concur.

PEOPLE v. SCHMIDT.[1]

(*Supreme Court of California.* Oct. 26, 1883.)

HOMICIDE—OBJECTIONS TO INFORMATION—FORMER CONVICTION.

1. An information will not be set aside on motion, except on the grounds specified in Pen. Code, § 995.

2. A demurrer to an information will not lie on any ground other than those specified in Pen. Code, § 1004.

3. A conviction of murder, set aside at the instance of defendant because of a defect in the information, is not a bar to a subsequent trial and conviction on a valid information for the same offense.

4. Defendant was convicted of murder. On appeal the conviction was set aside for defect in the information, and the case remanded for further proceedings. The court below dismissed the prosecution under Pen. Code, § 1385, which allows such dismissal when "in furtherance of justice," and allows the retention of defendant in custody for proceedings on a new information. *Held*, that defendant was properly proceeded against under a new information, and that his pleas of "once in jeopardy" and "former conviction" constituted no defense.

In bank. Appeal from superior court, Butte county.

Information in the superior court of Butte county against Herman Schmidt for murder. From a conviction and an order denying a motion for a new trial, defendant appeals. Affirmed.

John W. Turner and *Gray & Sexton*, for appellant. *Atty. Gen. Marshall*, for the People.

McKEE, J. The appeal in this case is from a judgment of death pronounced against the defendant upon a conviction for murder in the first degree, upon an information filed March 13, 1883, in the superior court of Butte county, and also from an order denying a motion for new trial. It is stipulated in the record of the case that the verdict was warranted by the evidence, except on the issues of "once in jeopardy" and "a former conviction;" also that all the proceedings at the trial were regular, with the exception of the errors which are specified. The specifications of error are that the court refused to set aside the information upon motion, overruled a demurrer to the information, and, after conviction, refused to arrest the judgment, and denied defendant's motion for a new trial. The grounds enumerated in section 995 of the Penal Code are the only grounds upon which an indictment or information may be set aside on motion, (People v. Southwell, 46 Cal. 141;) and those enumerated in section 1004 of the Penal Code are the only grounds upon which a demurrer to an indictment or information may be made. Neither the motion to set aside the information nor the demurrer to the information was based upon any of the grounds enumerated in these sections, except that one of the grounds of the motion was that the defendant had not been legally committed by a magistrate before the filing of the information; and one of the grounds of the demurrer was that the information did not conform to the requirements of sections 950–952, Pen. Code. But the information substantially conformed to those sections; and the record of the case shows that the defendant had been legally committed by a magistrate pursuant to section 872 of the Penal Code, before the information was filed. There was therefore no error in denying the motion to set aside, nor in overruling the demurrer. Nor was there any error in denying the motion in arrest of judgment, because that motion was based upon the ground specified in the demurrer, which, as we have before seen, was properly overruled.

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[1] This case, filed October 26, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

But the principal question at issue, urged by the appellant and argued on the hearing, arises out of the specification of error that the verdicts upon the pleas of "once in jeopardy" and "a former conviction" were contrary to the law and the evidence. At the trial of the issues raised by these pleas, the defendant proved that he had been tried and found guilty of murder in the first degree for the same homicide, upon an information filed in the superior court of Butte county, June 29, 1882. But it was also proved that the information upon which he was convicted contained no allegation that the homicide had been committed with "malice aforethought," nor were any words of equivalent import used in it to describe the crime; the information was therefore fatally defective. Nevertheless, judgment of death was pronounced against the defendant; but he appealed from the judgment to this court, and obtained a reversal of the judgment, because of the defective information upon which the conviction was had, and the court "remanded the cause for further proceedings." People v. Schmidt, 63 Cal. 28. Yet the defendant contends that that conviction and judgment, although they have been set aside at his own instance, constitute a bar to further prosecution for the same crime upon the ground that he has been once in jeopardy. The mere statement of the proposition would seem to be its own refutation; for the judgment having been vacated, and the conviction set aside at the instance of the defendant himself, there was no existing judgment or conviction which could be availed of as a bar to the action. No case can be found where, the verdict of guilty having been set aside on motion of the prisoner, it has been held a bar to another trial. U. S. v. Keen, 1 McLean, 435.

But it is argued that on reversing the judgment this court did not remand the case for a new trial, and that in consequence of the failure to order a new trial the defendant was entitled to be discharged. A new trial upon a fatally defective information would be a vain thing; the case was therefore remanded for further proceedings. That did not entitle the defendant to be discharged from custody if the law authorized his detention. The legal effect of the remanding order was to remit the defendant to his original position upon his plea of not guilty to the information on file, just as though a trial had never been had, and, upon the going down of the *remittitur* to the superior court, that court had jurisdiction to proceed in the case before it in any way authorized by the criminal law. Now, a superior court in which a criminal action is pending has authority to dismiss the action, and to direct the resubmission or reexamination of the charge, and, in the mean time, detain the defendant in custody for his appearance to answer a new indictment or information, in the following cases: (1) Where in the trial of a cause it appears that the facts as charged do not constitute an offense punishable by law, and, in the opinion of the court, a new indictment or information can be framed, upon which the defendant can be legally convicted. Section 1117, Pen. Code. (2) Where, after a verdict of acquittal has been given, because of a variance between the pleading and proof which may be obviated by a new indictment or information. Section 1165, Id. (3) When, after an order in arrest of judgment, it appears to the court, from the evidence given on the trial, there is reason to believe the defendant guilty, and a new indictment or information can be framed upon which he may be convicted. Section 1188, Id. (4) Where, in the judgment of the court, the dismissal of the action would be "in furtherance of justice." Upon that ground the court is authorized of its own motion, or upon the application of the district attorney, to order the dismissal of an action or indictment. Section 1385, Id.

Under the provisions of the last cited section of the Penal Code, proceedings were taken by the superior court against the defendant. Upon due notice given, the district attorney moved the court to dismiss the action and retain the defendant in custody for a re-examination upon a new charge for the same homicide. The defendant and his counsel were present at the hearing of the motion, and made no objection; and the court ordered the dismissal of the action upon the ground stated in section 1385, supra. After the entry of the order a new charge of murder was made against the defendant, upon which he was regularly examined before a magistrate, and committed to answer. The dismissal of the former action did not constitute a bar to another prosecution for the same homicide. Section 1387, Pen. Code. Nor did the proceedings after the dismissal and before the filing of the second information have that effect; nor could the former conviction upon the first information be availed of for that purpose, because it had been set aside on the motion of the defendant himself. Having been set aside, at the instance of the defendant, upon the ground that the information was insufficient in form and substance to sustain the conviction, it cannot be legally said that the defendant had been already tried and convicted upon an information valid and sufficient to sustain a conviction for the same offense of which he has been since convicted upon another information. He has therefore not been tried twice for the same offense.

People v. Gilmore, 4 Cal. 376, is not a parallel case to the one in hand. In that case the defendant was indicted for murder and convicted of manslaughter. On his own motion verdict was set aside, and he was put on trial a second time upon the same indictment, and was convicted of murder; but the supreme court set aside the conviction upon the ground that the former conviction for manslaughter was an acquittal for murder, and the defendant could not be retried for the crime of which he had been acquitted, although the conviction for the less offense was set aside on his own motion. That decision was followed in the case of People v. Backus, 5 Cal. 275, and was quoted approvingly by Justice Sawyer in People v. Apgar, 35 Cal. 389, but neither Justice Sanderson nor Justice Rhodes expressed an opinion, both concurring in the judgment in the case upon other grounds. Whether those cases would be considered as binding upon this court under the provisions of the Penal Code, it is not necessary now to decide; for in the case in hand there has been no acquittal of a greater offense by a conviction for a lesser offense included within the greater, and there has been no retrial upon the same offense. There was a conviction for the highest offense under an information, which was adjudged insufficient to sustain the conviction. There was, therefore, no implied verdict of acquittal available for any purpose, and, as the conviction was set aside on the defendant's motion, there is no existing verdict of any sort which can be availed of as a bar to a further prosecution for the same crime. Therefore the defendant has not been in jeopardy, within the meaning of the constitution, and there was no error in denying his motion for a new trial. We find no error in the record.

Judgment and order affirmed.

Sharpstein, McKinstry, Myrick, Ross, and Thornton, JJ., concurred.

(64 Cal. 265)

Doerfler v. Schmidt.[1]

(*Supreme Court of California.* Oct. 29, 1883.)

Service of Summons—Affidavit—Vacating. Deed—Waiver of Service.

1. An affidavit of service of summons, which states that affiant, who served it, is over the age of 18, but does not show that he was of that age at the time of service, is insufficient.

2. In an action to set aside a deed as fraudulent, the complaint will be fatally defective unless it avers delivery of the deed.

3. Statements in an affidavit used on a motion to set aside a default cannot be deemed a waiver of service of the summons.

Department 2. Appeal from superior court, Alameda county.

Action by Joseph Doerfler against Albert Schmidt to set aside a deed as having been procured by fraud. In the affidavit to show service of summons, affiant stated that "I am over the age of eighteen, and that I did on the 6th day of March, 1879, personally serve the defendant." The affidavit was made March 7, 1879. The complaint failed to aver that the deed sought to be avoided had been delivered. There was judgment for plaintiff, from which, and from an order refusing a new trial, defendant appeals. Judgment and order reversed.

H. S. Mulford, for appellant. *Thomas Watts*, for respondent.

Per Curiam. The proof of service of the summons was insufficient. Maynard v. McCrellish, 57 Cal. 355, was decided upon a similar state of attempted proof. The statement in the affidavit used on the motion to set aside the default cannot be deemed a waiver of the service. We cannot look beyond the judgment roll for the purpose of ascertaining the validity of the judgment. It is argued that the complaint does not state facts sufficient to constitute a cause of action, in that it does not aver a delivery of the deed. We think the point is well taken.

Judgment and order reversed, and cause remanded for further proceedings.

(64 Cal. 267)

Ex parte Carpenter.[2]

(*Supreme Court of California.* Oct. 30, 1883.)

Perjury—Identification before Notary—Competency of Grantor.

The oath of a person before a notary public in his own behalf, identifying himself as the grantor in a deed, is competent for that purpose, where affiant is not within any of the exceptions of Code Civil Proc. §§ 1879, 1880, disqualifying witnesses; and such oath being with respect to a material matter, if false, renders the affiant guilty of perjury. Ross and McKinstry, JJ., dissenting.

In bank. Petition for a writ of *habeas corpus*. Petition denied.

Tyler & Tyler, for petitioner.

McKee, J. The petitioner is held in custody by an order of commitment holding him to answer upon a charge of perjury. He complains that his imprisonment is illegal, because there was no evidence before the committing magistrate to sustain the charge, and no sufficient cause to believe him guilty. The evidence upon which the order was made showed that between the hours of 8 and 9 o'clock on the night of the 21st of April, 1883, the petitioner appeared before a notary public in Solano county, to acknowledge the execution of a deed, which he then exhibited to the notary, signed by one E. Bouchard as the grantor therein named. The notary, having had no personal knowledge of the petitioner, administered to him an oath, as a witness in his own behalf, for the purpose of determining whether he was the person who had signed the deed which he wished to acknowledge; and the petitioner on oath testified that he was E. Bouchard, the person named in and who executed the deed. Upon that evidence the notary took the acknowledgment, certified to it, and returned the deed, with his certificate annexed, to the petitioner. The identity of a party acknowledging the execution of an instrument is an essential fact to be found by the officer taking the aknowledgment; and it must be found by him from his personal knowledge of the person, or from satisfactory evidence of a witness, and, when found, it must be stated in the certificate of acknowledgment. In the proceeding before the notary the testimony given by the petitioner was therefore material, and the evidence before the committing magistrate showed that it was false. Being false, the act of taking the oath was an act coupled with an intent prejudicial to one or the other or both of the parties named in the deed, and the evidence made a sufficient cause to hold the petitioner to answer upon the charge of perjury, if the notary had authority to administer the oath. There is no question that the notary was an officer legally authorized to take and certify acknowledgments to written instruments, and to administer oaths and take testimony for that purpose. Section 1181, Civil Code, and section 2093, Code Civil Proc. His jurisdiction, it is true, is limited by law to cases in which he personally knows, or has satisfactory evidence on the oath or affirmation of a credible witness, that the person making the acknowledgment is the person who executed the instrument. In the proceeding commenced by the petitioner the notary had jurisdiction, and, as the petitioner was unkown to him, he had authority to administer an oath to any credible witness for the purpose of ascertaining and determining the fact of the petitioner's identity with the grantor named in the deed before taking his acknowledgment. The question, therefore, arises whether, under such circumstances, the petitioner was a competent witness in his own behalf to prove that he was the person described in and who had executed the deed. By the practice act of 1850, all persons who were parties to an action or proceeding, or for whose immediate benefit the action or proceeding was prosecuted or defended, or who were the assignors of the things in action for the purpose of becoming witnesses, and all black and mulatto persons and Indians, in actions to which a white person was a party, were excluded from testifying. Sections 304–306, St. 1850, p. 455. And "no acknowledgment of any conveyance whereby any real estate was to be conveyed, or might be affected, could be legally taken, unless the person offering to make such acknowledgment was personally known to the officer taking the acknowledgment to be the person whose name was subscribed to the conveyance as a party thereto, or was proved to be such by the oath of a credible witness." The name of the witness was required to be inserted in the certificate of acknowledgment, and he had to be another than the grantor, for the grantor himself could not, at that time, as a witness in his own behalf, prove the execution of his deed. The deed had to be attested, and its execution could be proved only—"*First*, by the testimony of a subscribing witness; *second*, when all the subscribing witnesses were dead or could not be had, by evidence of the handwriting of the party of at least one subscribing witness, given by a credible witness to each signature." St. 1850, pp. 249, 250. In 1851 the legislature declared all persons competent to testify, except persons to an action or proceeding, or for whose immediate benefit the action or proceeding was to be prosecuted or defended, all persons of unsound mind, children under 10 years of age, who appeared incapacitated to receive just impressions of facts and to relate them truly, and Indians or persons having one fourth or more of Indian blood, etc. Sections 391–393, St. 1851, pp. 113, 114. In 1854 the disqualification of a witness was extended to "all persons who had a present, certain, and vested interest in the event of the action or proceeding," and to all unpardoned convicts of felony St. 1854, pp. 66, 67. Subsequently, by an act passed April 27, 1863, sections 391 and 392 of the act of 1851 were so amended that the disqualification of interest in the action or proceeding was entirely removed; and it was enacted that "the parties to any action or proceeding were competent to give evidence either *viva voce* or by deposition, or in any other legal mode, as any other witness, in behalf of himself, or of any of the parties to the action or proceeding," except where the adverse party, or the party for whose immediate benefit the action or proceeding was prosecuted or defended, was the representative of a deceased person, and the facts to be proved transpired before his death. At the same time it was provided that "nothing contained in section 392 shall affect the laws in relation to the attestation of any instrument required to be attested." St. 1863, pp. 701, 702. The amendments of 1863 continued to be the law of the competency of witnesses until the Codes swept away nearly all of the disqualifications which had rendered persons incompetent. By sections 1879 and 1880 of the Code of Civil Procedure no person was excluded from testifying because of interest in the action or proceeding to which he was a party, nor because of conviction for crime, nor on account of race, color, or previous condition of servitude. All persons were declared competent to testify, except persons of unsound mind, children under 10 years of age, who appeared incapable of receiving just impressions of facts, or of relating them truly, and parties to or in whose behalf an action or proceeding was commenced against an executor or administrator upon a claim or demand against the estate of a deceased person, and professional persons as to confidential communications made to them in their professional character, (sections 1879–1881, Code Civil Proc.;) and by section 1195 of the Civil Code it was provided that "proof of the execution of an instrument, when not acknowledged, may be made either (1) by the parties executing it, or either of them; or (2) by a subscribing witness; or (3) by other witnesses, in cases mentioned in section 1198." At the time the petitioner appeared before the notary to acknowledge the deed, which was signed by E. Bouchard, whom the petitioner falsely personated, he was not within any of the exceptions enumerated in sections 1879 and 1880 of the Code of Civil Procedure. He was therefore a competent witness in his own behalf in the proceeding before the notary, to which he was a party; and, when he testified falsely on the oath administered to him by the notary he subjected himself to be proceeded against for perjury. "Every person who, having taken an oath that he will testify, depose, or certify truly before an competent tribunal, officer, or person, in any of the cases in which such an oath may be administered, willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury." Section 118, Pen. Code. And it is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner, (section 121, Pen. Code,) nor is the incompetency, even, of a witness, any defense; it is sufficient that he did give such testimony, (section 122, Pen. Code.) It follows, as the notary had jurisdiction in the proceeding before him to administer an oath to the petitioner, that the oath administered was judicial; and as the testimony of the petitioner given on oath was material to the proceeding, and shown to be false, there was probable cause for holding him to answer upon the charge against him. Writ dismissed, and petitioner remanded.

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[1] This case, filed October 29, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed October 30, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

MYRICK and SHARPSTEIN, JJ., concurred. THORNTON, J., concurred in the judgment. ROSS and MCKINSTRY, JJ., dissented.

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64 Cal. 273

RICHMOND v. LATTIN *et ux.*[1]

(*Supreme Court of California.* Nov. 2, 1883.)

COUNTERCLAIM—FORECLOSURE OF MORTGAGE—PAYMENT.

In an action to foreclose a mortgage, an answer setting up a sale of property to plaintiff in satisfaction of the mortgage sufficiently shows a counterclaim, under Code Civil Proc. § 438, which provides that a counterclaim must be (1) a cause of action arising out of the transaction set forth in the complaint or connected therewith, or, (2) in an action on a contract, any other cause of action arising upon contract.

Department 2. Appeal from district court.

Action by Charles B. Richmond against Ambrose J. Lattin and Almira, his wife, to foreclose a mortgage executed by defendants to secure a note for $1,000. The answer alleged that the property mortgaged was community property, and that the interest of the wife was a homestead right only, and set up as a defense and counterclaim a sale by defendant A. J. Lattin to plaintiff of an interest in a patent right for $2,000, of which $1,000 was in satisfaction of the mortgage in question. The answer further alleged that plaintiff had neglected and refused to give a certificate of satisfaction of the mortgage, though often requested to do so, and prayed a decree declaring the mortgage satisfied, and directing the payment of a forfeit of $100 to defendants because of such refusal. The court decreed that plaintiff pay to defendants $1,000 balance due on the sale of the patent, and the $100 forfeit, and that he acknowledge satisfaction of the mortgage. Plaintiff appeals. Code Civil Proc. § 438, provides that a counterclaim must be "a cause of action arising out of the transaction set forth in the complaint, * * * or connected with the subject of the action," or, "in an action arising upon contract, any other cause of action arising upon contract, and existing at the commencement of the action." From a judgment for defendants, plaintiff appeals. Affirmed on condition.

Albert A. Moore and *John Reynolds*, for appellant. *J. C. Martin* and *J. C. Plunkett*, for respondents.

PER CURIAM. This is an action to foreclose a mortgage. The affirmative relief asked for by the defendants is sufficiently stated as a counterclaim, as to the $1,000, (subdivision 2, § 438, Code Civil Proc.,) and the evidence relating thereto is sufficient to sustain the findings. As to the $100 claimed as a forfeit for not executing, on demand, a certificate of discharge of the mortgage, the findings relating thereto are not sustained by the evidence. There is no evidence of the demand required by section 2951 of the Civil Code. As there is a want of evidence to sustain the findings in regard to the demand for satisfaction of the mortgage, and as we cannot direct a new trial on that portion of the case only, it is therefore ordered that if, within 20 days next succeeding the filing of this opinion, the defendants shall file in this court a stipulation in due form, remitting the sum of $100 from the judgment in favor of the defendants, and consenting to a reduction of said judgment to that extent, the said judgment in that event shall be affirmed as to the remainder thereof; but, if the defendants shall fail or neglect to file said stipulation within the said period above prescribed, then that said judgment be reversed, and said cause remanded for a new trial.

Hearing in bank denied.

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64 Cal. 284

HAHN v. SCHMIDT.[2]

(*Supreme Court of California.* Nov 5, 1883.)

MALICIOUS PROSECUTION—FORGERY—BONA FIDES OF PROSECUTION—ERROR OF MAGISTRATE.

1. A person who in good faith makes affidavit before a magistrate of facts conceded to be true, and which the magistrate erroneously determines to be a particular offense, and issues a warrant accordingly, is not liable to the person arrested, for malicious prosecution.

2. It is not necessary that a person making affidavit before a magistrate of facts supposed by affiant to constitute a forgery of his name must have believed at the time that he was responsible for the payment of the money mentioned in the forged paper, in order to relieve him from liability in an action for malicious prosecution.

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[1] This case, filed November 2, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed November 5, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Department 2. Appeal from superior court, Alameda county.

Action by William Hahn against Joseph Schmidt. From a judgment for defendant, plaintiff appeals. Affirmed.

Tyler & Tyler, for appellant. *Samuel P. Hall*, for respondent.

SHARPSTEIN, J. This is an appeal from a judgment and from an order denying the plaintiff's motion for a new trial in an action for malicious prosecution. There are but two exceptions before us:

1. To that portion of the charge of the court contained in the following extract: "Now, I instruct you that this complaint, on the face of it, not only does not state facts which constitute the crime of forgery, or any crime; it merely shows that the plaintiff signed an acceptance, thus: 'Joseph Schmidt, per William Hahn;' and this in law does not constitute a forgery. Yet the facts stated in the complaint, although not constituting the crime of forgery, may be true, and if made to the justice in good faith, and the justice, upon the facts so stated, adjudged the offense to be forgery, and issued his warrant, under which the arrest was made, then, under such circumstances, the defendant would not be liable; and you are therefore instructed that if you find that the facts stated in the affidavit or the complaint upon which the plaintiff was prosecuted were true, and defendant at the time believed the facts to be true, then the defendant cannot be held liable in this action, even though such facts do not technically constitute a crime. Do not misapprehend my instruction. You must find that the charge made or facts stated are true, and that defendant so knew or believed, before this complaint can form a defense. In determining whether this complaint was in fact true, you should consider whether, in making the complaint, the defendant suppressed any facts shown by the evidence to be known by him. In this connection you may consider the restriction placed upon the plaintiff in the power of attorney, which rendered the acceptance void, and also the evidence on the subject of the circumstances under which the acceptance was made."

2. To the refusal of the court to give in this connection an instruction asked by the plaintiff, of which the following is a copy: "That, in order for such complaint to be made in good faith by Schmidt, he must have supposed that at the time he made it he was responsible upon the acceptance, and that it charged him with the payment of the money." The complaint referred to is in the form of an affidavit made by the defendant before a justice of the peace, who thereupon issued a warrant for the arrest of the plaintiff, and upon which he was arrested and brought before the justice on a charge of forgery. The charge was dismissed. The only question which arises upon the record is whether one who makes, before a committing magistrate, an affidavit stating facts conceded to be true, which the magistrate erroneously supposes constitute a crime, and proceeds accordingly, is liable in damages to the person whom the magistrate causes to be arrested upon such affidavit. In Leigh v. Webb, 3 Esp. 165, Lord ELDON ruled that if a party makes a complaint before a justice, which the justice conceives to amount to a felony, and issues his warrant against the party complained against, and the facts do not amount to felony, no action for malicious prosecution will lie against the party who made the complaint. In Cohen v. Morgan, 6 Dowl. & R. 8, ABBOTT, C. J., said: "There is nothing in the defendant's conduct to show that he was influenced by malice. To support the averment of malice it must be shown that the charge is willfully false. But here, according to the evidence, the defendant merely related his story to the magistrate, leaving it to him to determine whether the facts amounted to felony." Referring to Cohen v. Morgan, supra, Lord DENMAN, in Carratt v. Morley, 1 Gale & D. 275, said: "It is clear from that and other cases, and upon principle, that a party who merely originates a suit by stating his case to a court of justice is not guilty of trespass, though the proceeding should be erroneous or without jurisdiction." We are unable to find any English case in which Leigh v. Webb, supra, has been overruled, or the soundness of the views expressed by Lord ELDON even questioned. In McNeely v. Driskill, 2 Blackf. 259, Leigh v. Webb was cited and followed. But, in order to constitute a defense to an action for malicious prosecution, the facts stated in the complaint, if they do not constitute a crime, must nevertheless be true. Dennis v. Ryan, 63 Barb. 145; Collins v. Lowe, 7 Blackf. 416; Forrest v. Collier, 20 Ala. 175; Anderson v. Buchanan, 8 Ind. 132; Farlie v. Danks, 30 Eng. Law & Eq. 115. The court not only so charged the jury, but went further than any case which has fallen under our observation goes, and charged that the defendant must have believed at the time of making the complaint that the facts stated in it were true, in order to shield himself from liability. In each of the cases cited by appellant's counsel the complaint, on which the warrant for the arrest of the party issued, charged him with a criminal offense, or, if it did not, was false, as in Dennis v. Ryan, 63 Barb. 145. In Sutton v. McConnell, 46 Wis. 269, 50 N. W. Rep. 414, the defense was that the facts which the defendant stated to the magistrate did not constitute the offense charged in the complaint. But the defendant swore to the complaint, and the court held that he could not avail himself of the statement which he made to the magistrate, a person unlearned in the law, and his advice thereon, before the complaint was prepared, as a defense to an action of malicious prosecution, based upon his having caused the arrest of the plaintiff on a false and malicious charge. The charge of the court was as favorable to the plaintiff as the law would admit of its being, and the instruction asked and refused was properly refused. It is not necessary that a party who makes a complaint charging another with forgery should suppose that he (the party making the complaint) is responsible upon the forged instrument in order to constitute good faith in making the com-

plaint. A party is never responsible for an unauthorized use of his name.

Judgment and order affirmed.

THORNTON and MYRICK, JJ., concurred.

(64 Cal. 287)

DERBY *et al.* v. STEVENS *et al.*[1]

(*Supreme Court of California.* Nov. 5, 1883.)

STOCKHOLDER'S LIABILITY—SEVERAL JUDGMENTS—JURISDICTION OF SUPERIOR COURT—COSTS.

1. Under laws of California, making the liability of stockholders to creditors several only, Civil Code, § 322, authorizing two or more separate actions to be united in one, but requiring separate judgments to be entered against each defendant, and Const. 1849, art. 6, § 6, limiting the jurisdiction of the district court to demands not less than $300, the district (now superior) court cannot, in an action against several stockholders alleging a liability less than $300 as to some of defendants, take jurisdiction as to them.

2. But as to such of the defendants of whom an amount in excess of $300 was demanded, the court had jurisdiction to render judgments for less than $300.

3. The aggregate of the judgment recovered by plaintiff exceeded $300, but not having recovered any single judgment, joint or several, for $300 or more, he was not entitled to costs under Code Civil Proc. § 1022, entitling him thereto only in case of recovery of judgment for $300 or more.

In bank. Appeal from superior court, city and county of San Francisco.

Action by E. M. Derby and others against C. F. Stevens, H. W. Thomas, and others, to recover of defendants proportionate amounts for which they were liable as stockholders of the Livermore Mining Company. Less than $300 was claimed against any of the defendants except Thomas. From a judgment for plaintiffs, defendants Thomas and Stevens appeal. Reversed.

Curtis H. Lindley, for appellants. *H. A. Powell*, *E. B. & J. W. Mastick*, and *Arthur Rodgers*, for respondents.

MCKINSTRY, J. From the moment a debt is created by a corporation each of the then stockholders becomes primarily liable for his proportion of such debt. Neither by the constitution, nor by any statute, are the several stockholders made jointly liable to each of the creditors of the corporation. Section 322 of the Civil Code authorizes two or more separate actions to be united in one, but the issues to be joined between the plaintiff and each of the defendants are separate, and may be very different, and by the express language of the section a several judgment must be rendered as between the plaintiff and each of the defendants. The present action was brought in the district court. The sixth section of article 6 of the constitution of 1849, as amended in 1862, provided: "The district court shall have original jurisdiction * * * in all cases at law * * * in which the demand, exclusive of interest, * * * amounts to three hundred dollars," etc.

Under the former constitution, to bring a case, under section 322 of the Civil Code, within the jurisdiction of the district court, a plaintiff had to allege as due to him $300 or more, from one or more, or all, of the defendants separately. A demand supposes a tribunal or person on whom it is made. The demand spoken of in the constitution is a demand for judgment, evidenced by the prayer of a complaint, and a statement of facts which can uphold the judgment prayed for. If a stockholder's proportion of a certain debt is less than $300, and the creditor sues the stockholder for such proportion, the former does not demand a judgment against the latter for $300 or more. If the creditor shall unite as defendants other stockholders, the proportion of each of whom is less than $300, the creditor does not demand a judgment of $300 or more against the defendants severally, nor does he demand (under section 322 of the Civil Code he is not authorized to demand) a judgment for $300 or more against the defendants jointly. In such case the plaintiff does not pretend to demand a judgment against any one for $300 or more; he demands a several judgment against each of the defendants in a sum less than $300. If the creditor demanded a judgment for more than $300 against one of the defendants only, as in the case before us, the district court had jurisdiction only to render a judgment based upon such demand,—a demand for judgment against the particular defendant. The section of the Civil Code does not purport to provide that the actions therein authorized may be brought in the district or superior court, without regard to the judgments demanded; it provides that certain actions may be brought. The matter of jurisdiction is left intact, and a party proposing to bring the suit must select the appropriate forum. If he demands a judgment against one of the stockholders, defendants, or a several judgment against more than one, for $300 or more, the superior court has, as the district court had, jurisdiction to render a judgment against such defendant or defendants. If in the same action he demands a judgment for less than $300 against any of the defendants, the superior court has no jurisdiction to enter a judgment in plaintiff's favor against those defendants of whom he has so demanded less than $300. But when the plaintiff has demanded $300 or more as against any defendant, the district court had, and the superior court has, jurisdiction to enter a judgment for less than $300 against such defendant. The action should have ben dismissed as to all the defendants except H. W. Thomas, and a judgment entered against him for $280.65. Whether the judgments be or be not valid as against the defendants, other than Stevens or Thomas, inasmuch as Stevens alone has appealed, we are only required to order that the judgment be reversed as to defendant Stevens. There is no authority for the joint judgment for costs against all the defendants. This action is for the recovery of "money or damages," and plaintiff has recovered no judgment, joint or several, for $300 or over. Code Civil Proc. § 1022. Plaintiff was not entitled to any costs. It is not necessary to decide whether, in case he had recovered several judgments against two or more of the defendants, plaintiff would have been entitled to full costs against each, or whether the court could divide the costs.

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Judgment reversed, and cause remanded, with direction to the court below to enter judgment in accordance with the views herein expressed.

MORRISON, C. J., and ROSS and MCKEE, JJ., concurred.

(3 Cal. Unrep. 540)

NEWMAN *et al.* v. MALDONADO *et al.* (No. 14,786.)

(*Supreme Court of California.* Aug. 26, 1892.)

FAILURE TO MAKE FINDINGS—HARMLESS ERROR—WAIVER OF APPEAL BOND.

1. A judgment will not be reversed because of the failure of the trial court to find on issues, the burden of proving which was on appellant, unless he shows by bill of exceptions or by statement that he offered evidence in support thereof, sufficient, in the absence of countervailing evidence, to justify a finding in his favor thereon.

2. Under Code Civil Proc. § 940, requiring an undertaking to be filed or waived within five days after service of notice of appeal, the waiver must be made within the five days, but it need not be filed within that time. Perkins v. Cooper, 25 Pac. Rep. 411, 87 Cal. 241, followed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

(Not to be published in California Reports.)

Suit by Mary A. Newman, William Newman, and others against George B. Maldonado, by Mary Hentig, his guardian *ad litem*, to quiet title to certain lands. From a judgment for plaintiffs, defendants appeal, and plaintiffs move to dismiss appeal. Motion to dismiss denied, and judgment affirmed.

Geo. M. Holton, *Duncan & Haas*, and *Houghton*, *Silent & Campbell*, for appellants. *Thomas J. Carran*, for respondents.

HAYNES, C. Suit to quiet title to certain lands in Los Angeles county. The complaint is in the usual form. The defendant George B. Maldonado, a minor, appeared by his guardian *ad litem*, Mary Hentig, and filed an answer, and also a cross complaint. The answer alleged that William Newman, one of the plaintiffs, was a minor, was not represented by guardian, and had no capacity to sue; denied the ownership of plaintiffs of the lands described in the complaint, or that they were, or ever had been, in possession, except as tenants of one J. H. Book, a special administrator of the estate of Bernard Newman, deceased, and of Mary Hentig, administratrix of said estate, and that as tenants they were holding over without right after the expiration of their term. The answer further admitted that he claimed to be the owner, and denied that his claim was without right, and alleged that defendant Mary Hentig claimed no interest otherwise than as his guardian. For a second and a third separate defense he pleaded that plaintiff's action was barred by sections 318 and 319, respectively, of the Code of Civil Procedure. Defendant's cross complaint alleged his ownership of said lands as heir at law of Bernard Newman, deceased, under a decree of distribution made by the superior court June 30, 1888, in the matter of said estate; that plaintiffs claim as the heirs of John Newman, deceased; that John Newman's title rested upon an instrument purporting to be a conveyance made by said Bernard Newman to John Newman, January 22, 1874, and which was afterwards recorded, but alleging that it was never delivered to John Newman, or to any one for him, and that John Newman died without knowledge of the making or recording of it; that for a long time prior to the date of said conveyance, and up to the time of his death, November 15, 1886, Bernard Newman continued to occupy the premises adversely, and that since the death of Bernard Newman his administrators were in possession, paid the taxes, etc., until the final distribution of said estate, June 30, 1888, when said lands were distributed to defendant, and that he is still the owner, and seised in fee. The cross complaint also repeated the allegations of the answer that plaintiffs entered under leases from Bernard Newman's administrators, and were holding over their term. The prayer of the cross complaint was for a cancellation of the deed above mentioned, and that the title be quieted, etc. The plaintiffs joined in an answer to the cross complaint, putting in issue all its material allegations. The transcript also contains another answer to the cross complaint, which is as follows: "Now comes W. B. Mathews, guardian *ad litem*, appointed by the court in the above-entitled action, and for answer to the cross complaint herein denies each and every allegation therein severally. W. B. MATHEWS, Guardian *ad litem*." This answer was not verified. Findings and judgment went in favor of plaintiffs, and defendants appeal from the judgment upon the judgment roll alone.

The findings are sufficient to support the judgment; but appellants contend that no findings were made upon several affirmative issues presented by defendant's answer, viz., the pleas of the statute of limitation; the allegation that plaintiffs entered under a lease and were in possession holding over after the expiration of their term; and that William Newman, one of the plaintiffs, was at the commencement of the action a minor, that he did not appear by guardian, and had not capacity to sue.

As to the first and second of these points it is sufficient to say that the burden of proving these affirmative matters rested upon the defendants, and, in the absence of evidence upon the issues thus presented, findings, if made, must have been against them; and under that supposition the defendants were not prejudiced by the failure of the court to find upon them, and this court will not presume that evidence was introduced in support of such issues, where the record does not disclose that fact. Himmelman v. Henry, 84 Cal. at page 105, 23 Pac. Rep. 1098; Winslow v. Gohransen, 88 Cal. 453, 26 Pac. Rep. 504. In Himmelman v. Henry, supra, the court said, (page 106, 84 Cal., and page 1098, 23 Pac. Rep.:) "This court will not reverse for the want of a finding upon an issue when there is no evidence in relation to that issue,—meaning, of course, an issue upon a point not necessary to sustain the judgment, but only sufficient, if proved, to invalidate the judgment. * * * The findings must be sufficient to support the judgment, and must contain nothing inconsistent with it; but a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." Counsel for appellants cite several cases to the point that findings upon all these issues are necessary. In all of these cases except Roeding v. Perasso, 62 Cal. 515, the appeal was from an order granting or refusing a new trial, as well as from the judgment; and it may therefore be inferred that the evidence touching the issues not found was before this court. In the excepted case above mentioned the opinion is *per curiam*, consisting of but five lines. There the appeal was from the decree rendered in the court below, and from an order refusing to modify it; but whether there was a bill of exceptions, or whether the fact that evidence was or was not given upon the issues in question, is not disclosed by the case as reported, and does not appear. These cases, therefore, cannot be held to conflict with the cases sustaining the proposition that to enable defendant Maldonado to reverse a judgment against him, upon the ground that no findings were made upon material issues raised by the averment of new matter in the answer, he must show by bill of exceptions or statement that he offered evidence in support of his allegation sufficient, in the absence of countervailing evidence, to justify a finding in his favor upon such issue.

Appellants' contention that there was no finding upon the allegation contained in the answer of the incapacity of one of the plaintiffs, William Newman, and that for that reason the judgment should be reversed, would be disposed of by the foregoing but for the insertion in the record of what purports to be an answer of W. B. Mathews, guardian *ad litem*, but which, among other imperfections, does not disclose for whom he was appointed such guardian, nor for whom he answered. The objection that this plaintiff was a minor, not appearing upon the face of the complaint, was properly taken by answer; but, like all other defenses of new matter, it is deemed denied, and the burden of proof was therefore upon the defendants, and, in the absence of evidence, the finding, if one were made, must have been against them. Counsel for respondents contends that, as the allegation of infancy was made only as to William Newman, the answer referred to must be presumed to have been that of William Newman. If that presumption may be indulged for any purpose, it must be taken as a confession that he was an infant, as alleged by defendant Maldonado, and, if so, a finding that he was an infant might have been made. That, however, would not have aided the appellants so far as the want of a finding upon that point is concerned, since, if it can be considered at all, it must be taken as an admission upon the pleadings, which rendered a finding unnecessary, (Swift v. Muygridge, 8 Cal. 445;) and in that case appellants would have the full benefit of a finding in their favor by such admission. But I do not think this answer, which does not disclose for whom he was appointed such guardian, and which therefore could not give him authority to bind any one, can be considered for any purpose; and a finding upon that issue must therefore be held unnecessary upon the authorities and for the reasons hereinbefore stated in reference to the other issues upon which no findings were made. If we were to regard the answer in question as an answer to the cross complaint, it would not aid appellants, as there was a finding that all the allegations of the cross complaint were untrue.

Whether the judgment in favor of William Newman be or be not conclusive between the parties is neither considered nor decided. It is sufficient to say that the record discloses no ground upon which, under the authorities heretofore cited, a reversal can be properly based.

Respondents' counsel makes the point in his brief that the appeal in this case should be dismissed, upon the ground that the written waiver of an undertaking on appeal was not filed until the sixth day after the notice of appeal was served. Respondents moved this court to dismiss the appeal upon other grounds, before the submission of the cause on the merits. Good practice would have required the ground now urged for a dismissal to have been presented at that time. The notice of appeal was served February 1, 1890, and the waiver of an undertaking on appeal was filed February 7th. The waiver was not dated, nor is it claimed by counsel for respondents that it was not made before the time expired for filing an undertaking on appeal. Section 940 of the Code of Civil Procedure does not require the waiver to be filed within the five days limited for filing an undertaking on appeal, if it is required to be filed at all. The waiver must be made before the time for filing the undertaking expires, (Perkins v. Cooper, 87 Cal. 241, 25 Pac. Rep. 411;) but there is no intimation in that case, or in any other to which counsel has referred, sustaining his proposition that the stipulation must be filed within that time. I find no case in which this question was directly presented or decided, but the intimations and reasoning of the court in several cases would seem to sustain the construction above given. See Buffendeau v. Edmondson, 24 Cal. 95; Moyle v. Landers, 78 Cal. at page 106, 20 Pac. Rep. 241, and Little v. Jacks, 68 Cal. 343, 8 Pac. Rep. 856, 9 Pac. Rep. 264, and 11 Pac. Rep. 128. I think respondents' request to dismiss the appeal must be denied, and that the judgment appealed from should be affirmed, and so advise.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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96 Cal. 38

FINCHER v. MALCOLMSON. (No. 14,777.)

(*Supreme Court of California.* Aug. 25, 1892.)

NEW TRIAL—MISTAKE—FINDINGS.

1. A defendant, whose attorney withdrew his cross complaint and failed to ask for a continuance, or to be present at the trial, after consultation with, and with the consent of, defendant, cannot, by changing his attorney, obtain a new trial on the ground of accident or surprise, where no charge is made that the attorney was incompetent, unfaithful, or negligent.

2. There is no such ground for granting a new trial as mistake or inadvertence, as distinguished from accident or surprise.

3. By failure to attend the trial a party waives findings. It is of no consequence, therefore, that the judgment erroneously refers to findings.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by Paulina Fincher against William Laing Malcolmson to quiet plaintiff's title to a tract of land. From a judgment for plaintiff, and an order refusing his motion for a new trial, defendant appeals. Affirmed.

Edward Lynch, for appellant. *Church & Cory*, for respondent.

TEMPLE, C. Defendant appeals from the judgment and order refusing him a new trial. The action is to quiet plaintiff's title to a tract of land. The answer, after certain denials, sets out as a further answer and cross complaint an agreement between the defendant and L. N. Fincher, husband of plaintiff, who, it is averred, owned the land, by which agreement said Fincher, in consideration of one dollar, agrees at any time within six months to sell to defendant, or any one he might name, the whole or any part of a tract of 320 acres of land, which included the tract in controversy. The contract reserved the crop then growing, or required compensation therefor at $2.80 per acre. There was a provision for the extension of the time for performance. It is averred that plaintiff knew all these facts, and that the conveyance to her was made for the purpose of hindering, cheating, and defrauding the defendant; that defendant, within the time, elected to purchase on the terms proposed, and notified Fincher of the fact, and also that he would take the crop growing on the land at the stipulated price; that said Fincher refused to perform his part of the agreement, and is about to harvest the crop, which he avers is worth $4,500; and he asks that said L. N. Fincher be brought in and made a party and required to answer; that he have specific performance of the agreement, and that a receiver be appointed to take possession of the crop. To the answer and cross complaint separate demurrers were interposed by plaintiff. An order was obtained making L. N. Fincher a party, and he was duly served. Before he had appeared herein the case was set down for trial. At the time set the demurrers had not been disposed of, but counsel for both parties were in court. No objection was made on any ground to the trial, but defendant's counsel asked and obtained leave to withdraw his cross complaint, without prejudice to his right to bring an action for damages against L. N. Fincher. Defendant's counsel then left the court room, although fully aware that the trial was about to proceed, having concluded, as he says, that it would be better to make the entire suit against Fincher a suit for damages. The plaintiff obtained a judgment quieting her title against defendant, whereupon, having changed his attorneys, defendant moved for a new trial on the minutes of the court and upon affidavits. The grounds of the motion were: *First*, accident; *second*, surprise; *third*, insufficiency of the evidence; *fourth*, the decision is against law; *fifth*, mistake, inadvertence, surprise, and excusable neglect; and, *sixth*, that the evidence was insufficient to enable the court to find that plaintiff is or was the separate or sole or any owner of the land described in the complaint, or that she had any interest therein.

It is plain that there is nothing in the nature of accident or surprise shown by the affidavits. The trouble seems to be that his attorney withdrew his cross complaint, failed to ask for a continuance, or to be present at the trial. But all this was done deliberately, after consultation, possibly with bad judgment, but certainly there is found here no element of surprise or accident. According to the affidavits of his attorneys, which are corroborated by other affidavits, it was also done after consultation with defendant and with his consent. He denies this, and proceeds now as though his attorneys were the adverse party, and not his representatives. He is bound by the action of his counsel, and cannot avoid responsibility in this way. What they knew he knew; what they did as his attorneys he did. There is no charge that his attorneys were incompetent, unfaithful, or negligent. He seems to have had an outside adviser, whom he trusted more than he did his counsel, and he concluded that their course was not the best, and so attempted to avoid it in this way. The court had ample grounds for believing that what was done was with his concurrence. There is no such ground for granting a new trial as mistake or inadvertence, as distinguished from accident or surprise, already discussed. There was evidence to sustain the conclusion that plaintiff was the owner of the property. It was secondary, that is, was not the best evidence of the fact, but it was not objected to. No exception was taken or reserved. By failing to attend the trial, defendant waived findings. Section 634, Code Civil Proc. This is a statutory waiver. The fact, therefore, that the judgment erroneously refers to findings, when none existed, is of no consequence. The statute requires none under such circumstances. The appellant was not injured by the failure of the court to pass on the plaintiff's demurrer to his answer. McCarthy v. Yale, 39 Cal. 585. Perhaps the fact that it had not been disposed of would have been a fact of some importance, if defendant had objected to a trial at that time. But when plaintiff insisted upon trying the issue of fact, he waived his demurrer. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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95 Cal. 598

GUTZEIL v. PENNIE *et al.* (No. 15,004.)

(*Supreme Court of California.* Aug. 12, 1892.)

CORPORATION—SIGNATURE—FOREIGN SURETY COMPANY—RIGHT TO DO BUSINESS.

1. Where an undertaking on appeal, purporting to be executed by a corporation as surety, is signed by its second vice president and its assistant secretary, and has affixed to it the corporation seal, in the absence of anything to show that such officers were not authorized to sign and deliver the undertaking, it will not be held void, as not properly signed.

2. Code Civil Proc. § 1056, provides, in respect to surety companies, that "the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases," and "shall require them to file similar statements, and issue to them a similar certificate." Pol. Code, § 616, provides that the insurance commissioner shall not issue a certificate to a foreign insurance company until it has filed with him "the name of an agent and his place of residence in this state, on whom summons and other process may be served in all actions * * * against such corporation." *Held* that, under the former statute, the latter applies to a corporation organized to become surety on bonds and undertakings, and, on filing a designation of an agent for the service of process with the insurance commissioner, such a corporation was entitled to transact business, though it had not filed such designation with the secretary of state, as required by St. 1871–72, p. 826, in the case of foreign corporations.

3. A certificate of the insurance commissioner that such a corporation is entitled to do business in the state raises a presumption that the corporation has complied with Pol. Code, § 616, requiring a designation of an agent for the service of process.

Department 2. Appeal from superior court, Santa Clara county; W. G. LORIGAN, Judge.

Action by Henry Gutzeil against James Pennie and others. Motion to dismiss appeal. Denied.

Eugene Deuprey, for appellant. *Barker & Leib*, *W. L. Gill*, and *J. R. Patton*, for respondents.

DE HAVEN, J. The undertaking on appeal herein was executed by the American Surety Company, a foreign corporation, and the respondent moves to dismiss the appeal upon the ground that the undertaking is not properly signed, and upon the further ground that the corporation has not filed with the secretary of state a designation of some person residing in this state, upon whom service of summons may be made, as required by the act relating to foreign corporations, approved April 1, 1872, (St. 1871–72, p. 826.)

1. The undertaking is signed in behalf of the corporation surety by its second vice president and its assistant secretary, and has affixed to it the seal of the corporation. There is nothing before us to show that these officers were not authorized to sign and deliver the undertaking, and we cannot, therefore, hold that the undertaking is void because not properly signed.

2. The corporation has never filed with the secretary of state a paper designating the person upon whom service of process can be made for it in this state, as required by the act of the legislature above referred to; but it appears from the certificate of the insurance commissioner for this state that "the American Surety Company of New York city, N. Y., is duly authorized to transact business in this state, and has been so authorized since December 5, 1884." It is provided by section 1056 of the Code of Civil Procedure that, in respect to corporations organized for the purpose of becoming surety on bonds or undertakings authorized by law, "the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases, [and] shall require them to file similar statements and issue to them a similar certificate." The certificate here referred to is one that the corporation is authorized to transact business in this state, and the insurance commissioner is not authorized to issue such a certificate to a foreign insurance company until it has first filed in his office "the name of an agent, and his place of residence in this state, on whom summons and other process may be served in all actions or other legal proceedings against such corporation or company." Pol. Code, § 616. We think that, under section 1056 of the Code of Civil Procedure, this provision of section 616 of the Political Code also applies to corporations like that executing the undertaking on appeal in this case, and that, when such a corporation has filed with the insurance com-

missioner the designation required by this section of the Political Code, that is all that is required of it in the matter of naming an agent upon whom process in actions against it may be served, to entitle it to transact business in this state, although the failure to file such designation with the secretary of state might deprive it of the benefit of "the statutes of this state limiting the time for the commencement of actions," as provided by the second section of the above-mentioned act of April 1, 1872. The certificate of the insurance commissioner, filed by the appellant herein, while it does not expressly state that the American Surety Company has complied with section 616 of the Political Code, is at least *prima facie* evidence that it has done so. There is a presumption that the insurance commissioner properly performed his official duty in issuing this certificate, and, in the absence of any evidence showing that this certificate was issued under circumstances not authorized by law, the certificate will be regarded as sufficient proof that it was properly issued, and that, as stated above, the American Surety Company had and has authority to transact business in this state. If, in fact, that corporation has not complied with the section of the Political Code above referred to, the respondent will be permitted to renew his motion, and show that the certificate was improperly issued, but upon the facts now before us the motion to dismiss the appeal must be denied. Motion denied.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

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96 Cal. 17

PEOPLE v. FAULKE. (No. 20,903.)

(*Supreme Court of California.* Aug. 25, 1892.)

CRIMINAL LAW—ARGUMENTS OF COUNSEL—NEW TRIAL.

1. In a prosecution for grand larceny, it was not error, during the district attorney's address to the jury, to refuse defendant's request that the stenographer's note of a witness' evidence be read to the jury, on account of an alleged misstatement of it by the district attorney.

2. The court's subsequent offer to the jury, if any of them desired it, to have the notes read after such address, was as advantageous to defendant as he could ask.

3. Specifications of error, on a motion for a new trial, are for the purpose of pointing out the particulars in which errors were committed at the trial, and the matters to which they point must be found in the substantive portion of the bill of exceptions, or they cannot be considered.

Department 1. Appeal from superior court, Santa Clara county; W. G. LORIGAN, Judge.

Faulke was indicted for grand larceny, and convicted. From a judgment denying his motion for a new trial, he appeals. Affirmed.

C. W. Clement, for appellant. *Atty. Gen. Hart*, for the People.

HARRISON J. The appellant was convicted of grand larceny, and has appealed from the judgment and an order denying him a new trial. In the bill of exceptions there is assigned as error certain remarks claimed to have been made by the district attorney in his closing argument to the jury, outside of the evidence in the case, and prejudicial to the defendant, but, as the bill of exceptions does not show other than by these specifications that the district attorney did in fact make such remarks, we cannot consider the matter. Specifications of error are the act of the attorney, annexed to a bill of exceptions after the trial, and are for the purpose of pointing out the particulars in which errors were committed at the trial. The matters to which such specifications point must be found in the substantive portion of the bill of exceptions; otherwise they cannot be considered. After the testimony had closed, and while the district attorney was making his closing argument to the jury, he made a statement respecting certain evidence, which was disputed by the attorney for the defendant, who thereupon requested the court to direct the stenographer to read the testimony of the witness in that regard. The court denied the request of counsel, stating that the jury had heard the witness, and that it was their province to determine what he testified to, to which ruling and remarks the defendant excepted. After the district attorney had completed his argument, the court said to the jury that they were the exclusive judges of what the witness had testified to, but, if any of them were in doubt as to what any witness testified to, if they desired, he would have the reporter read the testimony. There was no error in this action of the court. It would seriously interfere with the orderly conduct of a trial, if the court were to interrupt counsel in their address to the jury, by causing the evidence upon any controverted point to be read to them from the reporter's notes, whenever the opposing counsel should claim that the evidence was not correctly stated. The jury who heard the testimony must be presumed as able to determine whether it is correctly stated to them by counsel as to weigh the arguments that are based thereon, and, unless some one of that body desires to be assured upon the controverted point, there is no occasion for a repetition of the evidence. If the court is itself of the opinion that the evidence is being misrepresented, it will of its own motion, or upon a suggestion to that effect, cause the proper corrections to be made; but its omission to do so carries with it the presumption that no misrepresentation was made. The subsequent offer of the court to allow the testimony to be read for the purpose of resolving any doubt that there might be with the jury, gave to the defendant every advantage that he could have asked. The instruction given by the court in reference to the manner in which the jury should consider the testimony of the defendant, in view of the fact that he would be seriously affected by their verdict, does not differ appreciably from that on the same subject which was approved by this court in People v. Knapp, 71 Cal. 10, 11 Pac. Rep. 793, and for that reason it cannot be regarded as error. If the question was before us as a new proposition, we should be inclined to hold that it was an instruction upon the weight of evidence, and in violation of the constitutional provision which declares that "judges shall not charge juries with respect to matters of fact," and that a court would be justified in refusing to give such an instruction. An instruction of this character was first approved in People v. Cronin, 34 Cal. 191, and, as was said in People v. Murray, 86 Cal. 35, 24 Pac. Rep. 802, has been since approved so many times that it is too late now to question its correctness; but it is an instruction that can rarely be necessary, since, if its matter was not presented to the jury in the argument of the respective counsel, their own power of reasoning would impress them with all that is expressed in its terms. While a district attorney, in the zeal of his official position, may ask for such an instruction under the impression that it will have more weight with the jury if it comes from the court than if merely presented by him in argument, yet the court is not required to lend its aid to such zeal; and, if district attorneys as well as courts would be careful while framing instructions not to tread upon that dangerous border land which lies between matters of fact and matters of law, the result of the trial would rarely be changed, and the occasion for an appeal would be avoided. After a proposition of law involved in an instruction has been often approved upon appeal, the trial court will obviate further appeal thereon if it will limit its instruction upon that proposition to the terms in which it has been approved, rather than attempt a variation upon such terms. Many of the appeals which we are called upon to consider involve only the necessity of determining the effect of such variation, and the reversal of a judgment is often caused by the introduction of some phrase or expression which appears to result, not so much from a purpose to present a different proposition of law, as from a desire to express that proposition in different language. We cannot review the conflicting evidence for the purpose of determining whether the jury came to a correct conclusion thereon, and, as we find no error in the instructions of the court, the judgment and order are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(96 Cal. 42)

BOARD OF EDUCATION OF CITY OF SACRAMENTO v. BOARD OF TRUSTEES OF CITY OF SACRAMENTO. (No. 18,041.)

(*Supreme Court of California.* Aug. 25, 1892.)

SCHOOL TAXES—POWER TO LEVY—DISCRETION AS TO AMOUNT.

St. 1863, p. 717, §§ 1, 2, incorporating the city of Sacramento, as amended by St. 1870, p 7, provide that the board of education shall annually make and report to the board of trustees a statement in detail of the receipts and expenditures for school purposes in the city during the year then last past, and shall at the same time "make and furnish a detailed statement of the probable amount of money that will be required during the current year, and the purposes for which it is required;" and that on receiving the estimate "the board of trustees shall, at the time of levying other city taxes, levy a direct special school tax, which, after making proper allowance for delinquencies, will produce a sum that will make the amount required by the board of education," provided the levy shall not exceed 35 cents on the $100. *Held,* that the amount of the levy within the limit was discretionary with the board of trustees, and an action would not lie to compel them to levy the amount reported and required by the board of education.

In bank. Appeal from superior court, Sacramento county; A. P. CATLIN, Judge.

Action by the board of education of the city of Sacramento against the board of trustees of the city of Sacramento to compel defendant to make a certain levy of taxes for school purposes. From a judgment for defendant, plaintiff appeals. Affirmed.

W. A. Anderson, for appellant. *E. C. Hart* and *Clinton L. White,* for respondent.

HARRISON, J. The board of education of the city of Sacramento, on the 1st day of February, 1892, submitted to the board of trustees of that city, in accordance with the act of April 27, 1863, (St. 1863, p. 717,) a statement of the receipts and expenditures made for school purposes during the preceding year, and also a statement that the probable amount of money that would be required during the current year for school purposes, to be raised by taxation upon city property, was $68,700, and also stated that it was necessary that a tax of 35 cents on the $100 be levied in accordance with the law for the support of schools. After receiving the said report and statement, the board of trustees levied a special tax upon the property of the city of 26 cents on the hundred dollars, to meet the expenses of said school purposes. The petitioners herein allege that the taxable property of the city for the current year amounts to $15,300,000, and no more; that said tax of 26 cents is not sufficient to raise the amount so estimated and reported by the board of education; that, in order to raise said amount of money, it would require a tax of 35 cents upon each $100 of taxable property within the city; and that, under the provisions of the several acts of the legislature in reference thereto, it was the duty of the board of trustees to levy a tax of that amount for school purposes.

The act incorporating the city of Sacramento (St. 1863, p. 415) provides that the city shall be governed by a board of trustees, consisting of three members, in whom is vested the executive and legislative powers conferred upon the city, and who are authorized to levy taxes for whatever amount of money is to be collected for municipal purposes. At the same session of the legislature another act was passed (St. 1863, p. 717) in reference to the government of the common schools of the city, containing the following provisions: "Section 1. The board of education shall annually on or before the first day of February make and report to the board of trustees a statement in detail of the receipts and expenditures for school purposes in the city during the year then last past, and shall at the same time make and furnish a detailed statement of the probable amount of money that will be required during the current year, and the purposes for which it is required; and also an estimate of the amount that will be received by the city from the state and county for school purposes. Sec. 2. Upon receiving the estimate of moneys needed, as provided in section 1, the board of trustees shall, at the time of levying other city taxes, levy a direct special school tax, which, after making proper allowance for delinquencies, will produce a sum that will make the amount required by the board of education: provided, however, that in no case shall such special school tax exceed twenty-five cents on the one hundred dollars." This latter section was amended in 1870, (St. 1870, p. 7,) by which the limit was placed at 35 cents instead of 25 cents on the hundred dollars. The appellants contend that under the provisions of these sections the board of trustees has no discretion in the matter of levying a special tax for school purposes, but is required to levy such a tax, not exceeding 35 cents on the hundred dollars, as will raise the amount of money that the board of education shall estimate will be required during the current year. We are of the opinion, however, that it was not intended by this act to take from the board of trustees the power or right of determining the amount of money that should be raised by taxation for school purposes in any one year, but merely to fix a limit upon such power, and to furnish the board, in the exercise thereof, with such information as will enable it to act intelligently, and with a view to the needs of the school department of the city, considered relatively to the other departments. The trustees, having general charge of the welfare of the city, are intrusted with the discretion of determining the amount of money that shall be raised by taxation for the various municipal purposes, and must be deemed to have a better knowledge of the public needs, as well as of the financial condition and prosperity of the inhabitants, than any other department of the city government. As the legislative department of the city government, this board would be deemed to have the exclusive right of determining this question, unless such right has been qualified by the legislature in some express and unequivocal language.

The clause in the second section of the above act providing that upon receiving the statement from the board of education the trustees "shall, at the time of levying other city taxes, levy a special school tax, which will produce the amount required by the board of education," does not, by reason of the words therein used, necessarily imply that the legislature intended that the board of trustees should accept the statement as conclusive of the amount that should be expended for school purposes, and mandatory upon it to levy a tax sufficient to raise that amount. The general rule in the construction of statutes relating to the performance of a public duty which does not affect any private rights or interests, but concerns the public alone, is that the language of the statute, although imperative in terms, must be regarded as directory, rather than mandatory. The intention of the legislature is to be gathered from the manifest purpose of the statute itself, and also from a consideration of all of its provisions. The provision in the first section of the act aforesaid, that the board of education shall furnish to the board of trustees "a detailed statement of the probable amount of money that will be required during the current year, and the purposes for which it will be required," was evidently inserted for the purpose of enabling the board of trustees to intelligently exercise its discretion in determining the amount of tax to be levied, and also to revise the estimate, as well as pass upon the sufficiency of the purposes for which the board of education had reported that the money was needed. If, as is contended by the appellants, the board of trustees has no function in the matter other than to comply with the requirements of the board of education, there would seem to be no reason why the board of education should furnish it with any details of the amount required by it; but, inasmuch as, before the trustees levy the tax, they are to receive information in detail from the board of education, not only of the requirements of that board, but also of the purposes for which the money is to be expended, it must be assumed that the board of trustees is to make some use of this information in the exercise of the discretion conferred upon it in its general authority for levying taxes. This conclusion is strengthened also by considering that the board of education is to furnish only a statement of the "probable" amount of money that will be required, and that in the second section of the act it is referred to as an "estimate." This implies that the amount named in their statement is not a definite sum which the trustees are to raise by taxation, but is rather a recommendation of the amount which, in the opinion of the board of education, should be appropriated for school purposes. The fair and reasonable interpretation to be given to the statute is that the board of education shall give to the board of trustees an estimate in detail of the amount of money which in its judgment will be needed for disbursement in behalf of certain school purposes, and that the board of trustees, upon a consideration thereof, shall exercise its own judgment in determining whether the purposes therein specified are suitable subjects for expenditure, and whether the amount of money named in the statement is correctly estimated, and that thereupon it shall levy such tax as in its judgment, having regard to the interests of the entire municipality, as well as of its several parts, will be proper and just. The judgment is affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; DE HAVEN, J.; SHARPSTEIN, J.

(96 Cal. 33)

STINCHFIELD v. GILLIS *et al.* (No. 14,752.)

(*Supreme Court of California.* Aug. 25, 1892.)

MINES—INTERSECTING VEINS—ESTOPPEL TO DENY LOCATION.

Defendant conveyed a portion of a mining claim, of which he was in possession and claimed ownership, to plaintiff, and subsequently located the remaining portion of the claim at a date prior to a location by plaintiff of the portion conveyed to him. A vein running from defendant's claim intersected one of plaintiff's veins within his surface boundaries. *Held*, that plaintiff was entitled to all mineral at the point of intersection, since, as against plaintiff, defendant's claim was not a prior location, within Rev. St. U. S. § 2336, providing that all the mineral in the space of intersection of two veins shall belong to the prior location; defendant being estopped by his deed to deny that his title to the portion conveyed was perfected by a location valid at the time of the conveyance.

Department 1. Appeal from superior court, Tuolumne county; G. W. NICOL, Judge.

Action by A. W. Stinchfield against James W. Gillis and others to recover the value of certain property alleged to have been taken by defendants. From a judgment in favor of defendants, and from an order denying a motion for new trial, plaintiff appeals. Reversed.

I. M. Kalloch and *F. P. Otis*, (*Wheaton, Kallock & Kierce*, of counsel,) for appellant. *F. W. Street*, for respondents.

GAROUTTE, J. This action was brought to recover the value of certain gold alleged to have been taken by respondents from the mining claim of appellant. The facts, briefly stated, are as follows: For many years prior to January 17, 1886, respondent Gillis was in the peaceable possession of and claiming to be the owner of a certain mining claim known as the "Carrington Claim." Upon said date he sold and transferred to appellant, by bargain and sale deed, a portion of the Carrington claim, designated as the "Pine Tree Mine." At the date of this transfer the co-respondent Rice was working upon a portion of the Carrington claim not included in the transfer to Stinchfield, known as the "Rice Vein," giving Gillis a certain percentage of all gold taken out for the use of the mine. The *apices* of a vein called the "West Vein" and of the Pine Tree vein were within the surface limit of the Pine Tree mine, and the apex of the Rice vein was in that portion of the mine not transferred to Stinchfield by Gillis. Immediately after the transfer to Stinchfield, Gillis located or relocated that portion of the mine not transferred, and within a few days thereafter Stinchfield located that portion of the mine transferred to him. The Rice vein and the West vein in their descent into the earth intersect within the surface ground purchased by Stinchfield, and at the point of intersection of these veins valuable deposits of gold were found. Rice, in following his vein into the earth, came to the point of intersection, and thereupon found the deposits of gold, which he removed as his property. A few days subsequent, Stinchfield, following the West vein into the earth, arrived at the same spot, but too late. Indications pointed unmistakably to what had been, but the gold was gone. Appellant claimed the gold to be his property, and brought this action to recover $10,000, the same being the value thereof. Judgment went against him, and this appeal is before us attacking the judgment and the order denying the motion for a new trial.

As between the owners of separate and intersecting veins, the ownership of the mineral contained within the space of intersection is determined according to the provisions of section 2336 of the Revised Statutes of the United States, which reads as follows: "Where two or more veins intersect or cross each other priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection, but the subsequent location shall have the right of way through the space of intersection for the purpose of the convenient working of the mine; and, where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." From an examination of the record it is apparent that the judgment for respondents was based upon the law quoted, taken in conection with the finding that neither Gillis nor his grantor, Carrington, ever located the Carrington claim; and the further fact that the location of Gillis, made after his deed to Stinchfield, was prior in point of time, as compared to the location of Stinchfield. This is necessarily the fact, for the court finds in express terms that the gold was taken from the point of intersection of the veins to which reference has already been made, and that such point of intersection was upon the Pine Tree mine. Under such conditions, the title to the gold would be determined by priority of title to the respective mine, and it is from this standpoint that the court decided the case. As between the plaintiff and Gillis, the locations of their respective mines, made subsequent to the deed of Gillis, are not material to any matter involved in this litigation. By bargain and sale deed Gillis conveyed the Pine Tree mine to plaintiff, particularly designating its surface boundaries. These parties occupied the relative positions of grantor and grantee, under a bargain and sale deed, with all the rights and obligations peculiar to that relation; and it is elementary that Gillis, by a subsequent location or otherwise, could not obtain any title which he could assert against his grantee, and thereby defeat or limit his grantee's estate, or destroy or limit any easement or right appurtenant thereto, and necessary to the enjoyment of a perfect title. By his deed respondent Gillis was estopped from denying his own title in fee at the date of that conveyance, and therefore necessarily estopped from denying a valid location by himself or his grantor as the basis of such title. If he had title to the mining claim at the date of the deed, he could only have had such title by virtue of a prior location, for title in fee necessarily implies a prior valid location. It was said in Belcher Con. Gold Min. Co. v. Deferrari, 62 Cal. 163: "As we take notice of the character of the property and its original ownership in the United States, the defendants were estopped from denying that they and their cograntors (or those from whom they derived) had located the mines in accordance with the laws of the United States,—the only way in which the title could be acquired." It follows that no right whatever accrued to the grantor Gillis as against his grantee, the plaintiff, by virtue of his subsequent location, and that the location of the Pine Tree mine as against the grantor Gillis, must have occurred at some time prior to his deed to Stinchfield. In Champion Min. Co. v. Consolidated W. Gold Min. Co., 75 Cal. 78, 16 Pac. Rep. 513, it was held that defendant's location must be considered as having been made at least from the date of its patent, and here it must be considered that the location of plaintiff's mine must have been made at least as early as the date of his deed. The deed of Gillis passed to the plaintiff the Pine Tree mine to the same extent and to the same effect that a patent from the United States would have passed it; that is, as against the grantor, he was vested with the title to this mining claim, including every vein, and every part of every vein, throughout its depth, which had its apex within the surface boundaries of the claim, subject to the provisions of the Revised Statutes of the United States, heretofore quoted.

It is insisted that the West vein is not a vein, but a crossing. The court finds this "crossing" to be a "single small vein, dipping to the west, and having its apex in the Pine Tree mine." If this crossing, as it is termed, is a vein, (and the court has so found it to be,) its size is immaterial when considered with reference to the legal rights attached to the ownership. A "single small vein" is weighed and measured by the same law and entitled to the same consideration before the court as the mother lode, and very often is far more valuable in the eyes of its owner. In the case of Jupiter Min. Co. v. Bodie Con. Min. Co., 11 Fed. Rep. 675, Circuit Judge SAWYER said: "A vein or lode authorized to be located is a seam or fissure in the earth's crust, filled with quartz, or with some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It is not enough to discover detached pieces of quartz, or mere bunches of quartz not in place. The vein, however, may be thin, and it may be many feet thick or thin in places,—almost or quite 'pinched out,' in miner's phrase,—and in other places widening out into extensive bodies of ore. So, also, in places it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location, including the vein or lode." By reason of the views of the court hereinbefore expressed, the finding that neither Gillis nor his grantor made a location of the Carrington claim prior to the deed to Stinchfield is immaterial, and, if material, the evidence disclosed by the record is too weak to support it. The facts as to the erection of a barricade or bulkhead by the parties between the works of the respective mines are immaterial to the questions here involved, conceding them to be as claimed by the respondents. Stockton v. Garfrias, 12 Cal. 315. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; PATERSON, J.

GARBER v. GIANELLA. (No. 14,736.)[1]

(*Supreme Court of California.* Aug. 26, 1892.)

VENDOR AND PURCHASER—DEED SUBJECT TO LEASE.

Where the owner of a farm leased it to his son at a yearly rent, payable in cash, and the son leased it to B. for a share of the crops, a purchaser of the farm from the owner, "and the rents, issues, and profits thereof," subject to B.'s lease, is not entitled to such share of the crops reserved in the lease to B.

Commissioners' decision. Department 1. Appeal from superior court, Yuba county; JOHN C. GRAY, Judge.

Action by Samuel Garber against Vincenzo Gianella, in the nature of trover for certain wheat. From a judgment for plaintiff, and an order denying his motion for a new trial, defendant appeals. Reversed.

W. G. Murphy and *Barney & Donohue*, for appellant. *M. E. Sanborn*, for respondent.

VANCLIEF, C. In October, 1884, Lorenzo Gianella, then residing in Sonoma county, and being the owner of a tract of land in the county of Yuba, containing about 500 acres, leased it to the defendant—his son—for the term of five years, commencing November 1, 1884, at a yearly rent, payable in cash. On April 6, 1886, the defendant entered into a written agreement with Daniel Boulware, which they called a "sublease" of said land to Boulware, for a term of three years, commencing November 1, 1886, and extending to the termination of defendant's lease from his father. By the terms of this sublease, Boulware was to pay defendant a "yearly rent or sum of one third of the crops in the sack at the machine; the party of the first part (defendant) to furnish the sacks for the same; the party of the second part to keep the buildings and fences in repair during said term; the party of the first part to furnish the material for said repairs. The party of the second part agrees to plow and sow to wheat one half of said described land this coming winter, and summer fallow the other half the coming spring; all to be done in a good workmanlike manner, and to continue said work in its season during the term of this lease. * * * The proceeds of the pasture shall be equally divided among the parties to this lease. The party of the second part to cut and use all wood necessary for domestic purposes on the said premises. And the lessor may at any time enter to view and make improvements on said premises, and to expel the lessee if he shall fail to pay the said crop rent as aforesaid, or make or suffer any strip or waste on said described premises. * * *" This instrument was duly acknowledged September 7, 1886, and recorded April 3, 1888. On April 12, 1888, Lorenzo Gianella, by a grant, bargain, and sale deed, conveyed to plaintiff a certain field of said tract,

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[1] Rehearing granted.

(113 acres,) together with the appurtenances, "and the rents, issues, and profits thereof." The deed contains an express covenant of warranty against all persons lawfully claiming or to claim the land, "subject, however, to a lease to Daniel Boulware, which said lease expires November 1, 1889." By virtue of this deed plaintiff claims one third of the wheat grown on the field conveyed to him; and whether he is entitled to it, as against the defendant, is the principal question presented by this appeal.

During the wheat harvest in July, 1889, the plaintiff and defendant, adversely to each other, demanded of Boulware one third of the wheat; and, defendant having furnished the sacks according to the terms of the sublease, Boulware delivered the wheat to him. Thereupon plaintiff brought this action, in the nature of trover, alleging that he "was the owner and in possession of the wheat, (400 sacks,) of the value of $715, and that defendant wrongfully took the same and converted it to his own use, to the damage of plaintiff," etc. The answer of defendant is a denial of all material allegations of the complaint. The court found, generally, the facts as alleged in the complaint, and rendered judgment in plaintiff's favor for the value of the wheat and interest from the date of the alleged conversion. From this judgment, and from an order denying his motion for a new trial, the defendant has appealed, and contends here that the evidence is insufficient to justify the finding that plaintiff was the owner or in possession of the wheat at the time defendant took it.

Upon the facts proved, it may be questioned whether the agreement between defendant and Boulware is a sublease, reserving rent payable in a specified portion of the crop, or a mere cropping contract, by which defendant became a tenant in common with Boulware in the crop. See Schell v. Simon, 66 Cal. 264, 5 Pac. Rep. 238; Bernal v. Hovious, 17 Cal. 542; Henderson v. Allen, 23 Cal. 519; Wentworth v. Miller, 53 Cal. 9; Gear, Landl. & Ten. §§ 42, 43, and cases there cited. But I think it unnecessary to decide this question, since, by the terms of the deed from Lorenzo Gianella to plaintiff, the latter acquired only the rights of the former in and to "the rents, issues, and profits, * * * subject, however, to the lease to Daniel Boulware." Lorenzo Gianella had no interest in the rents, issues, or profits to be derived from the agreement between defendant and Boulware, whether that agreement was a lease, or a mere cropping contract. His interest in rents, issues, and profits was limited to such as he was entitled to by his lease to the defendant; and defendant was entitled to one third of the crop under his sublease to or agreement with Boulware, whatever may have been the value of the crop. It is claimed for respondent, however, that the lease of Lorenzo Gianella to defendant was not in writing, and therefore was void, except for the first year of the five-years term. But the testimony of the defendant, on examination by plaintiff's counsel, was that that lease was in writing, though not acknowledged nor recorded, and there was no other evidence touching that question.

It is also claimed that defendant is estopped from claiming the wheat in controversy. But no estoppel was pleaded or found; and the evidence did not tend to prove any representations of the defendant, by words or acts, which could have effected such estoppel, even though the plaintiff had necessarily confided in and acted upon them. If the plaintiff understood, as he claims he did, that the lease to Boulware mentioned in the deed was a lease from Lorenzo Gianella, such understanding was not induced by any representations of the defendant or any other person connected with the sale of the land, nor does he so pretend. That lease was of record, and his attention was called to it by the clause in the deed excepting it from the warranty, so that his misunderstanding of its contents must be attributed entirely to his own negligence. The only facts or circumstances proved, which should have been considered for the purpose of construing or interpreting the deed, are hereinabove stated. The evidence as to plaintiff's construction and understanding of it, in the absence of fraudulent misrepresentations, was erroneously admitted, having been objected to by counsel for defendant. Civil Code, § 1625; Code Civil Proc. § 1856. My conclusion is that the finding that plaintiff was the owner, in the possession, or entitled to the possession, of the wheat at the time it was taken by defendant, is not justified by the evidence; and for this reason that the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

64 Cal. 275

MCPHERSON v. WESTON *et al.*[1]

(*Supreme Court of California.* Nov. 2, 1883.)

LIMITATIONS—ACTION BETWEEN JOINT INDORSERS—EQUITABLE REMEDY.

1. F. and R., payees of a note, indorsed it jointly to F. Bros. The note not having been paid at maturity, F. paid it, and it was transferred to him by F. Bros. F. afterwards transferred the note to plaintiff, in the name of F. Bros., for collection, and plaintiff sued the makers and the payees and indorsers, F. and R. *Held*, that the action was not on the implied contract for contribution, but on the note itself, which F., in his character of indorsee of F. Bros., might himself, or through the agency of another, maintain against R. in equity, if not at law; and was not governed by the statute of limitations relating to contribution.

2. The fact that F. could not have maintained an action at law against R. because, being joint indorsers, they must have been joint defendants to the action, was immaterial with re-

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[1] This case, filed November 2, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

spect to plaintiff's right of recovery against R., under the system of code practice which admits but one form of action.

Department 2. Appeal from superior court, Kern county.

Action by William McPherson against E. J. Weston, L. L. Robinson, and others. From a judgment in favor of defendant L. L. Robinson, plaintiff appeals. Reversed.

Vincent Neale and *Henry E. Highton*, for appellant. *Lewis Shearer*, for respondents.

THORNTON, J. This is an action brought by plaintiff on the 22d of March, 1881, in the superior court of the county of Kern, to foreclose a mortgage against E. J. Weston, Stephen Boushey, L. L. Robinson, Alexander Forbes, William Temple, Julius Boushey, Richard Roe, and John Doe. The mortgage was executed to L. L. Robinson and Alexander Forbes by Weston and Boushey, to secure a promissory note for $5,000, executed by the latter to the former. The note and mortgage bear date March 23, 1876, and the former matured one year after date, and bore interest at the rate of 2 per cent. per month compounding. The payees of the note indorsed and transferred the note and mortgage to Forbes Bros., a copartnership consisting of the above-named Alexander Forbes and Charles Forbes, who paid $5,000 to Robinson and Alexander Forbes, and this money was paid over by the last-named persons to the makers of the note. At the time of indorsing this note the payees waived demand, protest, and notice of the same. It appears that during the time of the existence of the firm of Forbes Bros. Alexander Forbes was the managing partner of the firm. This firm continued in existence until the 1st day of January, 1877. The above facts were found by the court, and the court further found: "That after the maturity of said promissory note, to wit, about the 27th of October, 1880, the said Alexander Forbes instituted an action in this court against E. J. Weston, Stephen Boushey, Julius Boushey, William Temple, L. L. Robinson, John Doe, and Richard Roe, (defendants also in this action,) upon the said note and mortgage, for a decree for the foreclosure and sale of said mortgaged premises. That the complaint in said action was verified by said Alexander Forbes, and therein it was claimed that there was due to him, the said Alexander Forbes, from the defendant L. L. Robinson, as joint indorser with him of said note, the sum of $2,500 for principal, and $3,697.65 for interest, on said promissory note. That said Alexander Forbes, in said complaint verified by him, averred that, at the maturity of said promissory note, to wit, March 23, 1877, he was compelled to pay and did pay the same, and that he was, at the time of the verification of said complaint, to wit, the 16th day of October, A. D. 1880, the lawful owner of said promissory note and mortgage; and in that action said Alexander Forbes sought to recover from the said L. L. Robinson the moiety of the amount said Forbes had paid upon said note, as joint indorser thereof with said Robinson, together with interest thereupon. That to the complaint in the action the defendant L. L. Robinson demurred, upon the ground that the same did not state a cause of action against him, and that the cause of action for a contribution therein claimed was barred by limitation. That upon the hearing of counsel thereupon said demurrer was sustained. That thereafter, on March 15, 1881, the said Alexander Forbes wrote to the said L. L. Robinson, informing him that said demurrer had been sustained, and threatening to dispose of and transfer the note and mortgage, and have a new suit brought by the transferee, unless the said Robinson should pay to said Alexander Forbes one half of the principal of said promissory note, with interest thereon at 1 per cent. per month. That said Alexander Forbes afterwards, on or about the ——— day of March, 1881, caused said action, Forbes v. Weston et al., to be dismissed, and on the 19th day of March, 1881, indorsed the said promissory note in the name of said Forbes Bros., and delivered the same to William McPherson, the plaintiff in the action. That Vincent Neale, Esq., the attorney of the plaintiff in this action, was also attorney for the said Alexander Forbes in said former suit of Forbes v. Weston et al., and said Neale counseled and brought about the transfer of said note and mortgage by said Forbes to said McPherson That upon the indorsement and delivery of said promissory note to him, the said McPherson delivered his promissory note of $14,000, payable to Forbes Bros. That there was no money or other consideration given therefor. That it was understood that said note of $14,000 was not to be paid, and the matter was regarded as an exchange of checks between Forbes and McPherson. That said $14,000 note has not been paid." The court found, *inter alia*, the following conclusions of law: "That on the 1st day of January, 1877, by the dissolution of copartnership between Charles Forbes and Alexander Forbes, the said note and mortgage became the individual property of Alexander Forbes, and on the 23d day of March, 1877, the said Alexander Forbes was the owner and holder thereof. That from Alexander Forbes individually holding the note after the dissolution of said firm of Forbes Bros., it must be presumed that he paid the note at the time of the dissolution." Judgment was entered against the makers of the note, and in favor of Robinson. The plaintiff appealed.

That the plaintiff had a cause of action on this note, and was entitled to maintain it against the makers and indorsers of the note, there can be no doubt. The action by plaintiff was brought on the note, and not on any implied contract arising from a loan of money to Robinson by Forbes. The cause of action was not barred until the lapse of four years from maturity. The note matured on the 23d of March, 1877, and the action was brought on the 22d of March, 1881. The action was not then barred as to Robinson, on which ground the court below rested its judgment in favor of Robinson. It is argued that Chipman v. Morrill, 20 Cal. 130, sustains the view that the action is barred. We see no reason for any such conclusion. The case was this: Chipman, Morrill, and Webster purchased a piece of property together, Chipman taking an undivided one half, and Morrill and Webster each one undivided fourth, and for the purchase money executed their joint note. The note was not paid. Action was brought against the makers above named, and judgment recovered. Execution issued on this judgment was levied on Chipman's property, the property sold, and the proceeds applied to the payment of the judgment. Chipman brought a joint action against Morrill and Webster to recover their proportion of the debt which had been paid by a sale of his property. The court held—*First*, that a joint action could not be maintained; and, *second*, that, the judgment on the note having been paid by the plaintiff, the action was not on the written instrument, but on the implied *assumpsit* of each defendant to reimburse what had been paid for each by the plaintiff. As to the first part the court said: "But the case is not one for contribution between parties who have sustained a common loss upon a common liability. The note of the plaintiff and defendants, upon which the judgment was rendered, was given upon the purchase of real estate in which the parties took separate and distinct interests,—the plaintiff one undivided half, and each of the defendants one undivided fourth,—and between themselves the obligation of each was to pay for his respective interest. In giving their joint note for the whole amount of the purchase money each party was principal for the amount of his own interest, and cosurety for the remaining interests. Thus the plaintiff was principal for one half of the purchase money, and cosurety with Webster for one fourth of the same for Morrill, and cosurety with Morrill for one fourth for Webster. Goodall v. Wentworth, 20 Me. 322. When, therefore, the plaintiff paid the entire amount of the judgment recovered upon the note,—or, what is the same thing, when the proceeds of the property of the plaintiff sold under execution were applied to such payment,—he became entitled to maintain an action against the defendant for moneys paid on their account. The demands which he could then assert were several in their character. They were demands, not for contribution, but for reimbursement of moneys paid. The action should, therefore, have been against the defendants separately, upon the *assumpsit* which the law implies where a surety is compelled to advance money for his principal." 20 Cal. 136.

Here Alexander Forbes and Robinson were not makers of a note, but payees of one. They were joint indorsers, but there had been no payment of the note, as will more clearly appear hereafter. Their relations continued the same as to all the parties who succeeded to the ownership of the note through their indorsement. If Forbes (when this name, simply, is used herein, reference is always made to the defendant) should become the owner of the note by indorsement from Forbes Bros., we do not see why Robinson would not be liable to him on the written instrument. Forbes might have maintained an action in some way, either at law or in equity, by himself or through the agency of another, on the note against Robinson, and we do not see why the action would have been barred in less than four years. It would still have been an action on a written instrument, not barred in less time than the period above stated. It makes no difference that Forbes could not have maintained an action at law against Robinson and himself on the note (and they must have been parties to the action, as they were joint indorsers) by reason of the fact that Forbes could not sue himself. Under what is tyled the common-law system of procedure he (Forbes) could not have maintained an action at law, but he could have maintained his suit in chancery. He could have set forth the facts in a complaint, and if he was on such facts entitled to a judgment the court would be bound to grant it to him. White v. Lyons, 42 Cal. 282. In the case just cited the rule is thus stated: "Under the Code there is but one form of action in this state, and if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. If the facts stated are such as address themselves to the equity side of the court, the appropriate relief will be granted by the court, sitting as a court of equity. On the other hand, if the facts alleged are purely cognizable in a court of law, the proper relief will be administered in that form of proceeding. But a complaint which states a sufficient cause of action, either at law or in equity, is not demurrable as not stating facts sufficient to constitute a cause of action." See Wiggins v. McDonald, 18 Cal. 126, and Carpentier v. Brenham, 50 Cal. 551, 552. The language just quoted we understand to lay down the correct rule on the subject, and is in accordance with the rulings of the courts of New York, under the system of procedure long ago adopted in that state, by which, like the system in this state, one form of action is established. See Pom. Rem. pp. 81–83, et seq., and notes, where the cases are cited and commented on. See, also, Story, Eq. Pl. §§ 679, 680, 681.

Forbes Bros. could transfer the title to this note to the plaintiff, unless there appears in the case an inhibition raised by law. It will be observed that the court determined, as conclusions of law, that the joint payees of the note, Forbes and Robinson, indorsed and delivered it to Forbes Bros.; that on the 1st day of January, 1877, by the dissolution of the copartnership of Forbes Bros., the note and mortgage became the individual property of Alexander Forbes, and on the 23d of March, 1877, Forbes was the owner and holder of the note; that from Alexander Forbes individually holding the note after the dissolution of the firm of Forbes Bros. it must be presumed that he paid the note at the time of dissolution. Certainly the first proposition stated as a conclusion of law, that the joint payees of the note indorsed and delivered it to Forbes Bros., is not a conclusion of law, but a fact, and had already been found as a fact. The other propositions stated as conclusions of law are not of any law which will stand the test of investigation. How, merely by a dissolution of copartnership, a note belonging to the firm becomes by law the property of one member of it, we cannot perceive or understand. The same is true of the last proposition, that, because Alexander Forbes individually held the note, there is a presumption that he had paid it. If the propositions above stated are matters of fact, we do not find the two latter sustained by the evidence. There is no evidence that the title to the note ever vested in Forbes, and we know of no presumption authorized either by law or fact that Forbes has paid the note, because he at any time held it individually. We cannot perceive that when it is said that Forbes held the note individually anything more is meant than that he had it in his individual possession, and this is as compatible with ownership in the firm of Forbes Bros. as with ownership by himself. In fact, it is more in accordance with the other facts found that Forbes Bros. owned the note, because it nowhere appears that they ever indorsed or delivered it to any one, or that title ever passed out of them in any way, until indorsed to the plaintiff. Further, any interference or presumption of ownership by A. Forbes is entirely rebutted by the other facts found, viz., that the note was indorsed to and became the property of Forbes Bros., and there is no evidence that the ownership ever passed out of them but by the indorsement to the plaintiff. Forbes had the right, as partner, to indorse it in the name of Forbes Bros. to the plaintiff for the purpose of collection, to enable the plaintiff to bring an action on the note. If the note had been his individual property by assignment from Forbes Bros. he had a right to indorse it to the plaintiff. Admitting that Forbes had acquired the possession of the note by a payment of the amount due on it to the indorsees, Forbes Bros., we see no legal impediment to his indorsing it, either in his own name or in the name of Forbes Bros., to the plaintiff, especially as it appears that A. Forbes, after the dissolution of the partnership, carried on business in the name of Forbes Bros. It makes no difference that the plaintiff paid nothing for the note. Forbes had the right to indorse it to him whenever the note became his property. He held it with the same right as any other owner had. When he acquired it from Forbes Bros. he had the right to have it indorsed by that firm in their firm name, and to write over their names an indorsement to himself or any other person. We cannot understand that there is anything in the relation Forbes bore to Robinson, as a joint payee, that would take away this right from him. By paying Forbes Bros. the amount due thereon on the note he became its owner, with all the rights of ownership, and could transfer that ownership as any other owner. If he paid the money to Forbes Bros., it does not appear that he used any money of Robinson's to pay it with, and there is no evidence tending to prove, nor is there any principle of law making Forbes Robinson's agent, in paying the amount due on the note to the indorsee, with his own funds, by which such payment inured to the benefit of Robinson, and make Robinson his debtor on an implied *assumpsit* for money lent. What is meant by Forbes paying the note at the time of dissolution? The note had not matured at that time, and did not mature for months after that event. The dissolution was on the 1st of January, 1877, and the note matured on the 23d of March following. What is meant by his paying the note at any time? Certainly, not that he paid it for the makers, Weston and Boushey. If this was done, the note would have ceased to exist, and no action could have been maintained on it against Weston and Boushey. The court did not mean any such thing, for it rendered judgment on it against Weston, Boushey, and Forbes. It could only mean, then, that Forbes paid the amount due on it to his indorsees, Forbes Bros., took it up, and became the owner of it. If this was the case, we have stated what would be the legal result of such conduct. There is no evidence, in our judgment, that Forbes ever paid the amount due on the note to Forbes Bros. The facts show that he is using a lawful means to collect the amount due on the note for Forbes Bros. We think that the plaintiff is entitled to maintain the action brought on the note against Robinson, and to judgment against Robinson, as well as Forbes, for the amount due on the note. Should Robinson be compelled to pay more than his proportion of this indebtedness, he has recourse to Forbes for what he has been compelled to pay, and we see nothing which will prevent his recovery being effectual. It is not averred that Forbes is insolvent, nor is there any evidence that such is the fact. There is nothing in the cause which would justify us in holding that Forbes should lose his recourse against Robinson for this money, and that the burden of paying the whole of it should be cast on Forbes.

The admission of the record of the suit, Forbes v. Weston et al., and the letter of Forbes to Robinson, was of matters which did not affect injuriously the plaintiff in this case. They show nothing adverse to plaintiff's right to maintain this action. The court erred in holding that the action was barred as to Robinson. Judgment and order reversed, and cause remanded for a new trial, in accordance with the views above expressed.

MYRICK and SHARPSTEIN, JJ., concurred.

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64 Cal. 290

PAULSON v. NUNAN.[1]

(*Supreme Court of California.* Nov. 5, 1883.)

EXEMPTIONS—FINDING OF FACTS.

A finding that certain property is not exempt from levy and sale, instead of a finding of the facts on which such conclusion of law was founded, is insufficient. Paulson v. Nunan, 54 Cal. 123, followed.

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[1] This case, filed November 5, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

In bank. Appeal from superior court, city and county of San Francisco.

Action by L. L. Paulson against Mathew Nunan to recover two horses, claimed by plaintiff as exempt from levy under Code Civil Proc. § 690, subd. 6, which exempts, among other things, two horses by the use of which a huckster, peddler, etc., habitually earns his living. From a judgment for defendant, plaintiff appeals. Reversed.

B. S. Brooks and *Wm. Leviston*, for appellant. *Citus Barbour*, for respondent.

ROSS, J. The complaint is in the usual form, for the recovery of two horses. The answer justifies the taking by the defendant as sheriff under certain stated writs. Plaintiff claimed the property as exempt under the sixth subdivision of section 690 of the Code of Civil Procedure, and introduced evidence tending to show that he was a peddler, and habitually earned his living by the use of the horses. When the case was last here (54 Cal. 123) it was held that the question as to whether the plaintiff was or was not a peddler, habitually earning his living by the use of the horses, was a material issue in the case, upon which there was then no finding, and there is none now. For the same reason that the case was then reversed and sent back for a new trial, it must be reversed and sent back now. The finding that is now relied on as determining that question was then regarded as but a conclusion of law, and it must be so regarded now. Judgment and order reversed, and cause remanded for a new trial.

MORRISON, C. J., and MYRICK, MCKINSTRY, SHARPSTEIN, and THORNTON, JJ., concurred.

(64 Cal. 283)

WHITTIER *et al.* v. HOLLISTER.[1]

(*Supreme Court of California.* Nov. 3, 1883.)

MECHANICS' LIENS—MATERIAL MAN—AMOUNT DUE CONTRACTOR.

Under laws of California, a person furnishing materials to a subcontractor beyond the amount due from the owner to the original contractor is not entitled to a mechanic's lien. Latson v. Nelson, 11 Pac. Coast Law J. 589, followed.

Department 2. Appeal from superior court, Alameda county.

Action by W. F. Whittier and another against H. F. Hollister. From a judgment for plaintiffs, defendant appeals. Reversed.

Charles J. Swift, for appellant. *H. A. Leake*, for respondents.

PER CURIAM. This is an action to enforce a lien for materials furnished to a subcontractor, which were used in the construction of a building on the premises of the defendant, Hollister. The building was erected in pursuance of a contract. There is no allegation in the complaint that any money was due or to become due from the owner to the contractor. The defendant, Hollister, demurred to the complaint. The question involved in this appeal was disposed of in Latson v. Nelson, 11 Pac. Coast Law J. 589. The judgment, so far as it relates to the defendant, Hollister, and so far as it concerns the real estate mentioned therein, and directs a sale thereof, and the order denying her motion for a new trial, are reversed, and the cause is remanded with instructions to sustain the demurrer of the defendant, Hollister. Renton v. Conley, 49 Cal. 185; Wells v. Cahn, 51 Cal. 423.

(64 Cal. 291)

Ex parte BENNINGER.[2]

(*Supreme Court of California.* Nov. 5, 1883.)

COUNTY BOARD MEETINGS — VALIDITY OF ORDINANCE — INTOXICATING LIQUORS — VALIDITY OF LICENSE TAX.

1. A session of the board of supervisors of a county was commenced May 7th, under Pol. Code, § 4032, and continued from day to day until May 16th. *Held*, that the session of the board was not terminated by an act which went into effect May 14th, requiring the board to provide for regular meetings thereof at the county seat, and that an ordinance adopted by it on May 16th was valid.

2. An ordinance imposing a license tax of $25 per month on sellers of spirituous liquors, and malt or fermented liquors, and wines in quantities less than one quart, is not in restraint of trade, unreasonable, or oppressive, and is valid.

In bank.

Application by John Benninger for a writ of *habeas corpus*. The ordinance referred to in the opinion imposed a license tax of $25 per month on sellers of spirituous liquors, malt or fermented liquors, and wines, in quantities less than one quart. Writ dismissed.

Henry M. Willis and *Byron Waters*, for petitioner.

PER CURIAM. The petitioner is in custody under a warrant of arrest duly issued upon a complaint charging him with a violation of a certain ordinance adopted by the board of supervisors of San Bernardino county, which he claims to be void. The ordinance is said to be void for two reasons: *First*, because adopted at a time when the board was not legally in session; and, *secondly*, for the reason that it is unreasonable, oppressive, and in restraint of trade. It was adopted pursuant to the act of the legislature approved and which went into effect March 13, 1883. St. 1883, p. 297. At that time section 4032 of the Political Code read: "The regular meetings of the boards of supervisors must be held at their respective county seats on the first Mondays in May, August, November, and February of each year, and must continue from time to time, until all the business before them is disposed of. * * *" Pursuant to this authority of law, the board of supervisors of San Bernardino county met in regular session on the 7th day of May, 1883. Not concluding its labors on that day it adjourned until the next, and so on to and including the 16th day of May, on which day the ordinance in question was adopted. We do not understand counsel to deny that the board was legally in session on the 16th of May, unless it be that it was deprived of the power to act by reason of section 22 of the act commonly called the "County Government Act," which it is said went into effect on the 14th of May. That section reads: "The board of supervisors must by ordinance provide for the holding of regular meetings of the board at their respective county seats." We do not think this section put an end to the May session of the board, which was legally commenced and continued under section 4032 of the Political Code. It is not so inconsistent with the last-mentioned section as to annul a meeting legally existing at the time it went into effect. Nor do we think the provisions of the ordinance come within the rule that would justify us in declaring it void because unreasonable, oppressive, or in restraint of trade. Writ dismissed, and prisoner remanded.

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[1] This case, filed November 3, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed November 5, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

(64 Cal. 293)

PEOPLE v. COLLINS.[1]

(*Supreme Court of California.* Nov. 6, 1883.)

HOMICIDE—DECLARATIONS OF CO-CONSPIRATOR—PROCEEDS OF ROBBERY—IDENTIFICATION.

1. On a trial for murder committed in a highway robbery perpetrated in pursuance of a conspiracy, the declarations of one of the conspirators, who procured the gun with which the murder was committed by defendant, made before the robbery, and showing the objects of the conspiracy, namely, the business of robbing stages, are admissible.

2. On a trial for murder committed in a highway robbery it appeared that defendant took from the murdered man two bars of gold bullion, of the value of about $4,000 each. Defendant at the time of the murder had just been released from prison, and was without money. *Held*, that evidence that defendant, shortly after the murder, disposed of two gold bars of the same value as those taken from the murdered man was properly received as a circumstance tending to show defendant's guilt, though the bars taken and those sold were not shown to be the same.

In bank. Appeal from superior court, Nevada county.

Indictment against John C. P. Collins for murder. Defendant was convicted, and appeals. Affirmed.

J. M. Walling and *A. D. Mason*, for appellant. *Atty. Gen. Marshall, Thos. S. Ford, E. H. Gaylord, Miles Searls*, and *A. C. Niles*, for the People.

ROSS, J. About midday of the 1st of September, 1879, the Eureka stage, *en route* from Eureka via North Bloomfield to Nevada City, in Nevada county, of this state, was stopped when within three and one half miles of its destination by two masked highwaymen, who forced the driver and passengers to alight, and thereupon proceeded to rob them. Among the passengers was William F. Cummings, who had with him a valise containing two bars of gold bullion, each about 4 inches long, 2 to 3 inches wide, and from 1½ to 2 inches in thickness, and each of the value of from $3,500 to $4,000. When the robbers took hold of the valise, Cummings said it contained all his worldly possessions, and that he would defend it; and thereupon a scuffle ensued between him and them, during which one of the robbers fired upon him with a shot gun, killing him almost instantly. They then fled with the bullion of the murdered man. For that murder Collins, whose *alias* is Patterson, and one Thorne, *alias* Dorsey, were jointly indicted on the 26th of October, 1882. They were separately tried. Collins was convicted of murder in the first degree, and sentenced to be hung. From the judgment of death and an order refusing him a new trial he prosecutes the present appeal, relying upon certain alleged errors in the ruling of the court below.

It appears that, nearly two years after the commission of the murder, Collins and one Roger O'Meara met in the jail at St. Louis, in the state of Missouri. Each was incarcerated for a crime alleged to have been committed by him in that state. They had known each other in California, and had been inmates together of the state prison at San Quentin, and, subsequently, had been confederates in the commission of other crimes within the state of California. When O'Meara met Collins in the St. Louis jail the conversation between them, according to O'Meara's testimony in the case at bar, turned upon the robbery and murder of the 1st of September, 1879; and in that conversation Collins confessed to him his own participation in them, detailing with great minuteness all the circumstances in relation to them, from the inception of the unlawful and wicked enterprise, in the pursuit of which the robbery and murder were committed, to and including the disposal of the bullion of the victim at New Orleans, La., and Louisville, Ky. According to the confession, as testified to by O'Meara, Collins, Thorne, and one Crumm met by appointment, in the spring of 1879, at Stockton, and there arranged for a series of robberies, commencing their operations in Tuolumne county, and continuing them in Sacramento and Yuba counties. About August, 1879, they met at the house of one Frazee, near Marysville, in Yuba county, where Thorne obtained the gun with which the murder was committed. About that time Crumm withdrew from the agreement and Collins and Thorne went into Nevada county for the further prosecution of their enterprise, camped in the vicinity of Nevada City, and committed the robbery and murder in question on the 1st day of September. Crumm was put upon the stand by the prosecution, and testified to the meeting of Collins, Thorne, and himself at Stockton, and to the agreement to rob; the subsequent meeting at Frazee's about August, 1879; his withdrawal from the arrangement; and to declarations by Collins and Thorne that they would go into Nevada county, and continue the business of robbing stages, mines, and whatever else they could.

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[1] This case, filed November 6, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

The first point made for the defendant is that this testimony of Crumm was inadmissible. We do not think so. It not only went to corroborate the confession, but it was good as independent testimony of the conspiracy to perpetrate robberies formed by Collins, Thorne, and Crumm in the first place, and its subsequent continuation by Collins and Thorne. The conspiracy, according to the testimony, contemplated the robbing of stages and their passengers whenever and wherever opportunity offered. The law holds each party to it responsible for the acts of each co-conspirator done in pursuance and furtherance of the common design, which extends to the consequences which might reasonably be expected to flow from carrying into effect the unlawful combination. There was therefore no error in admitting in evidence against Collins the acts and declaration of Thorne in relation to the gun with which the murder was committed. Besides, there was evidence tending to show that, within an hour of the commission of the murder, the defendant was seen in company with Thorne, in the immediate vicinity of the place of the murder, with the identical gun in his hand. On the trial the people offered evidence tending to show that the murderers of Cummings took from him the two bars of gold bullion, and they also introduced proof tending to show that in December, 1879, at New Orleans and Louisville, the defendant had in his possession and disposed of gold bullion corresponding in amount to that proven to have been taken from the murdered man. It is objected that the bars of bullion possessed and disposed of by defendant in New Orleans and Louisville were not shown to have been the same bars taken from Cummings. It is true there was no direct evidence that this was so, nor was it necessary that there should have been. It had been shown that the defendant was discharged from the state prison at San Quentin but a short time before the commission of the robbery and murder; that he was then impecunious; that the robbery and murder were committed; that two bars of gold bullion were taken by the murderers from the murdered man; that shortly afterwards the defendant was in possession and disposed of gold bars corresponding in amount with that stolen; and that he and Thorne divided the proceeds. We have no difficulty in holding such testimony admissible, as tending to connect the defendant with the commission of the crime. We see no error in the instructions nor in the rulings of the court below prejudicial to any substantial right of the defendant. Judgment and order affirmed.

Morrison, C. J., and Myrick, McKee, Thornton, Sharpstein, and McKinstry, JJ., concurred.

(64 Cal. 299)

Livermore v. Brundage Judge.[1]

(Supreme Court of California. Nov. 16, 1883.)

Change of Venue—Disqualification of Judge—Notice of Motion.

When the judge of a court is a party defendant to a cause, it is not necessary to serve him with notice of a motion for change of venue, since no defense could be made to such motion, under Code Civil Proc. § 170, subd. 1, which provides that a cause in which a judge is disqualified from acting as such "must be transferred" to another court; nor can the judge make any order in such case, except an order of transfer.

Department I. Application by Horatio P. Livermore for a writ of mandate to compel Benjamin Brundage, judge of the superior court of Kern county, to transfer a cause in which said judge was defendant, to another court. Writ granted.

Stetson & Houghton, for petitioner.

McKee, J. The petitioner is plaintiff in an action against the defendant, who is judge of the court in which the action is pending. Being defendant in the action, and judge of the court in which the action is pending, it was not necessary for the petitioner, in making a motion to transfer the cause, to serve the judge of the court with notice of the motion, as it would be in a motion for a change of venue under the provisions of section 396 of the Code of Civil Procedure, in a suit before him between ordinary litigants; for in an action pending in his court, to which he himself is a party, he has no jurisdiction to hear and determine an application for a change of venue. Being a party to the action, the judge was directly interested in the action, and disqualified from acting at all, except so far as the action might be affected by the arrangement of the calendar of his court, or the regulation of the order of business, and except to transfer the case to some other court for trial. A judge who is a party to a cause pending in his court should not assume to sit in the case, (subdivision 1, § 170, Code Civil Proc.;) nor has he any authority to retain the case in his court for nonaction. The law imposes upon him a single duty in regard to it, and that is to order the case to be transferred for trial to the nearest court of an adjoining county, unless it shall be stipulated to transfer it to some other court. Section 398 of the Code of Civil Procedure provides as follows: "If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, * * * it must be transferred for trial to a court the parties may agree upon by stipulation in writing, or made in open court, and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist." Other than the duty imposed by this provision of the Code, a judge who is a party to an action or proceeding pending in his court has no discretion in the case. Let a writ of mandate issue.

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[1] This case, filed November 16, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

ROSS and MCKINSTRY, JJ., concurred.

(64 Cal. 296)

HARVEY v. FOSTER *et al.*[1]

(*Supreme Court of California.* Nov. 7, 1883.)

ATTACHMENT—JUDGMENT—COLLATERAL ATTACK—FORECLOSURE OF MORTGAGE—SURPLUS—LIABILITY OF SHERIFF—PARTIES.

1. Mortgaged property was levied on under attachment, and the attaching creditor recovered judgment. The mortgagee afterwards foreclosed his mortgage, and at the foreclosure sale bid an amount sufficient to cover, not only the mortgage debt, but an unsecured debt of the mortgagor to the mortgagee. *Held*, that such excess was bound by the lien of the attachment in question.

2. In such case, the mortgagee, not having been a party to the attachment proceeding, could not attack the validity of the judgment therein obtained, in an action by the attaching creditor against the sheriff and himself to recover the excess in question.

3. In such action the sheriff was concluded by his return showing such excess.

4. The sheriff and his sureties were liable for the excess in question.

5. The mortgagee was properly joined with the sheriff as defendant in the action to recover such excess.

Department 1. Appeal from superior court, Tehama county.

Action by Charles Harvey against Charles F. Foster and others to recover a surplus remaining in his hands after satisfying a mortgage from the proceeds of a foreclosure sale, claimed by plaintiff under a judgment obtained by him in an attachment proceeding wherein defendant, the mortgagor, appeared, but made no objection to the validity of the proceeding. The surplus in question was claimed by the mortgagee, defendant Kraft, who bid an amount sufficient to cover not only the mortgage, but an unsecured claim which he had against the mortgagor. From a judgment for plaintiff, defendants appeal. Affirmed.

Chipman & Garter and *Geo. Cadwalader*, for appellants. *J. Chadbourne*, *J F. Ellison*, and *A. P. Catlin*, for respondent.

MCKINSTRY, J. As the answer consists only of general and specific denials of the averments of the complaint, the finding "that all the allegations of the plaintiff's complaint are true" covers all the issues of fact. The attachment affidavit filed by plaintiff in the action Harvey v. Logan stated that the indebtedness from the defendant to the plaintiff therein had not been secured by any mortgage or lien, "or, if originally so secured," such security had become valueless. The affidavit fails to state the amount of the indebtedness due from Logan to Harvey. Code Civil Proc. § 538. If the defendant in the action (Harvey v. Logan) had moved to dissolve the attachment, it would have been the duty of the court to have ordered the attachment to be dissolved. Wilke v. Cohn, 54 Cal. 212; Hawley v. Delmas, 4 Cal. 195. But the lien of the attachment was valid as against the present defendants. Fridenberg v. Pierson, 18 Cal. 152, was a bill in equity alleging that both plaintiff and defendant were attaching creditors, the defendant's attachment (upon insufficient affidavit) having been first issued and levied, and prayed that the defendant's attachment be set aside in favor of the plaintiff. The court held that the bill could not be maintained, citing Drake, Attachm. § 273: "Whatever irregularities may exist in the proceedings of an attaching creditor, it is a well-settled rule that other attaching creditors cannot make themselves parties to those proceedings, for the purpose of defeating them on that account." Hawley v. Delmas, 4 Cal. 195, was an appeal from an order quashing an attachment. So, also, was Wilke v. Cohn, 54 Cal. 212. In Porter v. Pico, 55 Cal. 173, it was said: "Any irregularities in obtaining it [the attachment] were waived by the defendant to the suit when he appeared and answered, without taking advantage of them by motion or otherwise in the course of the proceedings. The process is merely auxiliary, and the judgment in the action cures all irregularities." The transcript shows that in the action Harvey v. Logan the defendant appeared, etc. If the transaction connected with the sale under the mortgage decree could be held to constitute Kraft, the mortgagee, successor in interest to Logan's statutory right of redemption, he acquired by it no right to attack the lien of the attachment, since Logan had none. Drake, Attachm. §§ 87, 112, 124, 143, 185, 273. The sheriff's return to the order of sale shows that he received at the mortgage sale the sum of $15,700.53 cash. He cannot make any defense inconsistent with his return. Freem. Ex'ns, 450; Ferguson v. Tutt, 8 Kan. 370. A sheriff is concluded by his return when it is set up by any party who may claim something under it. Crock. Sher. 46. Where at a judicial sale property brings more than the amount of the execution, if the officer fails to pay the excess, or see to it that it is paid to the defendant, he and the sureties on his official bond are liable in an action of debt at the suit of the defendant for the excess. State v. Reed, 5 Ired. 357. And an action may be maintained by the execution creditor for money collected by the sheriff upon an execution. Nelson v. Kerr, 59 N. Y. 224; Nelms v. Williams, 18 Ala. 650. Statutory remedies are cumulative, and leave the common-law remedies unimpaired. Freem. Ex'ns, 448. In the case before us the plaintiff has shown that he is entitled to receive from the sheriff the excess of the proceeds of the sale beyond the amount of the sale, costs, etc. Upon principle he should recover in an action against the sheriff, and, under the peculiar facts pleaded and proved, he was justified in joining Kraft as defendant.

Judgment and order affirmed.

MCKEE and ROSS, JJ., concurred.

Hearing in bank denied.

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[1] This case, filed November 7, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

96 Cal. 21

LOCKE v. MOULTON *et al.* (No. 14,739.)

(*Supreme Court of California.* Aug. 25, 1892.)

MORTGAGES—ABSOLUTE DEED—NEW TRIAL—NOTICE OF MOTION.

1. On an issue as to whether a deed absolute in form, executed by defendant to plaintiff, was a mortgage, as claimed by plaintiff, a witness testified that plaintiff had told him that "he had lent some money and got the land, and all he wanted out of it was his money and interest." The accounts between plaintiff and defendant, as kept in plaintiff's books, were introduced, in which defendant was charged with the fees for recording the deed under which plaintiff claimed, and also with the annual interest on the whole amount of money paid by plaintiff, and which formed, under his claim, the consideration for the deed. *Held*, that the evidence was sufficient to warrant a finding that the deed was intended as a mortgage.

2. A motion to set aside a judgment, and asking for a new trial, is not necessarily defective because it fails to ask to vacate the decision, since granting a new trial will of itself vacate the decision.

3. A deed absolute in form may be shown to be a mortgage, though there is no written promise by the grantor to pay money.

4. A mortgage, though in the form of a deed absolute, does not give the mortgagee the right of possession, and the mortgagor cannot be required to pay the debt for which the security was given, to enable him to defeat an action brought by the mortgagee to gain possession.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; JOSEPH H. BUDD, Judge.

Ejectment brought by George S. Locke against C. S. Moulton, S. M. McCloud, and Mrs. McCloud. From a judgment rendered in favor of plaintiff, and from an order denying defendants' motion for new trial, defendants appeal. Reversed.

Carter & Smith, for appellants. *L. W. Elliott* and *W. L. Dudlen*, for respondent.

HAYNES, C. Appeal from a judgment rendered in favor of the plaintiff, and from an order denying defendants' motion for new trial. The complaint was in ejectment to recover certain lands therein described, alleging ownership in fee for five years last past. A general demurrer to the complaint was properly overruled. The defendants answered, and set up three separate defenses: (1) Denied plaintiff's ownership and right of possession, admitted the possession of S. M. McCloud, denied that it was unlawful, and denied that either of the other defendants were in possession. (2) Alleged that defendant Moulton was the owner in fee of the demanded premises from April, 1870, to May 15, 1890, and during that time was in possession; that on October 2, 1885, Moulton executed and delivered to plaintiff what purported to be a grant, bargain, and sale deed, which was duly acknowledged and recorded, and which, although in form a deed absolute, was executed and delivered as, and was intended to be, a mortgage to secure the payment of $6,127.50, with interest at 10 per cent. per annum, in which sum Moulton was then indebted to plaintiff; that Moulton was then in possession of said land, and so continued in possession until July 15, 1890, when he conveyed to defendant S. M. McCloud, who since that time has been in possession and entitled to the possession of the lands in controversy. (3) The third defense alleged adverse possession under a written instrument by defendant McCloud and his grantor, Moulton, for more that five years. Defendants prayed that said instrument be decreed to be a mortgage, and that defendants recover costs. The court found that all the allegations of the complaint were true; that Moulton was not the owner; that said instrument was intended to be and was a deed; that it was not given to secure any sum of money; that prior to the delivery of said deed Moulton was indebted to the plaintiff, which indebtedness was part of the consideration, and the remainder of the consideration was paid in cash; and that neither of the defendants have held adversely to plaintiff.

The principal question presented by appellants is whether the evidence justified the finding that the deed made by Moulton to plaintiff October 2, 1885, was not a mortgage. The plaintiff introduced in evidence said deed, which expressed a consideration of $1,500, but subject, however, to a deed of trust before that time made by Moulton to secure to the Stockton Savings & Loan Society the payment of $4,240 and interest. The plaintiff then testified as follows: "I know the land mentioned in the complaint. I demanded possession of the land from Mr. Moulton. He was upon the land at the time. I went there a short time before I commenced this suit. I went there to notify him to leave. He said he wouldn't leave, I think." The plaintiff offered no other evidence, except as hereinafter noticed, either in chief or in rebuttal. The land in question consisted of about 320 acres. The defendant Moulton testified that he was nearly 72 years of age, that he had resided on the land in question "going on twenty-one years," and resided there in October, 1885, and remembered the making of what purported to be a deed of said land to the plaintiff in October, 1885. "The agreement between us at that time was this: I borrowed some money of him, and gave him a deed to secure him, and whenever I paid him the principal and interest I was to have the deed back again. I saw Mr. Locke about it at his ranch; I went there to see him. I told him I wanted to pay some bills, and he spoke of the mortgage, and I told him the bank had a mortgage on it, and he agreed to take it up, and I should pay him. He should let me have $1,500, barring the $500 I owed him, and he should take up the mortgage, and I should pay him ten per cent. interest, and whenever I paid him principal and interest I should have the deed back; and that S. M. McCloud was present, and heard all the conversation." The witness further testified, in substance, that he had talked with Mr. Locke about it several times since; and he wished plaintiff to reduce the interest, and plaintiff thought he could not, or would not, but witness could not recollect all that was said; that plaintiff never called it his ranch, and all he ever wanted or claimed was the principal and interest; that witness thought he could get the money for 8 per cent., but thought he would call to see plaintiff first, to see if he would let him have it for 8 per cent., and at one time witness wanted to get a bond so as to raise the money, and plaintiff said he had better let it be as it was. Upon cross-examination Moulton testified that he did not give a note; that he thought the amount he was to repay plaintiff was $6,100; that he could not tell the amount; that he made no memorandum; that his memory was short; that he knew all about it at the time, but had forgotten; that he thought he had it down in his memorandum book which Mr. McCloud had made; that the interest was paid right along by Mr. McCloud, who had the ranch; that he did not rent the place from plaintiff; that he gave a note for the interest and a mortgage on the crop to secure the interest, the note being for $1,200. The note and mortgage were made January 8, 1886. The witness was unable to explain why the note was for nearly twice the amount of one year's interest, and in reply to the question put by plaintiff's counsel, "Didn't you mortgage the crop for the rent money?" answered, "Yes; for the first season;" but later said it was not to secure rent, but to secure the interest; that other creditors might come in, attach the crop, and plaintiff wouldn't get any interest; that he had always claimed the land,—always lived there.

In reply to a question put by plaintiff's counsel, the witness said he never swore that it was not his land. Witness was then shown the assessment book of San Joaquin county for 1886, and admitted that the signature looked like his. Plaintiff then offered in evidence said assessment, to which defendants objected, as will be noticed hereafter. The objection being overruled, the said assessment list was read in evidence, and showed only some personal property amounting to $65 assessed to witness. The witness said he did not recollect why he did not put in the land; that he wanted to get a bond for a deed, because "I couldn't get it unless he signed it;" that he tried to get plaintiff to give McCloud a bond for a deed, so they could either sell or get the interest cheaper; that he didn't understand whether the only way to remove a mortgage was for the mortgagee to make a deed. "Question. You say he got a certain share of the grain each year as rent? Answer. Yes; as interest. He got half the grain to pay him for interest, and if there was anything over it went on the principal."

S. M. McCloud, one of the defendants, testified that he had resided on the land in question about 20 years; that he was present at the conversation at plaintiff's ranch testified to by defendant Moulton; that Moulton wanted the money, and wanted to mortgage the land; that Locke said he would not take a mortgage, but that, if he would give him a deed, he would give Moulton the ranch back when he paid the principal and interest. Mr. Moulton said he wanted to pay some bills, and accepted the proposition with the understanding that he, Locke, should give the place back on paying the principal and interest at 10 per cent. per annum. At another time the witness said he went with Mr. Moulton to see plaintiff, when Moulton told Locke to give the witness the same agreement he had with him,—that witness was to take care of him,—and Mr. Locke said he would, or words to that effect; that he, the witness, had other conversations with Locke in regard to this transaction when he made settlements with him for the interest on that property, and for seed and feed that witness was to pay him for; that he had settlements with plaintiff, from plaintiff's books, in 1888 and 1889; that all the settlements he had related to the ranch in question; that in February, 1889, witness had a conversation with plaintiff in presence of Dr. Barber, in which witness asked plaintiff if he would give him the ranch on payment of the money and interest, and plaintiff replied, "Yes; I guess so;" that in 1890 he asked Locke to tell him the amount of the mortgage on that ranch; that he thought he could get the money; that plaintiff replied he could not now, but to come over to the house and he would; that the crop mortgage given in January, 1886, for $1,200, was to secure the interest, and for whatever seed and feed he might want; and that that note had been settled. Defendants further put in evidence the account kept by plaintiff in his books, entitled, "M. McCloud & Ranch in account with G. S. Locke," under which C. S. Moulton and M. McCloud were charged under dates of October 2 and 3, 1885, with sundry notes paid to other parties; also several items of cash and checks, and among them, "making deed, $3;" "recording Moulton deed, $1.50;" "recording trust deed to G. S. Locke, $3;" and "payment of trust deed to bank, $4,624.50," —the whole amounting to $6,127.50. This account further shows, among other items relating to feed, seed, interest on other items, etc., an annual charge of interest on the original amount of $6,127.50 for each year down to October 13, 1890, and under date of May 30, 1887, and also in the year 1890, he charges for taxes paid; but whether these taxes were paid on the land does not appear.

A. J. Larsen, another witness for defendants, testified that about 18 months before the trial he saw plaintiff, and asked him if he wanted to sell the land in question, "and he said I would have to see McCloud; that he had lent some money and got the land, and all he wanted out of it was his money and interest, and wanted me to go and see McCloud about it."

M. G. Flanders corroborated the testimony of defendant McCloud as to the conversation with plaintiff in the presence of witness.

The defendants also introduced evidence tending to show that the value of the land in question at the time of the transaction between plaintiff and defendant Moulton, in October, 1885, was about $35 per acre, amounting to some $4,500 more than was paid by plaintiff.

Upon the evidence in this case, the findings of the court that the deed was absolute in fact as well as in form, and was not given to secure a loan, cannot be sustained. The presumption arising from the execution and delivery of a deed absolute in form is undoubtedly that it is made in pursuance of an agreement to sell, and vests an absolute title in the grantee; and this court, while holding that a deed absolute in form may be shown by parol to have been intended as a mortgage, has sufficiently protected purchasers in fact by requiring satisfactory proof that the deed was intended as a security for the payment of money or the performance of an act by the grantor. At the same time the court has been watchful against all schemes of money-lenders to deprive unfortunate debtors of their lands at less than their value, under the claim that the transaction was a purchase and not a loan; and equity has not unfrequently gone further, and relieved against absolute sales and conveyances where the circumstances of oppression and undue advantage taken by the creditor of the debtor's condition has been held to constitute actual fraud. In the case at bar there can be no difficulty in arriving at a satisfactory conclusion. The testimony of Moulton is not only strongly corroborated, but is wholly undenied by the plaintiff. Some apparent contradictions and want of memory on the part of Moulton are sufficiently accounted for by his age, his apparent lack of knowledge of proper business methods, and his evident confidence in plaintiff's integrity. If any shadow of doubt rested upon the testimony of defendants Moulton and McCloud, it was entirely removed by the testimony of the witness Larsen, to whom plaintiff stated that "he had lent some money and got the land, and all he wanted out of it was his money and interest." But stronger still is the evidence furnished by his own accounts, showing that he not only charged Moulton for recording a deed to himself, which he now claims to have been a deed absolute, but also charged his vendor annually the interest at 10 per cent. upon the whole of the purchase money, which he paid, and which interest he received year after year, and on the 13th of October, 1890, only two months before the commencement of the action, the total indebtedness charged up by plaintiff amounted to the sum of $8,255.15. As I view this evidence, it is not strange that he did not go upon the stand to rebut the evidence he had piled up against himself.

The specifications of errors of law occurring at the trial require but little notice. The relation Mr. McCloud bore to Mr. Moulton and to the ranch could not affect the result of the case. If the deed to plaintiff was an absolute conveyance, and not a mortgage, he would have been entitled to recover, whatever might have been the relation of Mr. McCloud to the property or to Mr. Moulton; nor could such relation affect plaintiff's security if it were a mortgage.

As to the assessment list put in evidence by plaintiff, defendants' objection was properly overruled. It was defendant Moulton's duty to have listed his land subject to the mortgage, while it was equally the duty of the plaintiff to have returned his mortgage security for taxation, and Mr. Moulton would have been liable only for the tax upon any excess of the assessed value of the land over the amount of the mortgage. As it had some tendency to show that Mr. Moulton did not consider the land his at that time, even though inconclusive and susceptible of explanation, the evidence was properly received.

The exclusion of defendant Moulton's book, considered as the admission of plaintiff, the witness having testified that he took it down at plaintiff's dictation, was error; but, as the same facts were shown by defendants from plaintiff's account book, they were not prejudiced.

Respondent contends, however, that appellants' notice of motion was to set aside the judgment, and that a proceeding for a new trial must be aimed at the decision, and cites Sawyer v. Sargent, 65 Cal. 259, 3 Pac. Rep. 872, in which the notice was that defendant "intends to move the court to vacate and set aside the judgment, and to ask the court for a new trial," etc. The notice was held insufficient. In the case at bar, the notice is: "You will please take notice that the defendants, and each of them, intends to move the court to set aside and vacate the judgment rendered and entered herein, and to grant a new trial in this case upon," etc. In Bauder v. Tyrrel, 59 Cal. 99, it was held that it was not necessary for the notice of intention to move for a new trial to contain in terms a notice of intention to move that the decision should be vacated; that the order granting a new trial does of itself vacate the decision. This case was cited and followed in Heinlen v. Heilbron, 71 Cal. 557, 12 Pac. Rep. 673, in which the notice was that defendants would "make and submit to said court above named a motion for a new trial of said cause," designating the grounds of the motion. If, therefore, as was held in Bauder v. Tyrrel, it was not necessary that the notice in terms included the vacation of the decision, the notice in the case at bar is sufficient, and that part of the notice referring to the vacation of the judgment may be treated as surplusage; for if that part of the notice were stricken out, it would leave the notice precisely within the case of Heinlen v. Heilbron, supra. But the case of Sawyer v. Sargent, 65 Cal. 259, 3 Pac. Rep. 872, upon which respondent relies, has been virtually overruled by the late case of O'Connell v. Hotel Co., 90 Cal. 518, 27 Pac. Rep. 373. There the objection to the notice was that it did not formally give notice that a new trial would be asked for, and instead gave notice that defendant would move to set aside the decision. This court there held that if the notice distinctly and unmistakably gave the information that a new trial was asked for, it must be held sufficient; and pertinently asked: "Could any attorney imagine such a motion based upon the ground of insufficiency of the evidence, or errors of law occurring at the trial, or for newly-discovered evidence, and made upon a statement of the case, unless it were a motion for a new trial under the statute authorizing and requiring these things?" Under these authorities the notice of motion for new trial in the case at bar must be held sufficient.

Respondent's objection that the indebtedness of defendant Moulton was not evidenced by any writing is fully answered by the case of Husheon v. Husheon, 71 Cal. 407, 12 Pac. Rep. 410, where it was held that no accompanying written promise on the part of the mortgagor is necessary.

Respondent further contends that defendants cannot be heard to say that the deed is a mortgage, and to have it so decided, unless they offer to pay what they admit they owe. Such offer is not necessary to the defense in an action of ejectment brought upon a deed which was given as security, since it is well settled in this state, since the adoption of the Codes, that such deed does not pass the title, and therefore the denial of the title and ownership of the plaintiff raises an issue under which the facts showing the deed to be in fact a mortgage may be proved, and, when that conclusion is reached, section 2927 of the Civil Code, which declares that a mortgage does not entitle the mortgagee to possession unless authorized by the express terms of the mortgage, becomes applicable to the case. In Smith v. Smith, 80 Cal. 323, 21 Pac. Rep. 4, and 22 Pac. Rep. 186, 549, it was held that an affirmative defense that the deed relied on by plaintiff was a mortgage is covered by a denial of the plaintiff's allegation of ownership, and therefore that it was not an equitable defense, which the parties could require to be first disposed of.

As the mortgage, though in the form of a deed absolute, does not give the mortgagee the right of possession, it must follow that defendant Moulton, or his grantee, McCloud, being the owner of the legal title, cannot be required to pay the debt for which the security was given, or offer to pay it, to enable him to defeat the action brought by plaintiff to recover possession. I advise that the judgment and order denying defendants' motion for a new trial be reversed, and a new trial granted.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

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96 Cal. 14

WILLIAMS *et al.* v. FRESNO CANAL & IRRIGATION Co. (No. 14,855.)

(*Supreme Court of California.* Aug. 24, 1892.)

INJURIES BY CONTRACTOR—RESPONDEAT SUPERIOR—EVIDENCE—HARMLESS ERROR.

1. Where defendant canal company contracts with a third person for the repair of its canal, to be made with soil taken from plaintiff's land, the contract is in its nature injurious to plaintiff, and defendant is liable for the damage caused by its performance, under the doctrine of respondeat superior.

2. The employment of a surveyor by a canal company to have the canal repaired need not be in writing, to render the company liable on contracts made by the surveyor in effecting the repairs.

3. Where a witness, in an action for removing the soil from a portion of a tract of land, has testified that he is acquainted with the value of the land in the locality, and that the portion from which the soil was removed was injured to the extent of its whole value, it is not prejudicial to defendant to ask witness whether he would give as much for the tract after the removal of the soil as before.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by Williams and another against the Fresno Canal & Irrigation Company to recover damages for wrongfully digging, plowing, and scraping away the soil of plaintiff's land, and for an injunction against continuing said alleged trespasses. Judgment for plaintiffs for $750. From an order denying a motion for a new trial, defendant appeals. Affirmed.

Church & Corey, for appellant. *Sayle & Coldwell*, for respondents.

MCFARLAND, J. This action was brought to recover damages for wrongfully digging, plowing, and scraping away the soil of plaintiffs' land, and for an injunction against continuing the said alleged trespasses. The jury returned a verdict for plaintiffs in the sum of $750, for which judgment was entered. Defendant appeals from an order denying a motion for a new trial.

1. The main point urged by appellant is that the trial court erred in denying a motion for a nonsuit made upon the ground "that no evidence has been adduced connecting the Fresno Canal & Irrigation Company with the alleged trespass set out in the complaint." The appellant, a corporation, owned a canal running along the northern side of respondents' land; and, for the purpose of raising and otherwise improving the canal, the top soil of respondents' land was plowed up to an average depth of about one foot, and over a space about 60 feet wide and a quarter of a mile long, and scraped off and piled up on the bank of said canal. The work by which this was accomplished was actually done by one Applegarth, and appellant contends that it was not responsible for the result of such work. But it sufficiently appears from the evidence that one Manuel was the surveyor of the appellant, regularly employed at a monthly salary, and that it was his business to have the said work done on the canal; that he made some kind of contract (the particulars of which do not appear) with said Applegarth to do said work; and that by said contract said Applegarth was to take the soil from respondents' land. When A. makes an independent contract with B., by which the latter is to do for the former a piece of work in itself harmless, and B. does the work so carelessly or unskillfully as to injure a third party, A., as a general rule, is not liable. But, when the contract is in its very nature and necessarily injurious to a third party, then the doctrine of *respondeat superior* applies. In such a case the injury does not result from the manner in which the work is done, but from the fact that it is done at all. In Boswell v. Laird, 8 Cal. 469, frequently cited as a strong case against the liability of principals, the court, by Judge FIELD, says: "If the mode and manner which constituted the defect by which the injuries complained of were occasioned had been inherent in the plan, and this plan had been devised by Laird and Chambers, which the contractors were engaged to carry out, then liability would attach to Laird and Chambers." In the case at bar the carrying away of respondents' soil was the very thing contracted for, and it inherently and necessarily caused the injury complained of. Without reviewing the evidence here at length, it is sufficient to say that, in our opinion, the agency of Manuel to act for the appellant in the matter of repairing and enlarging the canal clearly appears. It was not necessary that his employment for that purpose should have been in writing.

2. The second point made by appellant is that the verdict is not sustained by the evidence. This, however, is substantially the same as the one made about the nonsuit, and is not tenable.

3. The third and last point made by ap-

pellant is that the court erred in allowing respondent to ask the witness Shipp the following question: "Would you give as much for that eighty acres of land since the digging and scraping as you would have given for that eighty acres of land before?" Assuming that this question was not in proper form, still it is impossible to see how it could have prejudiced appellant. Before the question was asked the witness had testified at considerable length to the effect that he was a landowner, and well acquainted with the nature of the soil and the value of land where the premises described in the complaint were situated, and that the digging and scraping had taken away from the value of the land. He was afterwards examined minutely, and testified that the land was worth $2.50 per acre before the scraping; and he said, "I think this digging and scraping has damaged that part dug and scraped to the extent of its whole value," and that the acres thus injured "would not be worth anything now." In the face of this testimony, it was of no importance whether or not he said he would not give as much for the land after the scraping as before; of course he would not. The order appealed from is affirmed.

We concur: De Haven, J.; Sharpstein, J.

96 Cal. 61

MAZE v. GORDON. (No. 14,915.)

(*Supreme Court of California*. Aug. 30, 1892.)

Real-Estate Agents—Compensation—Contract—Ratification by Principal.

1. Where recovery of broker's commission is sought on a contract of employment in the sale of land, the contract need not describe the land specifically, if the terms of the employment can be made definite without it; but, where there is an attempt to limit the employment to certain property, it must appear that the property sold was within the description.

2. Before ratification of a sale of lands intrusted for sale by the owner to a broker can be inferred, it must be shown that the owner had knowledge of the particular conditions of the sale.

3. By the terms of a contract of employment between an owner of land and a broker, commission became due upon withdrawal of the property from sale within a certain time. *Held*, that a notice reciting that it was given under the contract by the owner to the broker not to sell, as the land had been withdrawn from the market, written within that time, while the owner was repudiating a sale by the broker, was a withdrawal of the premises from sale, entitling the broker to his commission, not as damages for breach of contract, but as a debt.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by W. C. Maze against Alexander Gordon, administrator of the estate of J. H. Hamilton, deceased, to recover broker's commission. Judgment for defendant. Plaintiff appeals. Reversed.

Edward Lynch, *R. B. Terry*, and *G. E. Colwell*, for appellant. *J. P. Meux*, for respondent.

Temple, C. Plaintiff appeals from the judgment and an order refusing a new trial. Action to recover broker's commission. The broker was employed under the following contract: "Know all men by these presents, that I have this day placed in charge and possession of W. C. Maze, as broker, for sale, for the term of twelve (12) months from date hereof, the following described property, to wit, secs. 1, 2, 3, 10, 11, 12, 13, 14, and 15 of T. 11 S., R. 19 east, containing fifty-seven hundred and twenty acres, or any number of acres agreed on of above-numbered sections, commencing on the north side, at $7 per acre, and agree to pay 5 per cent. on small sales, and 3½ per cent. on entire tract of 10,840 acres, for $75,000, with improvements thereon; and I hereby agree that if during said time or thereafter, and before the said W. C. Maze shall have been notified in writing not to sell said property, he shall make sale, or any sale be made, of said property for the sum of $7 per acre, or $75,000 on entire tract, or any less sum hereafter fixed by J. H. Hamilton, to pay the said W. C. Maze 3½ and 5 per cent. commission on the gross amount of said sale; and further agree to pay the said W. C. Maze the like commission in the event of withdrawing the sale of said property during said time. Said W. C. Maze is authorized to allow any person applying to purchase said property, as aforesaid, a reasonable time to examine the title thereto, and to give such person a receipt for the deposit made, with the condition that if the title is defective the deposit will be returned, and also the sum of $— to cover expenses of examination of title. And it is further agreed that, in case I consummate the sale or exchange land at any time to the said W. C. Maze's customer, he having shown or called the attention of said customer to the above property, and he afterwards becomes a purchaser, to pay the above compensation, and will also pay the above compensation if I should find purchaser. Witness my hand this 29th day of October, 1886. J. H. Hamilton."

The broker found a purchaser for the entire tract of 10,840 acres, and entered into a written contract with the proposed purchaser in the name of his principal. The terms of the sale differed materially from those authorized in the broker's contract. The tract of 10,840 acres is described in the purchaser's contract as the east half of township 11 S., range 19 E., Mount Diablo meridian, excepting section 36, and 40 acres in section 12, which is not owned or possessed by Hamilton. It is averred in the complaint that this is the entire tract of 10,840 acres alluded to in the contract.

The complaint contains three counts. In the first it is averred that the sale made was ratified by Hamilton; in the second, that, after the purchaser was found and sale made, Hamilton withdrew the land from sale and forbade the completion of the contract of sale; in the third, that Hamilton ratified the sale made, and accepted it as under the contract, and then compromised the matter with the purchaser, paying him a consideration to be released, and then withdrew the land from sale, and revoked the authority of the plaintiff, before the expiration of the year, wherefore plaintiff is entitled to his commissions. In neither count is it averred that the authority of the broker was changed as to the conditions of the sale authorized. The action was tried without a jury, and the findings were for defendant on every point. The answer admits the contract of employment, and that a sale was arranged as averred, but denies that a purchaser was found willing to purchase according to the terms authorized, or that the sale negotiated was ratified, and it is denied that the land ever was completely withdrawn from sale. Some affirmative matters are also set up in defense. No evidence was offered by the defense, but the case was submitted upon the evidence of plaintiff.

It is contended that the tract of 10,840 acres is not described in the contract of employment. A contract to employ a broker need not describe the lands specifically, if the terms of the employment can be made definite without it. Where, as here, there is an attempt to limit the employment to certain property, it must appear that the property sold is within the description. So far as the statute of frauds is concerned, however, the terms of the employment are the essential part. If the circumstances surrounding the transaction should disclose that Hamilton then owned or claimed a tract of land containing just that number of acres, of which the nine sections specified composed a part, I think it would suffice for a contract of this character. No such circumstances are averred or proven here. If, however, the sale was ratified by Hamilton, and accepted as made under the employment, this would not matter. I do not think the evidence shows ratification. It is not made to appear that, when the letters were written to plaintiff, Hamilton was sufficiently aware of the terms of the sale to enable him to ratify it. The letters show that he knew of a sale, and, since he was willing to ratify, one might infer that he must have known of the particular conditions of the sale. But this is not enough. Before ratification can be inferred, such knowledge must be shown.

At the date of the telegram of November 2d he certainly knew, but then he was trying to rid himself of the claim that a purchase had been made. The dispatch was evidently sent under the impression that at that late date the purchaser could not comply with the terms of the sale, and may be taken as an offer, by way of a bluff, to let the purchaser go on with the contract, rather than pay what he had promised as a compromise. The offer to buy off the purchaser cannot be construed into a ratification. It was an attempt to get rid of a claim which was a cloud upon his land. Although it may be evidence of some value, it is too equivocal to justify finding upon it alone a contract of sale. September 14, 1887, while Hamilton was repudiating the sale and attempting to get rid of the claim, he wrote the following letter to plaintiff: "To W. C. Maze, Madera, Cal.: You are hereby notified, according to the terms of my contract with you, dated 29th day of October, 1886, not to sell sections one, two, three, ten, eleven, twelve, thirteen, fourteen, and fifteen, in township eleven south, range nineteen east, M. D. B. & M., as the same has been withdrawn this day from the market. J. H. HAMILTON. Dated Fresno, Cal., Sept. 14, 1887." In view of this letter, I am unable to see how the third finding, to the effect that "Hamilton did not, at any time previous to the expiration of the period mentioned in said agreement within which the plaintiff should have authority to sell, withdraw said premises from sale, or prevent the plaintiff from effecting a sale thereof," can be sustained. It was not essential to make out plaintiff's case that he should have found a purchaser. By the terms of the employment, commissions became due "in the event of withdrawing the sale of said property during the time." The claim to compensation under this provision of the contract is not, as respondent suggests, as damages for a breach of the contract in withdrawing the land from sale. This Hamilton had a right to do, and in such event he became indebted to plaintiff for his commissions. I think the judgment and order appealed from should be reversed, and a new trial had.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

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95 Cal. 594

PEOPLE v. McNULTY. (No. 20,945.)

(*Supreme Court of California.* Aug. 11, 1892.)

CRIMINAL LAW—APPEAL—STAY OF EXECUTION.

1. Under Pen. Code, § 1237, subd. 3, allowing defendant in a criminal case to appeal "from any order made after judgment affecting the substantial rights of the party," an order, made after a capital conviction, fixing the time and place of execution, may be appealed.

2. Under Pen. Code, § 1248, providing that an appeal may be dismissed if it "is irregular in any substantial particular, but not otherwise," an appeal cannot be dismissed on the ground that it is frivolous. McFarland, J., dissenting.

3. Under Pen. Code, § 1243, providing that "an appeal * * * from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases upon filing * * * a certificate of the judge * * * or of a justice of the supreme court that in his opinion there is probable cause for the appeal, but not otherwise," an appeal from an order fixing the time and place of execution does not stay the execution, unless such a certificate is filed.

In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

McNulty was convicted of murder in the first degree, and sentenced to death, and appeals from an order fixing the time and place of execution. Motion to dismiss the appeal. Denied.

Carroll Cook and *J. E. Foulds*, for appellant. *Atty. Gen. Hart*, for the People.

BEATTY, C. J. The defendant in this case was convicted of murder in the first degree, and sentenced to suffer death. He appealed from the judgment of conviction, which was finally affirmed by this court in February last. 29 Pac. Rep. 61. Upon the going down of the *remittitur* the superior court made an order fixing the 12th day of August, 1892, as the time, and the county jail of San Francisco as the place, of execution of the judgment. From this order the defendant, on the 8th day of August, served and filed his notice of appeal. The people now move to dismiss the appeal upon the ground that it is frivolous. This is not an appeal from the judgment of conviction, but only an appeal from the order last above mentioned, made and entered on June 17, 1892, and the fact that said order is designated in the notice of appeal as a judgment does not make it an appeal from the judgment of conviction which was made and entered more than three years before this last appeal was taken. An appeal from the judgment in a criminal case must be taken within one year after its rendition. Pen. Code, § 1239. This, then, is an appeal taken under subdivision 3 of section 1237 of the Penal Code, which allows the defendant in a criminal action to appeal "from any order made after judgment affecting the substantial rights of the party." In People v. Sprague, 54 Cal. 92, and in two subsequent cases[1] decided by this court, it has been held that an order made after affirmance of a capital conviction fixing the time and place of execution is one of the orders included by said subdivision. There can be no doubt of the correctness of this view, and it therefore follows that this defendant had a right to take and to prosecute this appeal.

Can it be dismissed upon the ground that it is frivolous? To dismiss an appeal is to refuse to consider its merits, and therefore there can be no dismissal of an appeal on the ground that it is without merit; for to reach this conclusion the merits must be considered, and the record must be examined. The motion, therefore, is in terms self-contradictory, and must be viewed in its real character as a motion for a summary hearing of the appeal and affirmance of the order of the superior court. This conclusion seems to be inevitable upon the grounds stated, but, if it were not, the statutory provision makes it so. By section 1248 of the Penal Code it is expressly provided as follows: "If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on any day, on motion of the respondent, upon five days' notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed." By this provision the supreme court is forbidden to dismiss an appeal in a criminal case unless the appeal itself is irregular in some substantial particular, and this is to be determined by reference to the order or judgment appealed from and the steps taken to perfect the appeal. Looking to this order, notice of appeal, etc., we find an appealable order and notice of appeal therefrom substantially and formally sufficient, regularly served and filed and in due time. The appeal, therefore, cannot be dismissed without a plain violation of the express inhibition of the statute.

Nor can we consider and determine the appeal upon its merits upon this motion and in this summary manner. The record is not before us, and the cause is not brought to a hearing in accordance with the rules of practice of the court, nor pursuant to any order modifying or dispensing with such rules. The *argumentum ab inconvenienti*, so strongly insisted upon by the attorney general as a reason for putting a different construction upon the above-quoted provision of the Penal Code relative to the dismissal of appeals in criminal cases, is without any force, for the simple reason that the inconvenience suggested cannot possibly arise. He says that, unless such an appeal as this can be summarily dismissed upon the ground that it is frivolous, it will be in the power of every person condemned to death to delay the execution of the sentence again and again, as often as he chooses, by the simple expedient of taking an appeal from each successive order appointing the time and place of execution, so short a time before the date of execution as to preclude the hearing of the appeal before the day has passed. This argument assumes that the taking of the appeal *ipso facto* stays the execution of the sentence. But the assumption is contrary to the express provision of the statute. Section 1243 of the Penal Code is as follows: "An appeal to the supreme court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had a certificate of the judge of such court, or of a justice of the supreme court, that, in his opinion, there is probable cause for the appeal, but not otherwise." It is clear, from a reading of this section, that it is only the appeal from the judgment of conviction which, as we have seen, must be taken within one year after its rendition, that stays the execution *proprio vigore*. In case of any other appeal, such, for instance, as this appeal from an order after judgment, the mere appeal has no effect in staying execution, unless the judge of the superior court or a justice of this court will grant a certificate of probable cause for the appeal. This, of course, involves an examination of the original record, or a copy, by the judge to whom the application is made, and is the regular and only method prescribed by the statute for a determination whether the appeal is frivolous. In pursuing this method, the *onus* rests upon the appellant to convince the judge of the superior court or one of the justices of this court that there is some merit in his appeal. If he cannot,—if his appeal is clearly frivolous,—no certificate will be granted, and there will be no stay. This being so, there is no occasion in such case for the people to assume the laboring oar, and, on motion to dismiss the appeal, show that it is frivolous. Motion denied.

We concur: De Haven, J.; Harrison, J.; Sharpstein, J.; Garoutte, J.

McFarland, J. I dissent. I think that the papers submitted show upon their face that they constitute a mere confessed attempt to take a second appeal from the judgment, and should be so considered. The appeal should, in my opinion, be dismissed.

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[1] Not reported.

96 Cal. 67

GREEN v. THORNTON. (No. 14,747.)

(*Supreme Court of California.* Aug. 30, 1892.)

ACCOUNT STATED—IMPEACHMENT.

Where a surviving partner, having in his possession a note of the partnership, which he is led by the representations of a third person to believe will be paid, renders an account, under Code Civil Proc. § 1585, for the purpose of adjusting the partnership affairs, and determining what part of the money thereon should go, when collected, to the estate of the deceased partner, which account is finally settled, but the note afterwards fails of collection, he may have the account opened.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by Susan P. Green, administratrix, etc., against Arthur Thornton. Judgment for plaintiff. Defendant appeals. Reversed.

F. D. Nicol and *P. W. Bennett*, for appellant. *Louttit, Woods & Lezinsky*, for respondent.

BELCHER, C. This is an action to recover the sum of $1,112.70, with interest thereon, alleged to be due plaintiff from defendant upon an account stated. The material facts of the case are as follows: In 1881 L. D. Green, plaintiff's intestate, and the defendant purchased and had conveyed to them a certain tract of land. They paid for the land $4,000, and to raise the money they borrowed from the Stockton Savings & Loan Society the sum of $3,500, for which they gave to the society their promissory note, secured by a trust deed of the property. Thereafter Green occupied and managed the land until October 25, 1884, when they sold and conveyed the same to one C. H. Bailey for $6,500. Of this sum Bailey paid to his grantors at the time $1,000 in money, and for the balance he gave them his promissory note for $2,500, bearing interest at the rate of 8 per cent. per annum, and due two years after date, and a mortgage on the land to secure its payment, and undertook and agreed to pay the grantor's note to the Stockton Savings & Loan Society, on which there was then due and unpaid the sum of $3,000. In November, 1886, Green died intestate, and in December following the plaintiff, his surviving wife, was duly appointed administratrix of his estate, and entered upon the discharge of her duties as such. On the 15th of November, 1887, Bailey filed in the court having jurisdiction of the estate his petition, stating, among other things, that by reason of some inadvertence or error the deed executed to him by Thornton and Green had never been recorded, and was lost, and that by reason of such loss he had no evidence of his title to the land purchased; that Thornton was ready and willing to execute and deliver to him a deed conveying all his interest in the said land, and that Mrs. Green, as administratrix, was ready and willing to convey to him all the interest of the estate in the said land if she should be authorized so to do by the court. Wherefore he prayed that, after notice and a full hearing as to the facts, a decree be made and entered authorizing and directing Mrs. Green, as administratrix, to execute to him a conveyance of all the right, title, and interest of the said L. D. Green, deceased, and of his estate in and to the said land. Afterwards the matter came on for hearing, and on January 7, 1888, by consent of Mrs. Green, expressed in open court by her attorney, a decree was entered authorizing and directing her to execute to Bailey the conveyance asked for, and to release one half of the mortgage upon said land "upon payment to her, as administratrix of the estate of L. D. Green, deceased, of the sum of $1,112.70, being one half of the sum now due and unpaid upon" said mortgage. The decree further directed that Bailey, before the delivery of the deed, execute and deliver to the administratrix and Thornton a written contract that he would pay the moneys due the Stockton Savings & Loan Society, as evidenced by the trust deed before mentioned. The clause above quoted was not in the decree, as it was drawn up by the attorney for petitioner, but was written in before it was signed by the attorney for Mrs. Green.

Before the petition was filed Bailey was told by one David Winders, who, as the agent of Mrs. Green, had attended to all the affairs of the estate except its law business since her appointment as administratrix, that, if he would file his petition and get deeds to the property, he (Winders) could and would help him raise money, by mortgage on the property, sufficient to pay his note to Thornton and Green and the amount due on their note to the Savings & Loan Society, and Bailey says that but for these representations he would not have applied at that time for the decree; and, while the proceedings under the petition were pending, Winders also stated several times to the defendant that, if Bailey succeeded in getting his decree and deeds, he could and would raise for him the money to pay off the entire indebtedness secured upon the land; and defendant says he relied upon these statements, and but for them he would not have made out the account sued upon. Defendant knew at that time Bailey's financial condition, and that he had no money to pay his note and mortgage, and no means of raising any except by a new mortgage on his land.

After the death of Green, the defendant always claimed and insisted that he and the decedent were partners in the purchase, management, and sale of the said land, and that the note given them by Bailey was partnership property. He also claimed that he had paid out and advanced for the partnership a considerable sum of money, and had a right to repay that sum to himself out of its assets. The plaintiff denied that any partnership had ever existed between her deceased husband and defendant, and insisted that one half of the Bailey note belonged to the estate of deceased, free and clear of all claims of defendant against it. This condition of things continued up to about January, 1888, when defendant had drawn up, and proposed to file in court, a complaint against the plaintiff here, praying for a decree establishing the existence of the partnership, and for an accounting as to its affairs. When this fact was made known to the plaintiff, she admitted that a partnership had existed, and thereupon the defendant made out the account here sued upon and filed it in court. The account was headed: "In the Matter of the Estate of L. D. Green, deceased. Arthur Thornton, surviving partner of the firm of Thornton & Green, in account with Susan P. Green, as administratrix of the estate of L. D. Green, deceased." It then credits Thornton with various sums of money paid out on account of the partnership, aggregating $967.14, and it debits him with $150, paid by Bailey as interest on his mortgage; with $405.84 "credit allowed Susan P. Green, as administratrix, as per agreement with said Susan P. Green;" and with $1,524, "one half of amount of note and mortgage due from C. H. Bailey." And it adds: "A. Thornton, debtor to balance, $1,112.70." On January 14, 1888, the court made an order as follows: "In the Matter of the Estate of L. D. Green, deceased. Arthur Thornton, surviving partner of the firm of Thornton & Green, having heretofore filed in this court his final account as such surviving partner with Susan P. Green, the administratrix of said estate, all parties interested therein this 12th day of January, 1888, appearing in open court and consenting thereto, on motion of P. W. Bennett, Esquire, attorney for said administratrix and said estate, it is ordered that the said final account be, and the same is hereby, settled, allowed, and confirmed." It turned out that Winders did not raise the money promised, or any part thereof, and Bailey did not pay to the defendant or plaintiff any part of the money due them, nor to the Savings & Loan Society any part of the money due it; but the society sold out his land under its trust deed, leaving Bailey insolvent and his note to the parties here worthless. Upon these facts the court below gave judgment for the plaintiff according to the prayer of her complaint. The defendant then moved for a new trial, and, his motion being denied, appealed from the judgment and order.

An "account stated" is defined by Bouvier to be "an agreed balance of accounts; an account which has been examined and accepted by the parties." It implies an admission that the account is correct, and that the balance struck is due and owing from one party to the others; and its effect is to establish *prima facie* the accuracy of the items without other proof, and to constitute a new contract on which an action will lie. Auzerais v. Naglee, 74 Cal. 60, 15 Pac. Rep. 371. It does not, however, operate as an estoppel, and it may be impeached for fraud or mistake. Judge Story says: "If there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined." 1 Story, Eq. Jur. § 523; and see 1 Wait, Act. & Def. p. 195. The question then is, was the defendant entitled to have the account in suit opened and re-examined? It will be observed that when the account was made out there was no claim by plaintiff that defendant was indebted to the estate in any sum whatever, and he was not in fact so indebted. He held the Bailey note, and was authorized to collect it, but, without any fault on his part, never succeeded in doing so. It was partnership assets, and, if collected, a portion of the proceeds would have belonged and been payable to the plaintiff, but defendant was under no obligation, legal or equitable, to pay her any part of it, unless and until that event should happen. He then believed, from the statements of Winders, that the note would be paid in full, and, acting on this belief, he seems to have rendered the account, in pursuance of the provisions of section 1585 of the Code of Civil Procedure, for the purpose of adjusting the partnership affairs and determining what part of the money due on the note, when paid, would go to the plaintiff. Under these circumstances, it seems neither reasonable nor just that defendant should be made to pay plaintiff money which evidently does not belong to her. We think the defendant was entitled to impeach the account, and that the pleadings were sufficient to enable him to do so. We therefore advise that the judgment and order be reversed, and the cause remanded.

We concur: HAYNES, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded.

(3 Cal. Unrep. 546)

ODD FELLOWS' SAV. BANK v. TURMAN.
(No. 14,487.)

(*Supreme Court of California.* Aug. 30, 1892.)

TRESPASS—TITLE TO MAINTAIN—POSSESSION—DEFENSES.

1. Certified transcripts of several recorded deeds, the first purporting to convey "a portion" of certain land, but not designating any particular portion, the second a "further portion," and the third the "remaining portion," offered without any showing of title in the grantors, or that the grantee had entered claiming under the said deeds, are not sufficient evidence of title to enable the grantee to maintain an action for trespass on the land.

2. Evidence of the survey of land, made for the purpose of locating a certain lake, an advertisement of the land for sale or rent, and a notification to a certain stockman to keep his stock off of "that land," is not sufficient, as to actual possession, to enable the alleged owner to maintain an action for trespass on the land.

3. The fact that defendant, in an action for trespass on land, makes the defense that the land was not fenced, does not estop him afterwards from denying plaintiff's ownership of the land.

Department 2. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

(Not to be published in California Reports.)

Trespass by the Odd Fellows' Savings Bank against H. B. Turman. Judgment for defendant. Plaintiff appeals. Affirmed.

Clark & Aram, for appellant. *H. M. Albery*, for respondent.

McFarland, J. This is an appeal by plaintiff from a judgment in favor of defendant and from an order denying a new trial. In the complaint (which was not verified) it is averred that plaintiff is, and during a certain named period was, "the owner of and lawfully in possession of" a large body of land described by legal subdivisions; and that during the said named period defendant's cattle pastured on said land, and destroyed grass, hay, etc., to plaintiff's damage in the sum of $3,000. In the answer "each and every allegation" of the complaint is denied. The court found that plaintiff was not either the owner or in possession of any part of the land described in the complaint at any time mentioned therein, and the evidence clearly warrants said finding. To prove paper title, plaintiff introduced a properly certified transcript of a recorded deed from one Maurice Dore to plaintiff, which purported to convey "a portion" of the land described in the complaint,—what portion does not appear. There was then introduced a defective certificate of another recorded deed from said Dore to plaintiff of a "further portion" of said lands, and another defective certificate of a recorded deed to plaintiff from one Fisher of the "remaining portion" thereof. This was all the evidence offered on that subject. There was no evidence tending to show that either said Dore or Fisher ever had title, or any estate or interest whatever, in any part of said land. There was no attempt to trace the title to its paramount source, and therefore no title was shown. There was no evidence that plaintiff entered upon said land, or any part of it, claiming under either of said deeds, and therefore there was no color of title shown.

There was no evidence showing that plaintiff was ever in the actual possession of the land or of any part of it. It is mostly tule land, unfenced and uninclosed. An agent of plaintiff visited the land once, and had some surveying done for the purpose of locating a certain Coon lake; and he also at one time advertised it for sale or rent, but had no offers. He also notified defendant's agent once to keep his cattle off "that land." These were the only acts done in the premises, and, of course, they did not constitute actual possession.

Appellant contends that there is some evidence of plaintiff's title to some parts of the land in certain answers of its witness Hiatt given on cross-examination, in which he says, without objection, that "the bank owns" certain mentioned small tracts. But these answers were in response to questions in cross examination, evidently, not with reference to the subject of title or ownership, but for the purpose of locating the lands claimed by appellant, and distinguishing them from lands claimed by Mr. Parks, and it was clearly so understood by both the questioner and the witness. Hiatt had testified in chief about the lands "described in the complaint," but he did not say or pretend to know anything about the title. At the end of his cross-examination he said: "I am only answering from the map; that is the only way I can answer it." The form of the answers, therefore, cannot be taken as evidence—certainly not as sufficient evidence—to establish title or ownership. The correct finding that appellant had no ownership or possession of the land renders it unnecessary to examine the somewhat complicated question as to what fence law obtains in Sutter county. The point that, because respondent made the separate defense that the lands described in the complaint were not fenced, he is estopped from denying that appellant owned them, is obviously too untenable to need discussion. Judgment and order affirmed.

We concur: De Haven, J.; Sharpstein, J.

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96 Cal. 47

San Joaquin County v. Budd *et al.*

(No. 14,723.)

(*Supreme Court of California.* Aug. 30, 1892.)

County Officers—Designating Rooms in Courthouse for Officers—Judicial Notice.

1. Under St. 1883, p. 299, authorizing supervisors to provide "county buildings and suitable rooms for county purposes," and to manage and control the same, the power of the supervisors to designate rooms in the courthouse for the use of county officers is not exhausted by one designation, but they may assign to the district attorney rooms occupied by the judges of the superior court, though such rooms were designated on the building plans as "Judges' Chambers."

2. In an action by the county to recover possession of such rooms the court will not take judicial notice that defendants are judges of the superior court of the county.

Department 2. Appeal from superior court, San Joaquin county; W. C. Van Fleet, Judge.

Action by the county of San Joaquin against Budd and another to recover possession of certain rooms in its courthouse. From a judgment in favor of defendants, plaintiff appeals. Reversed.

P. W. Bennett, (*T. C. Van Ness*, of counsel,) for appellant. *Jas. H. & J. E. Budd*, (*W. L. Dudley*, *S. D. Woods*, and *F. T. Baldwin*, of counsel,) for respondents.

De Haven, J. This action is brought by the county of San Joaquin to recover possession of two rooms in the courthouse of that county. A demurrer to the complaint was sustained, and at the same time the court granted a motion to strike out a portion of the complaint, and thereupon judgment was rendered in favor of defendants. The plaintiff appeals from the judgment.

The complaint alleges, in substance, that a certain block of land in the city of Stockton was dedicated by its owner for public use for the erection thereon of the courthouse for San Joaquin, and such other public buildings as might by the proper authorities be deemed necessary, and that the plaintiff did erect thereon a courthouse, and was on the 27th of January, 1891, in the possession, and was then, and ever since has been, entitled to the possession, of said block of land and of the courthouse, and of those two rooms on the second floor thereof, each of which is designated on the plans of said courthouse as "Judges' Chambers;" and that the defendants did "on the day and year last aforesaid wrongfully and unlawfully enter into said rooms, and did oust the plaintiff therefrom," and now "unlawfully withhold the possession thereof from plaintiff." The complaint also contained this paragraph, which is the part which was stricken out on motion of defendants: "That said rooms were assigned by plaintiff for the use and occupation of the district attorney of said county, and on the 7th day of April, 1891, he demanded of defendants in his own behalf and in the name of and on behalf of plaintiff that they vacate and surrender possession of said rooms, but to vacate or surrender possession thereof said defendants refused, and still refuse."

1. The court did not err in striking from the complaint the paragraph above quoted. It was merely the statement of a matter which might be proper to be shown upon the trial of the action, but it added nothing to the ultimate and issuable facts alleged in the complaint.

2. The complaint states a cause of action. It alleges facts showing plaintiff's right to the possession of its courthouse, and of the rooms therein described, and that defendants wrongfully withhold the possession of said rooms from plaintiff. This is all that a complaint in this character of action is required to state. Payne v. Treadwell, 16 Cal. 244; Marshall v. Shafter, 32 Cal. 194. Indeed, that this complaint would generally be considered sufficient in an action to recover possession of real property is not denied, but it is argued in behalf of respondents that the court must take judicial notice of the fact that the defendants are judges of the superior court of the county of San Joaquin, and, as it is alleged that the rooms occupied by them are marked upon the plans of the courthouse as "Judges' Chambers," that it thus appears from the complaint that they are rightfully in occupation thereof, and that their occupation is the possession of the plaintiff. This seems to have been the view of the learned judge who presided in the court below, and rendered judgment for the defendants.

3. We do not think the court, in passing upon the question raised by demurrer to the complaint in this action, is required to take judicial notice of the fact that the defendants are judges of the superior court of San Joaquin county. The court takes judicial notice of the fact as to who are the judges of the superior court of that county, and of their official acts; that is, of such acts as can only be performed by a judge of that court in his official capacity. But the court can have no judicial knowledge that a person who is sued upon a promissory note, or made a defendant in an action to recover possession of real estate, and who may have the same name as a judge of the superior court, is in fact such judge. The case has, however, been elaborately argued here by both parties upon the conceded fact that the defendants are judges of the superior court, and that this action is in fact brought to recover possession of certain rooms in the courthouse, which are occupied by defendants as their judicial chambers, and, as the case must be remanded for trial, it is proper to consider it from this point of view, and pass upon the main question which has been presented in the argument of counsel.

4. It sufficiently appears from the complaint that the rooms now occupied by the defendants were originally designed to be used as chambers for the judges of the superior court, and were so marked upon the plans for the construction of the courthouse; and it is argued here that, the rooms having been constructed for this purpose, the defendants have the right to occupy them, and that the board of supervisors has no right to devote them to any other purpose. We do not think that this contention, as thus broadly stated, can be maintained. The county of San Joaquin is a public corporation, vested with certain corporate powers necessary to enable it to perform the duties which are imposed upon it as one of the political subdivisions of the state, and its corporate powers "can only be exercised by the board of supervisors, or by agents and officers acting under their authority or authority of law." County Government Act, § 2, (St. 1883, p. 299.) In defining the powers of the board of county commissioners in the state of Ohio, the supreme court of that state say: "It may be laid down as a general rule that the board of county commissioners is clothed with authority to do whatever the corporate or political entity—the county—might, if capable of rational action, except in respect to matters the cognizance of which is exclusively vested in some other officer or person." Shanklin v. Commissioners, 21 Ohio St. 583. This expresses with accuracy the powers of the board of supervisors within the several counties of this state. In addition to the general language above quoted from the county government act, that statute expressly enumerates the powers of the board of supervisors, from which it very clearly appears that these officers are made the representatives of the county for the purpose of providing necessary county buildings and suitable rooms for county purposes, and that they are to take care of, manage, and control all real and personal property belonging to the county, and necessary for public use. County Government Act, § 25, subdivisions 7-9. It is the duty of the county to erect and furnish a courthouse, and to provide necessary offices for the several county officers. In performing this duty the county acts through its board of supervisors precisely as a private corporation acts through or by its directors, and the action of such board in providing "suitable rooms for county purposes," and in designating the particular rooms which shall be occupied by the different officers, is the act of the county. And this power is not exhausted when once exercised, but is a continuing one, and the assignment of offices may be changed whenever, in the judgment of the board, public convenience will be promoted by a change. The whole

matter of providing "suitable rooms for county purposes," which necessarily carries with it the power to designate the room which is suitable for the transaction of any particular part of the public business, is intrusted by law to the judgment and discretion of the board of supervisors, and the judge of the superior court has no more right to select the particular room in the courthouse which he will occupy as his chambers than has the clerk or the sheriff to choose the room which he will occupy as his office, and the law confers no authority upon him to take possession of any room in the courthouse for his chambers when such room has been assigned by the board of supervisors to any other county officer. The power of the board is necessarily exclusive. If, however, the room actually assigned for the use of the court or for the judge is not suitable for that purpose, he is not compelled to occupy it, but may proceed under the authority conferred by section 144 of the Code of Civil Procedure, and this power is amply sufficient to protect the superior court from any arbitrary or unreasonable action of the board of supervisors, without in the least interfering with their exclusive right to manage and control the public property, or with the right of other county officers to occupy such rooms in the courthouse as may have been assigned to them. Judgment reversed.

We concur: McFarland, J.; Sharpstein, J.

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96 Cal. 93

Los Angeles County v. San Jose Land & Water Co. (No. 14,589.)

(Supreme Court of California. Aug. 30, 1892.)

Condemning Land for Highways.

Pol. Code, § 2690, (as amended March 17, 1887,) provides that the board of supervisors of a county shall by order direct the institution of proceedings by the district attorney to condemn a right of way as a public highway, and that no informality in the proceedings shall vitiate the suit, but that the order to bring suit shall be conclusive proof of their regularity, "and the said suit shall be determined by the court or jury in accordance with the rights of the respective parties as shown in court, independent of said proceedings before said board." *Held*, that the statute establishes a rule of evidence for this particular proceeding, leaving the owner of the lands condemned to his appropriate remedy by a direct attack on the board's action.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Los Angeles county against the San Jose Land & Water Company to condemn a right of way for a public highway. From an order denying a new trial, defendant appeals. Affirmed.

S. R. Dunnigan and *Anderson, Fitzgerald & Anderson*, for appellant. *Geo. M. Holton* and *Walter J. Hughes*, for respondent.

Foote, C. This action was brought in the superior court of the county of Los Angeles for the purpose of condemning the right of way for a proposed public road over the lands of the defendant corporation. It was instituted under an order made by the board of supervisors of the county (plaintiff here) under section 2690 of the Political Code, as amended March 17, 1887, which is in this language: "If any award of damages is not accepted within ten days of the date of the award, it shall be deemed as rejected by the landowners. The board must by order direct proceedings to procure the right of way to be instituted by the district attorney of the county under and as provided in title seven, part three, of the Code of Civil Procedure, against all nonaccepting landowners, and when thereunder the right of way is procured the road must be declared a public highway, and opened as therein provided. In such suit no informality in the proceedings of the board shall vitiate the suit, but the said order of the board directing the district attorney to bring suit shall be conclusive proof of the regularity thereof; and the said suit shall be determined by the court or jury in accordance with the rights of the respective parties as shown in court, independent of said proceedings before said board." The appellant contends that the proceedings before the board of supervisors leading up to this proceeding were void, and that, therefore, the superior court has no jurisdiction to hear the present action, notwithstanding the existence of the statute just quoted; the contention being that if the action of the board of supervisors cannot be attacked collaterally in this, a different proceeding, the statute in question is unconstitutional, because it provides for the taking of private property without due process of law. If these proceedings necessarily had the effect of taking away the property of the appellant without affording any opportunity in any other legal way for the appellant to prevent this taking by showing that the board of supervisors had not proceeded in a legal way to lay out the road for the public use for which the land in controversy is needed, there would be much force in the plaintiff's position. But such is not the necessary result of this proceeding; and all that this statute does in effect is to establish a rule of evidence for this particular proceeding, leaving the landowner to his appropriate remedy of a direct attack on the action of the board before the order shall be made declaring the land taken "a public highway, and open," as by law provided. The object of the law plainly is not to allow, in this proceeding, a collateral attack on the action of the board of supervisors in another and distinct proceeding, formally had before them as a *quasi* court. This amounts, as before said, to nothing more than the establishment of a rule of evidence, and leaves the appellant to his appropriate remedy for a review of what he claims the unauthorized proceedings of that board. The case cited in 40 Cal. (Damrell v. San Joaquin Co., p. 155) is not in point here. That was a proceeding by *certiorari* to review the alleged void action of the board of supervisors of San Joaquin county, and in a proper proceeding would be authority, but not in a proceeding under the statute. This view of the matter necessarily disposes of all the other points made by the appellant, and the order denying a new trial alone appealed from ought to be affirmed, and we so advise.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

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64 Cal. 301

NEVADA BANK OF SAN FRANCISCO v. STEINMITZ, County Treasurer.[1]

(*Supreme Court of California.* Nov. 17, 1882.)

RAILROAD COMPANIES—MUNICIPAL AID—UNILATERAL CONTRACT—NONCOMPLETION OF TRACK—RATABLE ISSUE OF BONDS—REPEAL OF AID LAW.

1. The fact that there was no promise or obligation on the part of a railroad company receiving municipal aid to build a road contemplated by the aid is no objection to the validity of the bonds issued in pursuance of such aid, where the railroad in question has been actually built. Per Morrison, C. J.

2. Laws 1870 authorize counties to aid in the construction of railroads by the issue of county bonds, payable within twenty years," and provide that the board of supervision shall submit to the qualified electors of the county "the question whether such railroad aid shall be granted." An affirmative vote in pursuance of such statute authorized the board to issue such aid bonds upon such terms as might appear to them most advantageous to the county, the bonds to be delivered to the county at a specified rate for every mile of completed track. The termini were specified in the submission, but the road was built over a portion only of the distance between them. *Held,* that an issue of the bonds by the board in proportion to the amount of completed track was within their powers and valid. Myrick, McKee, and Thornton, JJ., dissenting.

3. In such case, the fact that all parties interested recognized the validity of the bonds, and raised no objection to the power of the board to issue them for a period of more than four years, was a circumstance to be taken into consideration in determining their validity. Per Sharpstein, Ross, and McKinstry, JJ.

4. The validity of railroad aid bonds issued after the repeal of the railroad aid enabling act of 1870, but under a contract entered into and partly performed prior to the repeal, was not affected thereby.

In bank.

Petition by the Nevada Bank of San Francisco for a writ of mandate to compel Charles Steinmitz, treasurer of the county of Santa Cruz, to pay the interest on certain railroad bonds. Writ granted.

McAllister & Bergin, for petitioner. *William D. Storey* and *Joseph H. Skirm,* for respondent.

MORRISON, C. J. By an act approved April 4, 1870, the legislature authorized the several counties of this state to aid (under certain conditions and qualifications) in the construction of railroads by the issue of county bonds payable within 20 years, and bearing interest not to exceed 7 per cent. per annum. The second section of the act provides that before the granting of such aid the board of supervisors of the county proposing to grant such aid shall submit to the qualified electors thereof the question whether such railroad aid shall be granted, and directs that a notice of the election as therein provided for shall be given. It further provides that no such aid shall be granted "unless a majority of the electors voting at such election shall cast their votes in favor of such aid." In pursuance of the provisions of the act referred to the board of supervisors of the county of Santa Cruz, at a regular meeting held on the 25th day of September, 1872, passed and duly entered in its minutes the following order: "Whereas, the board of supervisors of Santa Cruz county, state of California, propose that said county shall aid in the construction of a railroad of not less than a three-foot gauge, and beginning at or near the Pajaro depot, on the Southern Pacific Railroad, in the county of Monterey, and running thence in the most practicably direct route through the county of Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the county road leading to Soquel and the bay of Monterey, and thence along or near the coast to the boundary of said county, near the southeast corner of the Point New Year's ranch, by the issue of county bonds, payable within twenty years, and bearing interest, payable semiannually, at the rate of seven (7) per cent. per annum, to the amount of six thousand dollars per mile, but not exceeding in the aggregate the sum of two hundred and forty thousand dollars, such aid to be in lieu of the aid of one hundred thousand dollars heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad; and whereas, the Santa Cruz & Watsonville Railroad Company have agreed that the contract entered into by said company with the said county, dated January 18, 1872, and entered on the records of said board, in volume 3, page 184, and following, shall be deemed canceled in case the railroad aid herein proposed shall be granted: Now, therefore, it is ordered, and notice is hereby given, that at the next general election, to be held on the 5th day of November, 1872, there shall be submitted to the electors of Santa Cruz county the question whether the board of supervisors of Santa Cruz county, in lieu of the aid of one hundred thousand dollars, heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad at or near the town of Watsonville, and upon the cancellation of the said contract of the said county with the Santa Cruz & Watsonville Railroad Company, shall be authorized to grant, upon terms which appear to them advantageous to the county, the aid of the county of Santa Cruz in the construction of a railroad of not less than a three-foot gauge, on the route hereinbefore described, to an amount of not exceeding in the aggregate the sum of two hundred and forty thousand dollars, in the bonds of Santa Cruz county, as proposed by said board, to be issued at the rate of not more than six thousand dollars per mile for every mile of main track actually constructed. All ballots cast in favor of said proposition shall contain the words, 'Railroad Aid, Yes;' all ballots cast against said proposition shall contain the words, 'Railroad Aid, No.' Said election shall be held in all the election precincts in said county, * * *"—which order was published for the period of thirty days in two newspapers printed and published in the county of Santa Cruz, in accordance with such notice. On the 5th day of November, 1872, a general election was held in the county of Santa Cruz, and at such election a majority of the electors voting cast their votes in favor of granting aid to the railroad mentioned in said order, and on the 11th day of that month the board of supervisors, after canvassing the votes, published and declared that a majority of the electors voting at such election cast their votes in favor of granting the railroad aid mentioned in said order, and thereupon caused the proper record thereof to be entered in the minute book of its proceedings. On the 15th day of June, 1873, the board of directors of the Santa Cruz Railroad Company (the same being a corporation duly organized and existing under the laws of this state) passed a resolution authorizing the president of the company to apply to the board of supervisors for aid in the construction of its road at the rate of $6,000 per mile in county bonds, and on the 4th day of August, 1873, the board of supervisors of the county of Santa Cruz and the Santa Cruz Railroad Company executed the following agreement: "This contract, made and entered into on the fourth day of August, A. D. 1873, by and between the county of Santa Cruz, in the state of California, acting by and through the board of supervisors of said county, as the party of the first part, and that certain corporation, organized, acting, and existing under and by virtue of the laws of said state, and known, designated, and called the 'Santa Cruz Railroad Company,' as the party of the second part, witnesseth, that the board of supervisors of said county having, by an order duly made on September 25, 1872, and recorded at large in volume 3, pages 236, 237, 238, of the minutes of the proceedings of said board, proposed that said county shall aid in the construction of a railroad of not less than a three-foot gauge, the route of which road is definitely described in said proceedings as beginning at or near the Pajaro depot on the Southern Pacific Railroad; thence running in the most practicably direct route through the counties of Monterey and Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the county road leading to Soquel and the bay of Monterey; and thence along or near the coast to the boundary of said county near the southeast corner of the Point New Year's ranch,—by the issue of county bonds, payable within twenty years, and bearing interest, payable semiannually, at the rate of seven per cent. per annum, to the amount of six thousand dollars per mile, but not exceeding in the aggregate the sum of two hundred and forty thousand dollars; such aid to be in lieu of the aid of one hundred thousand dollars heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad. And the board of supervisors of said county, under and in pursuance of an act of the legislature of said state, approved April 4, 1870, and entitled 'An act to empower the board of supervisors of the several counties of the state to aid in the construction of a railroad in their respective counties,' and of the act of April, 4, A. D. 1870, supplemental thereto, having at the election held in said county on the 5th day of November, A. D. 1872, of which election at least thirty days' notice was given by publication once a week in a newspaper printed and published in said county, which notice stated the day on which, and the places where, such election was to be held in said county, and the amount of bonds of said county to be issued for railroad aid, and definitely described the route of the railroad for which aid was proposed, submitted to the qualified electors of said county the question whether such railroad aid shall be granted by said county to aid in the construction of a railroad on the route hereinbefore described; and at such election a majority of the electors voting at such election having cast their votes in favor of such railroad aid, and the result of said election, after a full and fair canvass by said board, having been declared by said board to be in favor of granting such railroad aid, and the sum of two hundred and forty thousand dollars, authorized by the said votes as aforesaid to be granted in and to such railroad, being less than five per cent. of the value of the taxable property of said county, and no aid whatever to any railroad ever having been granted by said county; and a certain agreement, dated January 18, A. D. 1872, between said county and the board of supervisors thereof, and the Santa Cruz & Watsonville Railroad Company, having been fully and forever canceled and annulled, and said county released and discharged from all liability thereunder, and covenants therein; and the said party of the second part having been heretofore duly organized as a corporation under the laws of said state for constructing and maintaining a railroad on the entire route first hereinbefore mentioned and described, and proposing to construct on said route, first, the section of such railroad between a point at or near said Pajaro depot and a point on the westerly side of said San Lorenzo river, and within the corporate limits of the town of Santa Cruz, which point last referred to is hereafter to be located by said party of the second part; and said party of the second part having solicited the said board to grant the aid of said county in the construction of such railroad, and the terms offered by said party of the second part appearing to said board to be advantageous to said county, and it appearing that said county will be greatly benefited by the construction of such railroad, or any part thereof: Now, therefore, this contract witnesseth that in consideration of the premises and of the agreements herein named, to be done and performed by said party of the second part, the said party of the first part has agreed and hereby does agree with said party of the second part to issue, deliver, and donate unto said party of the second part, in aid of the construction of such railroad, bonds of the said county of Santa Cruz in amounts and at the times and upon the terms as herein stated. Said bonds, as herein provided, shall be payable in gold coin to said party of the second part and to the holders of such bonds within twenty years from the date of their issue at the office of the treasurer of said county, and shall bear interest in like coin at the rate of seven per cent. per annum, and the installments of interest shall be payable semiannually on the first Mondays of January and July of each year on coupons to be issued and delivered with such bonds, and each of such bonds shall be of the denomination of not less than one hundred dollars, nor more than one thousand dollars, signed by the chairman of said board and by the treasurer and clerk of said county, and under the seal of said county, the interest coupons to be signed by the treasurer and clerk of said county. Such bonds are to be prepared for signing in the following form, to wit: 'Number ——. State of California. ——— dollars. Bond of the county of Santa Cruz,'" etc. The contract further provides that when five miles of the road are completed, and a construction train has been run over the same, there shall be issued to the company bonds of the county to the amount of $30,000, and upon the construction of every mile of the track thereafter, and the passage of a construction train over the same, there shall be issued to the railroad company bonds of the county to the amount of $6,000. The contract then proceeds to provide for a notice to be given of the construction of the road as it progressed, for an examination and inspection of the same, for an acceptance thereof by the county, and for the issue of bonds as the road was built, at the rate of $6,000 per mile. There are numerous other clauses in the contract, which it is unnecessary to notice for the purposes of this opinion.

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[1] This case, filed November 17, 1882, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

It appears from the evidence in the case that the railroad company commenced work on the first section of its road, and prosecuted the work thereon with reasonable diligence until the same was completed from the city of Santa Cruz to the Pajaro depot; that the company built a bridge over and across the San Lorenzo river; that the road was constructed in the manner provided for, and in accordance with the contract; that a construction train was run over the road; that it was inspected by the board of supervisors; that it was duly accepted, and the board of supervisors, on the 9th day of December, 1874, ordered that $30,000 of the bonds of the county be issued to the company. It further appears that on or about the 11th day of December, 1874, a suit was commenced by one William H. Patterson in the district court of the twentieth judicial district against the board of supervisors of the county of Santa Cruz, praying for an injunction to restrain and enjoin the defendants from issuing to the railroad company any bonds on account of the construction of said road, and thereupon an injunction was issued in pursuance of the prayer of the complaint. The case of Patterson v. Supervisors was afterwards tried upon its merits, and on the 23d day of February, 1876, a decree was entered therein declaring that the proceedings of the board were legal and valid, that the issuance of the bonds should not be in any manner restrained or enjoined; and thereupon the injunction previously issued was dissolved. After the judgment of the twentieth district court, dissolving the injunction referred to above, —that is to say, on or about the 25th day of February, 1876,—the board of supervisors of Santa Cruz county issued and delivered to the Santa Cruz Railroad Company $30,000 of bonds, each of which was in the following form: "In pursuance of an act of the legislature of the state of California, entitled 'An act to empower the board of supervisors of the several counties of the state to aid in the construction of a railroad in their respective counties,' approved April 4, 1870, and of an act supplemental thereto, approved April 4, 1870, and in accordance with the terms of a contract entered into by the board of supervisors of said county on the 4th of August, 1873, with the Santa Cruz Railroad Company, which said contract is entered upon the minutes of the board of supervisors in volume 3, pages 279, 280, 281, 282, 283, 284, 285, 286, the county of Santa Cruz owes and will pay at the office of the county treasurer in the town of Santa Cruz, state of California, to the Santa Cruz Railroad Company, or the holder of this bond, within twenty years from the date of these presents, the sum of one thousand dollars in United States gold coin, with interest thereon at the rate of seven per cent. per annum in like gold coin, from the date hereof until paid; interest payable semiannually on the first Mondays of January and July of each year, on the surrender to said county treasurer of the coupon for said interest." The coupon attached to each of the bonds is in the following form: "Coupon No. 41. On the 23d day of February, A. D. 1896, the county of Santa Cruz will pay to the Santa Cruz Railroad Company, or bearer, at the county treasurer's office, ten and twenty-one one-hundredths dollars in United States gold coin, interest due on bond No. 1."

On the 20th day of March, 1875, and at divers times between that date and the 15th day of November of that year, the Santa Cruz Railroad Company presented and filed with the board of supervisors written notices and communications informing them of the completion of 14 additional miles of the road, and thereupon proceedings were regularly taken by the board to inspect and examine the same, and after such examination and inspection the following order was passed: "It is therefore ordered by the board of supervisors of the county of Santa Cruz that there be issued and delivered to the Santa Cruz Railroad Company bonds of said county of Santa Cruz to the amount of eighty-four thousand dollars, in sums of one thousand dollars each, payable within twenty years of their date, in United States gold coin, and bearing interest in like coin at the rate of seven per cent. per annum from their date, and interest payable semiannually on the first Mondays of January and July of each year, in pursuance of the terms of said contract between the county of Santa Cruz and the Santa Cruz Railroad Company, and that said bonds be signed by the chairman of this board and by the county treasurer and county clerk, and under the seal of said county, and the interest coupons to be signed by said treasurer and said clerk. It is further ordered that each of the bonds issued to the said railroad company under said contract shall be of the denomination of one thousand dollars." In pursuance of the above order, bonds were issued to the Santa Cruz Railroad Company to the amount of $84,000. These bonds were in form similar to the bonds for $30,000 previously issued to the railroad company. All of these bonds were, within three months from the issuance thereof, sold and disposed of by the railroad company, and on the 2d day of August, 1879, they were purchased and paid for by the plaintiff, the Nevada Bank of San Francisco, in the ordinary course of business, at the rate of 95 cents on the dollar, and were purchased under the belief that the same were legal and valid. On the 3d day of January, 1881, the coupons on the bonds which fell due on the 1st of that month were presented to the defendant, the treasurer of the county of Santa Cruz, and payment thereof was demanded, which was refused by the defendant, although he at that time had sufficient funds on hand, specially provided by law for that purpose, to pay said coupons; and this is an application to the court for a peremptory writ of *mandamus* to compel the defendant, as treasurer of said county, to pay such coupons. There are other facts presented by the pleadings and report of the referee to whom this case was referred for the purpose of taking and reporting the facts therein, but we deem it unnecessary to consider them.

The question presented for our decision is simply this: Are the bonds in the hands of the plaintiff, claiming the same as a *bona fide* purchaser for value, valid and binding upon the county of Santa Cruz? The act of April 4, 1870, as appears from its title, as well as from its clearly expressed object, was intended to "empower the board of supervisors of the several counties of the state to aid in the construction of a railroad in their respective counties," and the only restrictions imposed upon the board were that the bonds to be issued for such aid should not exceed 5 per cent. of the value of the taxable property of the county; and further, that the question of granting such aid should be submitted to the qualified electors of the county in pursuance of section 2 of the act. The question of granting such aid was submitted to the voters of the county of Santa Cruz, and the proposition was for a road "beginning at or near Pajaro depot on the Southern Pacific Railroad in the county of Monterey, and running thence in the most practicably direct route through the county of Santa Cruz, crossing the Pajaro river near Watsonville, between the county road leading to Soquel and the bay of Monterey, and thence running along or near the coast to the boundary of said county, near the southeast corner of Point New Year's ranch;" and the order was: "Now, therefore, it is ordered and notice is hereby given that at the next general election to be held," etc., "there shall be submitted to the people the question whether the board of supervisors shall be authorized to grant, upon terms which may appear to them to be advantageous to the county, the aid of the county of Santa Cruz, as follows: When five miles of said first section of said railroad shall have been constructed, and a construction train run over the same, there shall be issued and delivered to said party of the second part, by the said party of the first part, bonds of said county to the amount of thirty thousand dollars; and upon the construction of every mile of track thereafter of such railroad, and the passage of a construction train over the same, there shall be issued and delivered, as last aforesaid, to the said party of the second part, bonds of said county to the amount of six thousand dollars; and so on until the construction of said railroad is completed;" and it was provided in the proposition submitted to and adopted by the vote of the people that bonds should be issued at the rate of not more than $6,000 for every mile of main track actually constructed.

It is claimed on behalf of defendant—*First*, that the contract was a unilateral one, and therefore not binding upon the county; *second*, that the board of supervisors had no power to enter into a contract for the construction of a railroad which did not extend over the entire route from Pajaro depot on the south to Point New Year's ranch on the north; and, *third*, that the act of 1870 was repealed before the bonds were issued

If the contract did not contain any stipulation on the part of the railroad company to build the road, or to do any other act, we can see no good reason why the party of the first part should not be bound by its promise or agreement, provided the railroad company, acting upon such promise or agreement, proceeded to construct the road in accordance with the conditions set forth in the contract. It may be that the county could have withdrawn its promise of aid at any time before work was done on the faith of the promise; but after the work was done, and the contract was executed, the county could not escape from its liability on the ground that the company did not in the first instance obligate itself to construct the road. If A. promise B. to pay him a stipulated sum for a certain service, and B. renders the service without any contemporaneous promise to do so, can it be doubted that A. will be bound by his promise? The following authorities are referred to in support of the point that the contract was binding on the county after performance by the company even if it was unilateral. Barnes v. Perine, 9 Barb. 211; Robertson v. March, 3 Scam. 198; Chit.

Cont. 64; Train v. Gold, 5 Pick. 379; White v. Baxter, 71 N. Y. 254. But is it true that the railroad company did not agree or promise to do anything on its part? The contract contains the following agreement or promise by the company: "And the said party of the second part [the company] has agreed and hereby does agree to and with the said party of the first part to build, construct, and finish such last-named bridge [across the San Lorenzo river] and to lay the track of said railroad from the easterly bank of said last-named river to a point on the westerly side thereof within three hundred feet of said bay in three months after said bonds of said county to the amount of ninety thousand dollars shall have been issued and delivered to said party of the second part." There is also a clause in the contract to the effect that the aid is granted in lieu of a former aid of $100,000, which is surrendered and canceled by the express terms of the contract. Here we find a sufficient consideration, if any were necessary, for the promise on the part of the county.

The second point made on behalf of the defendant involves an attack upon the contract, on the ground that the board of supervisors had no power to make it, because it did not provide for and the Santa Cruz Railroad Company was not bound under it to construct the road along the entire route. In this connection it is proper to notice the fact that the act of April 4, 1870, does not provide for a contract between the county and the railroad company, but simply empowers the county to aid in the construction of railroads upon certain terms. The aid authorized by the law and intended by the parties was to be granted as the work progressed, in order to assist and enable the company to pay for the work and construct the road, and it never was contemplated that the entire work should be completed and paid for by the company before the bonds should be issued. Kenicott v. Supervisors, 16 Wall. 466. This would not be aiding the company in the construction of the road, but would simply be reimbursing the company, in whole or in part, its money expended in building the road. This view is fortified by the proposition submitted to the electors, which was that the county should aid the railroad company in the construction of its road by issuing and delivering to it bonds "at the rate of not more than six thousand dollars per mile for every mile of main track actually constructed." The bonds should have been issued for every mile when constructed, (after the completion of the first five miles,) and it is fair to presume that they would have been so issued if the board had not been enjoined by the order of the twentieth district court. The Bank of Nevada purchased the bonds for value, without notice of any infirmity in them, and the only question is one of power in the board to issue them. Cromwell v. County of Sac, 96 U. S. 51; 1 Dill. Mun. Corp. § 515, and authorities there cited. "If the board did not have the power to issue the bonds there could be no such thing as a *bona fide* holder of them, as any purchaser would be held to have notice of the fact, where there was a total want of authority." Township of East Oakland v. Skinner, 94 U. S. 258. "The following doctrines are too well settled to be any longer open to question: A *bona fide* purchaser of negotiable paper for value before maturity takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited. Municipal bonds, payable to bearer, are subject to the same rules as other negotiable paper." 1 Dill. Mun. Corp. § 113, and authorities there cited. Speaking further on this subject, the same author says: "The supreme court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation." Id. § 518. "It [the supreme court of the United States] has adopted, when necessary to protect the *bona fide* holders of such securities, liberal construction of statutes and charters authorizing the creation of such debts. Against such holders it has given no favor to defenses based upon mere irregularities in the issue of the bonds or noncompliance with preliminary requirements, not going to the question of power to issue them." Id. § 515.

It is claimed in the case now under consideration that there was a want of power on the part of the board of supervisors to make any contract or to issue any bonds for a portion of the road, and that is the only ground upon which the question of power can arise. There is no charge of fraud or unfair dealing on the part of the board, and the most that can be said against its action is that it provided, in the first place, for the construction of that section of the road lying between the city of Santa Cruz and the Pajaro depot. In this we can perceive no just cause of objection or complaint, for that was the most important section of the road; and its completion brought a large portion of the county of Santa Cruz into direct communication with the Southern Pacific road, and thereby opened a lengthy line of travel north and south with other portions of the state. It does not appear that there was not an intention on the part of the board of supervisors to extend the road in a northerly direction from Santa Cruz to its northerly terminus, and, after appropriating one half of the $240,000 of the bonds to the first section of the road,—about one half of the entire route,—there remained to be issued a corresponding amount of bonds to aid in the construction of the other half of the railroad. It remains only for us to say that in our opinion the bonds were not issued without power, that they were valid when issued, and are good and binding upon the county in the hands of the plaintiff.

There is but one other question to be determined, and that relates to the effect of the act of January 14, 1874, repealing the act of April 4, 1870. This question has been passed upon in several cases. It is found in the report of the referee that the Santa Cruz Railroad Company commenced work on its road, under the contract between it and the county, on the 25th day of October, 1873, and prosecuted the same with reasonable diligence; but the repealing act was not passed until January 14, 1874. In view of the facts of this case the validity of the bonds was not affected by the repeal of the act of April 4, 1870. Town of Concord v. Savings Bank, 92 U. S. 630; Steamship Co. v. Joliffe, 2 Wall. 450; Montgomery v. Kasson, 16 Cal. 189. Let the writ issue.

Sharpstein, J., (*specially concurring.*) The only objection to the validity of the bonds which seems to us to merit any serious consideration is that, after a majority of the electors voting upon the proposition to issue bonds to aid in the construction of a railroad upon a certain specified route between two certain specified points had voted in favor of granting such aid, the board of supervisors entered into an agreement whereby said board agreed to issue bonds to the amount of $6,000 per mile for the construction of a railroad on said route for a distance less than the entire distance between the termini mentioned in the proposition submitted to said electors. And that objection is founded upon the hypothesis that it was the understanding of the electors who voted upon the proposition that in consideration of the aid granted the entire road should be constructed. There is but one way in which we can arrive at the intention of the electors who voted upon the proposition to grant aid, and that is by an inspection of the proposition itself. The proposition voted upon, as stated in the notice of the election, was substantially as follows: That the board of supervisors should be authorized to grant, (in lieu of the aid of $100,000, previously authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad,) upon terms which might appear to said board advantageous to said county, the aid of said county "in the construction of a railroad on the route" described as "beginning at or near the Pajaro depot, on the Southern Pacific Railroad, in the county of Monterey, and running thence in the most practicably direct route through the county of Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the county road leading to Soquel and the Bay of Monterey, and thence along or near the coast of the boundary of said county near the southeast corner of the Point New Year's ranch, * * * to an amount of not exceeding in the aggregate the sum of two hundred and forty thousand dollars, in the bonds of Santa Cruz county, as proposed by said board, to be issued at the rate of not more than six thousand dollars per mile for every mile of main track actually constructed." The vote was in favor of aiding in the construction of a railroad on a route "beginning at or near Pajaro depot, and ending at the boundary of said county, near the southeast corner of the Point New Year's ranch." And the board of supervisors was authorized "to grant, upon terms which to them" might "appear advantageous to the county," the aid of the county in the construction of a railroad on that route, in the bonds of the county, "to be issued at the rate of not more than six thousand dollars per mile for every mile of main track actually constructed," until the aggregate of the bonds so issued should amount to $240,000.

Now, it is not claimed that so much of the road as has been actually constructed was not constructed on the route designated in the proposition which was submitted to the electors of the county. But it is claimed that the board of supervisors was not authorized to agree to issue bonds at the rate of $6,000 per mile for any number of miles less than the whole number between the terminal points of the route. The board, however, was expressly authorized to grant said aid upon terms which might appear to it to be advantageous to the county; and if it appeared to it to be advantageous to the county to aid in the construction of 19 miles and no more of the road constructed on the route designated, it is not the province of this court to review the decision of the board upon that question. We are bound to assume that it appeared to the board to be advantageous to the county to have no more than 19 miles of that road constructed, at an expense of $6,000 per mile to the county, until we are convinced that it appeared otherwise to said board. The board was not bound to issue bonds at the rate of $6,000 per mile for every mile of railroad which might be constructed between terminal points mentioned in the proposition to grant aid. But it was authorized to issue them at the rate of $6,000 per mile for every mile of main track actually constructed. And whether it issued them at the rate of $6,000 per mile for a part of the distance or for the entire distance, it was issuing them in aid of the construction of a railroad on the route designated in the proposition upon which the electors had voted. By aiding in the construction of 19 miles of railroad on the route designated the county was aiding *pro tanto* in the construction of it from one to the other of the terminal points mentioned in said proposition. If it was the intention of the electors voting upon the proposition to grant the aid of the county in the construction of a railroad upon the route specified, that said aid should not be granted except upon the condition that a railroad should be constructed the entire length of the route, it must be admitted, we think, that they have failed to express that intention; and if they have it is no part of the duty of this court to supply the omission. It is our duty to construe the contract which the parties have made, not to make one for them.

The construction which we have put upon the vote of a majority of the electors who voted upon the proposition to issue bonds in aid of the construction of said railroad is in accord with that which the board of supervisors practically put upon that vote; and the people of said county acquiesced in that construction for a considerable period of time by offering no resistance to the issuing of the bonds, and by paying the interest upon them semiannually for a period of more than four years, three of which preceded the purchase of said bonds by the petitioner herein. It is not necessary to invoke the doctrine of "municipal decision" or of estoppel, of which it is one of the forms, to the extent that it has been applied by the supreme court of the United States to cases involving the validity of municipal bonds, in order to sustain the validity of these bonds. In a late treatise on public securities the author says: "It has often happened in the cases which have come before the supreme court of the United States that the municipalities which sought to evade the force of the bonds issued on their behalf had received the proceeds of the bonds, enjoyed the benefits of the improvements made by them, paid the interest for many years; and these circumstances, as well as the doctrine of municipal decision, have influenced the court in their determinations." And then adds: "It is not, however, against these decisions, when these different elements are combined, that we make our protest." Burroughs, Pub. Sec. p. 341. In addition to those enumerated in the above extract there is in this case another very important element, and that is that it was made a condition precedent to the issuing of any bonds to aid in the construction of said railroad that a certain contract by which said county had agreed with the Santa Cruz & Watsonville Railroad Company to aid it to the extent of $100,000 "in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad at or near the town of Watsonville" should be canceled, and it appears by a recital in the agreement between the board of supervisors and the Santa Cruz Railroad Company that said contract with the Santa Cruz & Watsonville Railroad Company was "fully and forever canceled and annulled, and said county released and discharged from all liability thereunder and covenants therein." That liability amounted to within $14,000 of the whole amount of the bonds held by the petitioner. And it is not even suggested that the liability so canceled can be restored, so as to place the parties in the same conditon that they were in prior to its cancellation. Does not that present a case for the application of the principle of estoppel? If that principle can be applied to a municipality, it is difficult to conceive of a case to which it could be applied more properly than to the one at bar. Here a majority of the electors voted in favor of a proposition which will at least admit of the construction which all of the parties interested in it practically put upon it for a period of four or five years by issuing the bonds and paying interest thereon, and now, after said bonds, which are negotiable, have passed through several hands, this court is asked to hold that such construction was erroneous, and that the petitioner, who paid their full market value, should have made that discovery before purchasing them, although it does not appear that any taxpayer, supervisor, treasurer, or legal adviser of the county made it until some time afterwards. That which it is now claimed constituted a condition precedent to the power to issue the bonds is certainly not clearly expressed in the proposition submitted to the electors, and for which a majority of them voted; and it seems to us inexplicable that, if such a condition had been supposed to exist, the board of supervisors should have been permitted to issue the bonds in utter disregard of it, when any taxpayer, in behalf of himself and all other taxpayers of the county, could have intervened and prevented the issue of them. And it is still more inexplicable to us that under such circumstances the interest on the bonds should have been paid for a period of four or five years without a word of protest from any taxpayer, so far as we are advised. "They had an opportunity, before innocent third persons could be injured or committed to the acts of their public agents, to enjoin their proceedings and protect themselves. They did not seek that protection; but now, when they have received all the fruits of the contracts of their agents from third persons who have acted upon their recognition of the authority of their agents, they ask the privilege of denying this recognition, and thus escape from their obligations. It is too late for them to do so as against innocent third persons. They are concluded not simply by the acts of their public agents, but by their own." State v. Van Horne, 7 Ohio St. 327. If the construction of the power conferred upon the board of supervisors for which the respondent contends was clearly the correct one, we might be compelled to hold that the petitioner was chargeable with notice of the want of authority in the board of supervisors to enter into the agreement which they entered into with the railroad company. But it is by no means clear that that construction is the correct one, and it is clear that during a period of four or five years all parties interested acted as if it was not the correct one, and we think that in a case like this that circumstance is entitled to great weight.

McKinstry, J., concurred.

Ross, J., *(specially concurring.)* I concur upon the second ground discussed in the opinion of Mr. Justice Sharpstein, and for the reasons by him given.

Myrick, J., *(dissenting.)* Under the act of April 4, 1870, (St. 1869-70, p. 746,) a vote was had authorizing the granting of aid, and a contract had been made between the board of supervisors of Santa Cruz and the Santa Cruz & Watsonville Railroad Company, by which aid to the amount of $100,000 was granted to that company to assist in the construction of a railroad from the town of Watsonville to the town of Santa Cruz. For some reason the work did not progress. On the 25th of September, 1872, the board of supervisors made an order for an election to be held upon the proposition of granting aid for the construction of a railroad from a point on the line of the Southern Pacific Railroad at or near the Pajaro depot, thence through the county of Santa Cruz to the northern line of the county near Point New Year's ranch; said aid to be $6,000 per mile, and not exceeding the aggregate of $240,000, interest-bearing bonds of the county to be issued therefor; said aid to be in lieu of the aid of $100,000 theretofore authorized to be granted. In pursuance of this order an election was held, and the result was in favor of the proposition. Thereafter, on the 15th of June, 1873, the Santa Cruz Railroad Company made its application for aid. On the 18th of June, 1873, the articles of incorporation of the Santa Cruz Railroad Company were filed, such incorporation being for the purpose of constructing, conducting, and maintaining an iron railroad within the counties of Monterey and Santa Cruz, commencing at a point at or near Pajaro station, on the Southern Pacific Railroad, in the county of Monterey, and running thence to and through the county of Santa Cruz to the northern boundary of Santa Cruz county at or near the south boundary of the Rancho Puntadel Ano Nuevo, (Point New Year's ranch,) the estimated length of said railroad being 40 miles. On the 4th of August, 1873, the board of supervisors received from the Santa Cruz & Watsonville Railroad Company a release of the $1,000 aid, and on the same day executed a contract with the Santa Cruz Railroad Company, in which was recited the before-mentioned proposition for aid in the construction of a railroad beginning at or near the Pajaro depot, and thence running in the most practicable direct route through the counties of Monterey and Santa Cruz to the boundary of Santa Cruz county near the southeast corner of the Point New Year's ranch, by the issuance of bonds, the same to be in lieu of the $100,000 before authorized; the submission of the proposition to the voters of the county; the election and the vote in favor of the aid; the release of the $100,000 aid; the incorporation of the Santa Cruz Railroad Company for the purpose of constructing and maintaining a railroad on the entire route; and the solicitation of the company for aid in the construction of such railroad. The contract then proceeded to declare that the county would be greatly benefited by the construction of said railroad, or any part thereof, and provided for the issuance of bonds at the rate of $6,000 per mile as the road should be completed in sections specified; but provided that the western terminus of the work to be done thereunder should be at a point within the corporate limits of the town of Santa Cruz. The company was authorized to commence its work at a point near the town of Santa Cruz and prosecute the same easterly to Pajaro station. It should be noticed that the town of Santa Cruz is about midway between the two ends of the road, as stated in the proposition submitted to the voters. No provision was made in this contract for the construction of a road beyond Santa Cruz, nor was any reference made thereto, except by the recitals above stated; on the contrary, it is perfectly evident from the contract that the board of supervisors on the one hand, and the railroad company on the other, intended that the same should apply only to that portion of the route between Pajaro and Santa Cruz. The work of construction so progressed that on the 7th of December, 1874, the board of supervisors made an order for the issuance of bonds to the amount of $30,000. At this point one Patterson brought a suit against the board of supervisors for the purpose of restraining the issuance of the bonds, and such proceedings were had that on the 23d of February, 1875, judgment of nonsuit was entered upon the ground that the plaintiff had failed to prove a sufficient case. Thereafter, in 1876, the road having been constructed from Pajaro to Santa Cruz, bonds were issued to the Santa Cruz Railroad Company,—$30,000 on the 25th of February, and $84,000 on the 11th of March. The bonds on their face refer to the act of 1870, and recite that they are issued "in accordance with the terms of a contract entered into by the board of supervisors of said county on the 4th day of August, 1873, with the Santa Cruz Railroad Company, which said contract is entered upon the minutes of the board of supervisors in volume 3, pp. 279, 280, 281, 282, 283, 284, 285, 286." On the 7th of August, 1879, the plaintiff purchased the bonds through a broker, having no knowledge of the then holder, paying therefor 95 per cent. of the par value. No road has been constructed over any part of the projected route between the town of Santa Cruz and the northern boundary line of the county, nor has such construction been or attempted to be provided for.

This proceeding is a petition for a writ of mandate requiring the respondent, as county treasurer, to pay the coupons on the bonds held by petitioner. The petitioner claims as well that the bonds were properly issued, and are a legal charge upon the county, as that, it being a *bona fide* holder for value, payment cannot be disputed. In our opinion, the question of the rights of *bona fide* holders of bonds does not arise and is not for consideration in this case. The bonds on their face refer to the statute authorizing the granting of county aid, and to the contract between the board of supervisors and the railroad company. Therefore the bonds are as though the statute and the contract were written, word for word, therein. The statute authorized the granting of county aid. The election was held thereunder, and the matter submitted was, shall aid be granted for the construction of a railroad from Pajaro to the northern line of the county? Upon that question, and that question only, the people voted to grant the aid. For that purpose, and that purpose only, the board of supervisors were authorized to issue bonds. There was no vote upon the granting of aid for any less distance. The contract was for "one section" only,—from Pajaro to Santa Cruz,—about one half the entire distance voted upon. It cannot be pretended that it is or has been the intention of the railroad company to complete the road. It is manifest that it was the intention of the parties who conducted the transaction on the part of the board of supervisors and the railroad company to take advantage of a vote which had been had for granting aid for the construction of the road for the whole distance, construct the road for only half of the distance, obtain the issuance of bonds for that half at the rate of $6,000 per mile, ($120,000 for the 20 miles, that probably being the only profitable part to build or operate,) and then omit to proceed with the further construction. The contract, which, by being referred to, is a part of each and every bond, refers also to the vote of the people in favor of aid for the road the entire distance, and then, after so referring, assumes to authorize the railroad company to construct but the part, the track-laying to commence at Santa Cruz and extend to Pajaro. No word is written or act provided for having in view any other or further construction. Such transactions are not fair dealing; and of such, in this case, holders of the bonds are bound to take notice. It is a question of power. The board of supervisors had no power to issue bonds to aid in the construction of any quantity or distance of road less than the whole. It acted under a limited and special power of attorney. Possibly bonds might have been issued for miles as the work progressed, but the holders of such bonds would be under the burden of providing for or requiring the entire construction.

The supreme court of the United States in Township of East Oakland v. Skinner, 94 U. S. 255, says: "We have held that there can be no *bona fide* holding where the statute did not in law authorize the issue of the bonds. The objection in such case goes to the point of power. There is an entire want of jurisdiction over the subject. It is not the case of an informality, an irregularity, fraud, or excess of authority in an authorized agent. Where there is a total want of authority to issue the bonds, there can be no such thing as a *bona fide* holding." As was said above, although there was power to issue bonds in a certain case, viz., for the construction of the entire distance, yet there was no power to issue in aid of the construction of a less distance. That it was the intent of the railroad company to build, and of the board of supervisors to have built, a part only, is clearly manifest from the proceedings. The board declared, (see contract between the board and the railroad company:) "It appearing that said county will be greatly benefited by the construction of said railroad or any part thereof." The board had not power to declare any benefit from a part. The people had by their votes declared the extent of the line of the road, and the board had no more power to diminish its length than to increase the amount of aid. The intent to avoid compliance with the law is apparent upon the face of the documents referred to in the bonds, and the purchaser was bound to take notice. The bonds were not, like a bill of exchange or promissory note, "a courier without luggage," but these transactions were tied to them, and could not be shaken off. The supreme court of the United States, in School Dist. v. Insurance Co., 103 U. S. 710, said: "As the bonds recite that they were issued under this act, [an act which the court held not to give authority for issuing the bonds in question,] and that the vote was taken under it, we cannot see that power, purposed to be exercised under other and very different circumstances, can be invoked to give validity to an act which is void by the authority under which it professed to be acting." It has been repeatedly urged that the holders of bonds have innocently invested their money, and should, as innocent holders of public securities, be protected. They are not, however, the only persons to be considered. Taxpayers are equally innocent. Taxpayers are not to be subjected to extraordinary burdens, or even ordinary burdens, except by law. To this case may be applied the language used by Justice FIELD, concurred in by Chief Justice WAITE and Justices GRIER and MILLER, in dissenting from the judgment of the court in Rogers v. Burlington, 3 Wall. 668: "In all such cases the mode becomes the measure of the power. * * * This is not a case where the doctrine of estoppel has any application. It is not a case where the purchaser of the bonds was misled by any recitals of conformity to law. Here the statute and the ordinance of the city of Burlington, under which authority to issue the bonds was assumed to exist, are both printed in full in the indorsements upon the bonds; and the ordinance is also referred to on their face. But if this were not so, the case would not be changed, as the statute did not authorize the issue of the bonds. No formality of execution and no extent of recitals could give validity to instruments thus issued." There are even stronger objections against the validity of the bonds involved in the case at bar than those considered in the case above referred to. The length of time which elapsed after the making of the contract and the issuance of the bonds before the purchase of petitioner may not be a controlling consideration, but it is certainly significant in one respect. The contract was made August 4, 1873, and the bonds were issued in February and March, 1876. The petitioner did not purchase until about three years and a half thereafter, to wit, August 7, 1879. During all that period no step had been taken by the railroad company or the board of supervisors for carrying out the will of the people as expressed in granting the aid. The petitioner is not in a position to say it was not fully advised of all the proceedings. While it had the proposed purchase of the bonds under consideration, it caused to be examined the act of April 4, 1870, the popular vote upon the question of extending the aid, the contract between the board of supervisors and the Santa Cruz Railroad Company, and it had the bonds before it. It also caused to be examined an action then pending by the railroad company against the board of supervisors for the further issuance of bonds, which action was being resisted upon the ground, among others, that no vote had been had for the granting of aid for any less distance than the whole. The writ should be denied.

McKee and Thornton, JJ., concurred with Myrick, J.

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64 Cal. 327

SAMSON v. SAMSON, (DAVIS, Intervener.)[1]

(*Supreme Court of California.* Nov. 21, 1883.)

LIMITATIONS—DISABILITIES — INFANCY —CONTESTING PROBATE—EFFECT OF DECREE.

A decree setting aside the probate of a will, at the suit of an heir arrived at full age, will not inure to the benefit of other heirs, who permit the time allowed them, after removal of their disabilities, for objection to such probate to pass without instituting a contest thereof.

In bank. Appeal from superior court, city and county of San Francisco.

Action by Fannie Reis Samson against Fannie M. Samson to set aside the probate of a will. Jacob Z. Davis intervenes, claiming an interest in the estate involved by virtue of a judgment against defendant. From a judgment for plaintiff, intervener appeals. Modified and affirmed.

Mastick, Belcher & Mastick, for appellant. *P. B. Ladd, S. Heydenfeldt*, and *Wilson & Otis*, for respondent.

Ross, J. This is an appeal from a judgment made and entered November 26, 1880, revoking the probate of a will which had been admitted to probate in the year 1870. The revocation was had upon proceedings initiated on the 26th of July, 1880, by and on behalf of a minor child of the deceased, under and by virtue of that provision of the statute which saves to infants and persons of unsound mind a period of one year after their respective disabilities are removed within which to contest the validity of a will. The deceased left surviving him a widow and four minor children. Shortly after his death the widow presented to the proper probate court a document purporting to be the last will and testament of the deceased, together with a petition praying its admission to probate. An order was duly made by the court, fixing a day for hearing the petition and proving the will, and directing notice to be given and the proper citations to be issued and served. Citations were duly issued and served upon the minor children, and the court appointed an attorney to represent them at the hearing. At the time appointed proof was taken, and, with the consent of the attorney for the minor heirs, the court admitted the document to probate as the last will and testament of the deceased, and appointed the widow executrix, she being named in the will as executrix and sole devisee, the children being by name expressly excluded from any share in the estate. Letters testamentary were afterwards issued to the widow, the estate administered, and finally, in 1875, about five years after the administration was begun, a final decree of distribution was entered by which all of the property of the estate remaining undisposed of was distributed to the widow, and the administration was then brought to a close. No further step was taken in the matter of the estate until July 26, 1880, when one of the children, then 17 years of age, filed a petition in the court of probate for the revocation of the will upon the ground that at the time of the execution of the instrument the deceased was *non compos mentis*, and therefore incompetent to make a will. It is said for the appellant that the order made by the probate court in 1870, admitting the document to probate as the last will and testament of the deceased, is a conclusive determination of its validity, since all of the heirs and parties in interest were then before the court, and the court had jurisdiction of the subject-matter. It is not necessary to determine how this would be if it appeared that at that time a contest was made on behalf of the heirs, to which the provisions of the statute in relation to new trials and appeals would have applied, for it does not appear that any contest arose until the filing of the petition on behalf of Fannie Reis Samson on the 26th of July, 1880, which was within the time allowed her by section 1333 of the statute for that purpose. Meanwhile, however, the other heirs had permitted one year after the removal of their respective disabilities to pass without instituting any contest; and the point is made that as to them, at least, the decree of probate is conclusive. The position, we think, must be sustained. We see no difficulty in avoiding the probate so far as the interests of the contesting heir are concerned, and permitting it to stand so far as concerns the heirs who have lost their rights by lapse of time. It must be remembered that, as the probate court had jurisdiction of the subject-matter and of the parties, its order admitting the document to probate is not void, but voidable merely. In this connection we quote the language of the surrogate in Bailey v. Stewart, 2 Redf. Sur. 227: "It is quite clear to my mind, where a petition shows a case conferring jurisdiction, the surrogate has authority to act in the premises, and it is not true to say that the subsequent discovery of persons who were entitled to an interest in the estate as heirs would render the decree void. Such a state of facts would only render the decree inoperative as to the person so discovered to be entitled. Suppose, as an illustration, that a testator should die, leaving, as is supposed, but three children, and upon that assumption the will should be probated, and many years thereafter it should turn out that a fourth child, supposed to be dead, was living, can it be seriously pretended that such a discovery would render a probate void? If so, most disastrous consequences might result to the estate and to those who had become possessed of it. The most that could be said in such a case would be that the probate might be avoided so far as the interests of the heir not cited are concerned, and that the probate for that purpose would be set aside, if at all, on appeal to the discretion of the surrogate." Cause remanded, with directions to the court below to modify the judgment in accordance with the views expressed in this opinion.

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[1] This case, filed November 21, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Morrison, C. J., and Myrick and Thornton, JJ., concurred.

Petition for rehearing denied.

(64 Cal. 330)

Thompson v. Samson *et al.*[1]

(*Supreme Court of California.* Nov. 21, 1883.)

Infants — Removal of Disabilities — Invalid Probate of Will—Rights of Purchaser.

Where probate of a will is had, and the estate is distributed afterwards under the will, an heir who, after removal of his or her disabilities, obtains a decree vacating the probate, cannot follow the property devised in the hands of a bona fide purchaser for value from the distributee. McKinstry, Sharpstein, and McKee, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Action by John D. Thompson against Fannie M. Samson and another. From a judgment for plaintiff, defendants appeal. Affirmed.

P. D. Ladd, *S. Heydenfeldt*, and *Wilson & Otis*, for appellants. *Mastick, Belcher & Mastick*, for respondent.

Ross, J. Antonio B. Samson died on the 28th of July, 1870, leaving surviving him a widow and four minor children. Shortly after his death the widow presented to the proper probate court a document purporting to be the last will and testament of the deceased, together with a petition praying its admission to probate. An order was duly made by the court fixing a day for hearing the petition and proving the will, and directing notice to be given and the proper citations to be issued and served. Citations were duly issued and served upon the minor children, and the court appointed an attorney to represent them at the hearing. At the time appointed proof was taken, and upon the proof taken, and with the consent of the attorney for the minor heirs, the court admitted the document to probate as the last will and testament of the deceased, and appointed the widow executrix; she being named in the will as executrix and sole devisee, and the children being by name expressly excluded from any share in the estate. Letters testamentary were afterwards issued to the widow, the estate administered, and finally, in 1875, about five years after the administration was begun, a final decree of distribution was entered, by which all of the property of the estate remaining undisposed of, including the real property here in controversy, was distributed to the widow; and the administration was then brought to a close. Subsequent to this the widow borrowed of Thompson, the plaintiff in the present action, $16,000, and to secure its repayment mortgaged the property to him. The mortgage was foreclosed, the property sold pursuant to a decree of foreclosure and sale, Thompson bought it, and in due time received from the sheriff a deed conveying to him all of the interest of the mortgagor therein. The regularity of the probate proceedings and of the proceedings in the foreclosure suit are not questioned, but it appears that during the pendency of the foreclosure suit, that is to say, in the year 1880, one of the children of the deceased, Samson, who was then a minor, by a guardian duly appointed, filed in the probate court a petition praying the revocation of the document which ten years before had been adjudged to be the last will and testament of the deceased, upon which petition, after proceedings regularly had, the probate court found that the deceased was *non compos mentis* at the time of making the alleged will, and therefore, on the 26th day of November, 1880, entered a decree annulling the order made in 1870 admitting the document to probate, and adjudging that the same was not the last will and testament of the deceased Samson. In the case entitled Samson v. Samson, 30 Pac. Rep. 979, (No. 7,577, just decided,) we have held that the decree thus rendered in 1880 must be modified so as to be limited to the protection of the rights of the contesting minor, and cannot be permitted to extend to the heirs who slept upon their rights and became barred by the lapse of the statutory time allowed them for such contest. But the question in the present case is, what is the effect of the revocation upon the rights of a purchaser from the distributee of the estate?

On the part of the heirs it is contended that, when the probate of the will was revoked, and it was determined that the document purporting to be a will was in fact not a will, every step in the probate proceedings, from the admission of the document to probate to and including the final distribution of the estate, became absolutely void and of no effect, and that any and all conveyances made by the distributee of the estate became likewise of no effect. The result of sustaining this proposition is, of course, to hold that no purchaser at an executor's sale, and no purchaser from any heir, legatee, or devisee, made even after final distribution, can ever be secure in his purchase until the expiration of one year after every infant and person of unsound mind who may be interested in the estate shall have been relieved of their respective disabilities. If this is the law, of course we must so declare it, however disastrous the consequences may be. But is it the law? It is true that there is a provision of the statute saving to infants and persons of unsound mind, one year after their respective disabilities are removed, within which to contest the probate of a will. But the statute also makes provision for the presentation to the proper probate court of a petition for the probate of a document purporting to be the will of a deceased person, for a hearing of the petition after due notice, the establishment of the will by proper proof, its admission to probate, and thereafter for the proper administration of the estate, and its final distribution to the person or persons entitled thereto; the statute declaring the decree of distribution to be "conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal." Section 1666, Code Civil Proc. These various provisions of the statute must be construed together, and effect given them in accordance with legal principles. The fundamental error on the part of appellant's counsel is in not keeping in mind the distinction between proceedings that are void and those that are voidable merely. If administration should be had upon the estate of a man supposed to be dead, but who is in fact alive, the entire proceedings would be utterly null and void, in however strict compliance they might be with the statutory requirements; and this, because of the absence of the necessary subject-matter for the exercise of jurisdiction. A case of this sort was before us recently, entitled Stevenson v. Superior Court, 62 Cal. 60. Of course, where the proceedings are absolutely void, all rights and titles dependent upon them must fall. But not so when the proceedings are only voidable. In the case at bar there is no question but that the probate court, throughout the proceedings culminating in the decree of distribution, had jurisdiction of the subject-matter and of the parties in interest, and that all the proceedings in the matter of the estate, to and including the entry of the decree of distribution, were in accordance with the provisions of the statute. That being so, it is plain that the decree of distribution was not void. At most, it was only voidable. Whether the instrument propounded as a will was executed in the manner required by law, and was what it purported to be,—the last will and testament of the deceased,—was a fact the probate court was called upon to determine in the exercise of the jurisdiction it had acquired over the subject-matter and over the parties in interest; and when that court decided that it was, and proceeded to administer the estate, its acts, and those of the executrix under its authority and pursuant to the statute, were valid and binding as to all dealings with third parties had in good faith and for value. Fitch v. Miller, 20 Cal. 383; Stevenson v. Superior Court, *supra*; Fisher v. Bassett, 9 Leigh, 119; Andrews v. Avory, 14 Grat. 236; Monell v. Dennison, 17 How. Pr. 426. Precisely the same reason that protects a purchase consummated from an executor or administrator, before his administration is revoked or superseded, protects the purchaser from the distributee of the estate. When, as in the case of Samson, the probate of a will has been annulled upon a contest initiated by an heir subsequent to an entry of a decree of distribution, the heir may undoubtedly pursue the property, and perhaps its proceeds, in the hands of the distributee, but, for the reasons already given, he cannot follow the property into the hands of one who bought in good faith and for value from the executor, administrator, or distributee prior to the revocation, and at a time when the proceedings appeared and were valid and binding. Judgment affirmed.

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[1] This case, filed November 21, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

MORRISON, C.J., and MYRICK and THORNTON, JJ., concurred. MCKINSTRY, SHARPSTEIN, and MCKEE, JJ., dissented.

Petition for rehearing denied.

64 Cal. 334

GULZONI V. TYLER *et al.*[1]

(*Supreme Court of California.* Nov. 23, 1883.)

COMMON CARRIERS — INJURIES TO PASSENGERS — CONTRIBUTORY NEGLIGENCE — DECLARATION OF PLAINTIFF — COMPARISON OF HANDWRITING — INSTRUCTIONS.

1. The lessors of a steamboat employed in carrying passengers, having no control over its operation or management, are not liable for the negligence of the lessees, by which a passenger was injured.

2. Declarations of a passenger that he was himself to blame for an accident occurring to him were properly received in evidence, though made some time after the injury occurred. Thornton, J., dissenting.

3. It is error to permit a party to write his signature in the presence of the jury, to enable them, by comparison of handwritings, to appreciate his nervous condition at the time of signing a release of all claims for damages for injuries received by him through the negligence of a common carrier.

4. In an action against a steamboat owner for injuries to a passenger received when standing near the gangway, an instruction that it was not contributory negligence for plaintiff to be there, "unless such location would have been considered by a man of ordinary prudence dangerous under the circumstances, and unless the employes of the boat had given plaintiff sufficient warning to enable him to avoid it," conveyed no clear idea of what constitutes contributory negligence, and should not have been given.

In bank. Appeal from superior court, city and county of San Francisco.

Action by Peter Gulzoni against W. C. Tyler and others. From a judgment for plaintiff, defendants appeal. Reversed.

E. S. Pillsbury, for appellants. *George Pearce*, for respondent.

SHARPSTEIN, J. The court erred in sustaining objections to the introduction of evidence by the defendants to prove that, at the time when the plaintiff received the injuries complained of the defendants were not managing, controlling, or running the steamer on which the plaintiff was injured, but that the same was run, managed, and controlled by the California Steam Navigation Company. Such evidence was relevant to a material issue in the case. The plaintiff alleged that said steamer was employed by the defendants in carrying passengers, etc., and that said "defendants so negligently and unskillfully conducted themselves in the management of the said boat, and through the negligence and unskillfulness of themselves and their servants, the plaintiff was injured." This and all other allegations of the complaint were denied by the defendants in their answer, and any evidence having a tendency to prove that they did not employ said steamer in carrying passengers, nor, at the time when the plaintiff received his injuries, have the management or control of it, but that the same was employed at that time in carrying passengers, and was managed and controlled by another person or corporation, was clearly admissible. The ground upon which respondent's counsel claims that these rulings were correct is that the boat was registered as belonging to the defendants, and, although not conclusive, it was *prima facie* evidence that they were and continued to be her owners, until it was shown that they had ceased to be, and that the defendants made no attempt to prove a change of ownership; and that nothing short of this could relieve them of liability for damages caused by the negligence of those who run, managed, and controlled the boat. The rule, as stated in Shearman and Redfield on Negligence, (section 501,) is that if the owner of property lets or lends it, and transfers the entire possession and control of it to another, the owner is not responsible for the wrongful use or mismanagement of it by the transferee. Whoever had the exclusive possession, management, and control of the boat, its officers and men, was alone responsible for its mismanagement; and whether rightfully or wrongfully in such possession the liability would rest on them alone. Under the rule *respondeat superior*, this must be so. If the defendants were owners of the boat, but had not the possession, control, or management of it themselves, or by their agents, servants, or employes, they cannot be held responsible for the negligence or mismanagement of whoever had the exclusive possession, control, and management of it. The evidence of what the plaintiff said when asked whether he blamed anybody on the boat should not have been stricken out. Evidence of what he said in regard to the occurrence was admissible for the defense. If he expressed an opinion as to who was to blame, the defendants were entitled to have the benefit of it. It was error to permit the plaintiff to write his name in the presence of the jury for the avowed purpose of having the jury compare, and then permitting them to compare, his signature, written in their presence, with his signature to a release signed by him about the time of his receiving his injuries, in order "to show the nervous condition of the witness at the time of the accident." We know of no rule which would sanction a comparison of handwritings for such a purpose. Besides, if there was a material difference between the handwriting of the plaintiff at the different dates, there was, at least, a liability that some of the jurors might have been led to doubt the genuineness of the signature to the release, which was not denied. In one of the instructions the court substantially charged the jury that the plaintiff had a right to be near the gangway, and it was not contributory negligence for him to be there, "unless such location would have been considered by a man of ordinary prudence, dangerous under the circumstances, and unless the employes of the boat had given plaintiff sufficient warning to enable him to avoid it." And if he had "sufficient warning to enable him to avoid" the danger, was it prudent for him to remain there? Would a prudent man have remained after having been warned of the danger, even if it was not otherwise apparent to him? The instruction is to the effect that if a man of ordinary prudence would have considered it dangerous to be there, it was not contributory negligence for the plaintiff to be there, unless warned of the danger by the employes of the boat; and even then it was not contributory negligence for him to remain there unless a man of ordinary prudence would have considered it dangerous to do so. Under such an instruction, an ordinary jury could hardly be expected to see very clearly what would constitute contributory negligence. Judgment and order reversed, and cause remanded for a new trial.

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[1] This case, filed November 23, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

ROSS, MYRICK, and MCKINSTRY, JJ., concurred.

THORNTON, J. I concur in the foregoing opinion, except as to the second point ruled in it. I do not think that the evidence of what the plaintiff said many hours after the happening of the event, by which he was injured, was admissible in evidence. The remark of plaintiff was not an admission of a fact. It was an inference or opinion drawn from a number of facts, and so far as we are informed by the statement or bill of exceptions, from which we get all our information on the subject, it was not based on plaintiff's knowledge of all the facts touching the manner in which he was hurt, but upon the statements of others, which might not have been true. It does not appear that plaintiff knew or could have known all the facts of the occurrence alluded to. It was most improbable that he did know them. In my opinion, the remark of the plaintiff that he was to blame, not being an admission of a fact, should not have been allowed to go to the jury.

96 Cal. 100

WHITTAKER v. TUOLUMNE COUNTY. (No. 14,767.)

(*Supreme Court of California.* Aug. 31, 1892.)

LICENSE TAX—LEGALITY—ACTION TO DETERMINE—RIGHT TO SUE COUNTY.

Code Civil Proc. § 1050, providing that "an action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation, * * *" does not authorize the maintenance of an action against a county to determine the legality of a license tax sought to be imposed on plaintiff by such county, since a political subdivision of the state cannot be sued except as specially authorized by statute.

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Action by Neri B. Whittaker against the county of Tuolumne to determine an adverse claim made by defendant against plaintiff for a license tax. Judgment for defendant, and plaintiff appeals. Affirmed.

Mesick, Waters & Maxwell and *Maxwell & McEnerney*, for appellant. *Wheaton, Kalloch & Kierce, J. H. Budd*, and *F. P. Otis*, for respondent.

TEMPLE, C. This action was brought for the purpose of determining an adverse claim, which it is alleged the defendant makes against the plaintiff for $200, under an ordinance imposing a license tax upon persons engaged in the business of raising, grazing, herding, and pasturing sheep. Plaintiff contends that the ordinance is void, and the defendant's claim against plaintiff and the license tax unfounded, and he asks for a judgment so declaring. The right to maintain such an action is supposed to be found in section 1050 of the Code of Civil Procedure, which reads as follows: "An action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation, and also against two or more persons for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety." This section does not support the contention. The state and its political subdivisions cannot be sued except as specially authorized by statute, and general language creating new remedies or prescribing procedure have never been held to authorize such actions. See Mayrhofer v. Board, 89 Cal. 110, 26 Pac. Rep. 646, where the subject is discussed and numerous cases cited. I think the suit ought to have been dismissed, with costs, but, as the judgment is only that the defendant recover its costs, I advise that it be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

TURNER v. DEWEY. (No. 18,095.)

(*Supreme Court of California.* Aug. 12, 1892.)

APPEAL—DISMISSAL FOR WANT OF TRANSCRIPT.

Where a bill of exceptions has been prepared and served within the proper time, and presented to the court for approval, a motion to dismiss the appeal for want of transcript and failure to file the bill, made before the bill is settled, will be denied. McGrath v. Hyde, 12 Pac. Rep. 497, followed.

Department 2. Appeal from superior court, Merced county; C. H. MARKS, Judge.

Jarboe & Goodfellow and *J. W. Knox*, for appellant. *Law & Law*, for respondent.

PER CURIAM. Upon the authority of McGrath v. Hyde, 71 Cal. 454, 12 Pac. Rep. 497, the motion to dismiss the appeal herein must be, and the same is hereby, denied.

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96 Cal. 84

STOCKTON SAVINGS & LOAN SOCIETY v. GIDDINGS *et al.* (No. 14,445.)

(*Supreme Court of California.* Aug. 30, 1892.)

PROMISSORY NOTE—ACTIONS—EVIDENCE—BREACH OF WARRANTY—DAMAGES AS SET-OFF—FAILURE OF CONSIDERATION.

1. In an action on a nonnegotiable promissory note, it appeared that the note was given for a machine purchased of a manufacturing company, and made payable to plaintiff bank. The president of the bank was also president and a managing agent of the manufacturing company, and knew that the note was given for the machine. The note was given to and held by plaintiff simply as collateral security for overdrafts of the manufacturing company. Defendants alleged in the answer want of consideration, warranty of the machine, failure of warranty, and that plaintiff knew that neither it nor said company had ever paid any consideration for the note; also that the two corporations conspired to cheat and defraud defendants, and both made false and fraudulent representations in regard to said machine, on which defendants relied; that defendants offered to return the machine to said company, but it refused to accept it or to return said note. *Held*, that evidence offered by defendants of the dealings between them and said company, as to the terms of sale, warranty, consideration, the knowledge of the president as to the character of the machine, and of other facts tending to prove the allegations of the answer, was competent and material, and should have been admitted.

2. Where, in such action, it appeared that the note was sent by defendants to said president of both corporations, and he deposited it with plaintiff as collateral security under an arrangement between the corporations that it should be so deposited, the note is not invalid for lack of delivery.

3. In such action, it is error to exclude evidence that would have made more explicit the proof that such note was the property of the manufacturing company, although evidence of such fact had been introduced.

4. In such action it appeared that one of defendants signed the note only as an accommodation to a partnership composed of the two other defendants and a person who did not sign the note, and who was not a party to the suit; that the machine was purchased for the benefit of the partnership, and the vendor was not a party to the suit. Defendants in the answer alleged special damages on account of fraud and breach of warranty; that a certain sum was paid on the machine; and asked judgment therefor. *Held*, that defendants were not entitled to recover the money paid, or to recoup damages for breach of warranty by way of set-off to plaintiff's demand, though it is the original payee, since the accommodation maker has no right of action for the same.

5. In such case defendants may show failure of consideration, and a rescission of the contract for fraud and breach of warranty, and the exclusion of evidence tending to show such facts is erroneous.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; ANSEL SMITH, Judge.

Action by the Stockton Savings & Loan Society against E. E. Giddings, W. R. Giddings, and L. M. Giddings, as executrix of the estate of E. Giddings, deceased, on a promissory note. There was a judgment for plaintiff, and defendants appeal. Reversed.

C. P. Sprague and *Nicol & Orr*, for appellants. *W. L. Dudley* and *J. G. Swinnerton*, for respondent.

TEMPLE, C. This appeal is from the judgment, and was taken within 60 days after its rendition. The action is upon a nonnegotiable promissory note, made by the defendants first sued, and payable to plaintiff. Since suit was commenced, one of the original defendants, E. Giddings, has died, and the defendant L. M. Giddings, his executrix, has been substituted. Several separate defenses are pleaded or attempted to be pleaded in the answer. They all deny the allegations of the complaint. In the second they admit making the note, but deny that it was ever delivered to plaintiff, and aver that they believed at the time of its execution that a corporation known as the Stockton Combined Harvester & Agricultural Works was the payee named therein, and that neither they nor either of them received any consideration therefor, except a promise made by that corporation which has not been kept or performed. By the third defense they aver that plaintiff is a corporation, and that at the time of the execution of the note one L. U. Shippee was its president and one of its managing agents, and was also at the same time president and one of the managing agents of the corporation known as the Stockton Combined Harvester & Agricultural Works. That at the same time a partnership, consisting of defendants E. E. Giddings, W. R. Giddings, and one James Sibley engaged in farming in Tulare county, was solicited by the last-named corporation (which, for brevity, I will call the Agricultural Works) to contract for the manufacture of a machine known as the "Shippee Combined Harvester and Shippee and Grattan Improvements." That the partners knew nothing of the machine save through the representations of the agents of the corporation, who made certain representations as to its value and efficiency, which induced the partners to contract for the manufacture of one of the machines, in which contract the corporation warranted that the machine would do good work, and was reasonably fit for the use for which it was purchased. The partners were to pay $1,800 for the machine, and did then pay the sum of $579.33 to the Agricultural Works. That the machine when delivered failed to perform good work, whereby defendants have been damaged in the sum of $3,000. That plaintiff well knew when it received the note that neither plaintiff nor the Agricultural Works had ever paid any consideration for the note. That the note was indorsed as collateral security to plaintiff for debts due it from the Agricultural Works. That such debts had all been paid, and that the other corporation, the Agricultural Works, was solvent and able to pay all its debts. That E. Giddings signed the note simply as an accommodation to the partnership, and, in case of recovery here, the partnership, including Sibley, who did not sign the note, will be held liable for any sum recovered. In the fourth defense very nearly the same facts are averred, so far as relates to the Agricultural Works and the other parties to the note, and that the contract of sale and the note were procured through the fraudulent representations of the Agricultural Works, and that the machine delivered was of no value whatever for any purpose. In the fifth defense the same matters are again alleged, but it is charged that the two corporations combined, conspired, and confederated together to cheat and defraud the partners named; that both and each of them made the false and fraudulent representations in regard to the machine which the partners agreed to purchase, relying upon and believing the false and fraudulent representations; that the machine was of no value for any purpose, and that, immediately upon discovering this fact, the vendees offered to return the same to the vendor, which then agreed to return the promissory note to the makers, and to repay the amount paid, provided said machine was not made to work satisfactorily within five days; that the partners, in pursuance of this contract, and the employes of the vendor, for five days then attempted to make the machine work, but wholly failed so to do, and such efforts proved the machine to be wholly valueless; wherefore the partners again offered to return it, but the Agricultural Works refused to accept it, or to return the note, or to refund the money, and has ever since refused to accept a return of the machine. They also set out specially damage suffered in consequence of the fraud and breach of warranty, and ask judgment for a surrender of the promissory note, the refunding of the money, and that the Agricultural Works be brought in to answer their cross complaint; that Sibley be permitted to intervene; and for general relief.

The case was tried with a jury. After the plaintiff rested, defendants proved by the cashier of the bank and by L. U. Shippee, who was president of both corporations, that the note was deposited in the bank by Shippee, and indorsed by him thus: "L. U. Shippee, Pres't S. C. H. and A. Works." The only consideration on the part of the bank was the indebtedness of the Agricultural Works, and debts thereafter to accrue; in other words, the overdraft. As long as the note remained there, it was security for any money the Agricultural Works might owe, an arrangement having been made between the two companies by which all such notes belonging to the Agricultural Works were to be deposited there to secure the overdraft of the corporation. That Shippee knew that the note was for money due the Agricultural Works for the harvester. A series of questions were then asked the witness Shippee, by which the defendants attempted to prove all the allegations in their answer. Each was objected to as immaterial and incompetent. All the objections were sustained, each ruling was excepted to, and all are brought here for review. In effect they were: If the note was not delivered to the Agricultural Works instead of to the bank. If it was not the property of the Agricultural Works. What were the terms of the sale? If certain representations were not made and warranties given, and if Shippee did not know at the time of each. If he did not know that the harvester was worthless, and as to the alleged offer to redeliver and the refusal. What the consideration was. Certain letters written by agents of the bank, and also of the Agricultural Works, were offered, tending to prove some of the same matters, but all were excluded. The questions were put in various forms, and each of the defendants was offered as a witness to prove the facts alleged in defense, but the court declined to receive their evidence, remarking that it intended to exclude all evidence as to dealings between defendants and the Agricultural Works.

The question is, was the proposed evidence competent, and, if so, was it material? I cannot agree with the contention that the evidence which defendants attempted to elicit, supposing the questions would have been answered favorably to them, would have shown that the note was void for lack of delivery. The theory of defendants was that the note was intended for the Agricultural Works, and was given in payment for the machine. It is admitted that it was sent to Shippee for that corporation, and by him deposited with the plaintiff as collateral security for the overdrafts of the Agricultural Works. It appears that an arrangement existed between the two corporations by which plaintiff was to take all the notes of the other as security for overdrafts. Presumably the bank was also to collect the notes. When, therefore, the note was made payable to the bank, it received it simply as agent of the Agricultural Works, and as collateral security for existing indebtedness and for money thereafter to be advanced. The note was therefore not invalid for lack of delivery. That the note was the property of the Agricultural Works, and was held by the bank only as security, sufficiently appears from the testimony of the president and cashier of the bank.

The evidence sought to be drawn out by the questions which were ruled out would have made the proof more explicit and satisfactory, and should have been admitted. This would not have been to vary or add to the terms of the instrument. It will not be controverted that a contract made in the name of an agent may not ordinarily be shown, either by the principal or the other party to the contract, to be nevertheless the contract of the principal; and the Code, in putting the burden upon the payee of a note to disprove the sufficiency of the consideration, throws the door open upon that subject. It is contended by respondent that the consideration of the note was solely the credits given to the Agricultural Works. The defendants sought to show that the consideration was not the overdraft, but the purchase of a machine with a warranty, and that the warranty had failed, and the machine was worthless; that the consideration of the note had wholly failed. This evidence was clearly admissible if material to any issue in the case. That the pleadings are sufficient to raise the question will hardly be disputed, if it be admitted that these defendants are all in a position to raise it. Sibley, one of the parties to the contract of sale, did not sign the note, and is not a party to this suit. The vendor and warrantor is not a party to the suit. The plaintiff was not a party to the sale. One of the payors in the note, who is also one of the defendants sued, was not a party to the sale, but signed the note merely as surety. If the surety in his defense can take advantage of the failure of consideration under these circumstances, it is plain that the absence of Sibley from the record is not fatal to the right of defendants to make this defense. This point will therefore be passed. The absence of the Agricultural Works from the record only raises the question as to what defenses may be urged against the indorsee. The plaintiff is certainly in no better position than it would be if the note had been given to the Agricultural Works, and by it indorsed to plaintiff. I doubt if its position is as favorable as it would have been as indorsee. If making the bank payee is evidence of immediate notice to the makers of the interest of the bank, it must also have the effect to place the bank in the position of payee as to such defenses as can only be made as against the original payee. The note, however, is not commercial paper, and it seems to me the bank holds it subject to all infirmities and to all defenses that might have been made if it were held by the Agricultural Works, not including, of course, possible defenses which might have accrued from subsequent transactions between the payors and the Agricultural Works, or claims against it subsequently acquired by assignment. It was shown that the bank did not credit the Agricultural Works with the amount of the note. The transaction, therefore, did not amount to novation.

That the surety could not maintain a counterclaim is clear, for he could not bring an independent action upon the warranty, as he was not a party to it. Chase v. Evoy, 58 Cal. 348; Roberts v. Donovan, 70 Cal. 108, 11 Pac. Rep. 599. It would naturally seem that the liability of a surety could not be greater than that of the principal, and that the Agricultural Works ought not to be enabled to recover in this way the price of a worthless machine in violation of its express contract. But, if it be necessary to consider the defense in the nature of a recoupment, it cannot be done. The difficulties in the way of such a defense are well stated by Judge SELDEN in Gillespie v. Torrance, 25 N. Y. 306. The suit was against the accommodation indorser of a note given for timber sold with a warranty, a breach of which was attempted to be set up in defense. The learned judge remarks that if the defense be regarded as a failure of consideration, in whole or in part, the surety can undoubtedly urge the defense, but he proceeds to argue that the claim is to recoup the damages for a breach of the contract of warranty; that often the damages might amount to more than the claim, and it is optional with the vendees when they are sued for the price to recoup or to bring an independent action for damages; that, (before the Code,) if he elected to recoup, he could not recover for a balance in his favor. He therefore concludes that such damages constitute a counterclaim, and not a mere failure of consideration, and, not being due to defendant, he cannot set it up. He cannot elect for the vendee whether to plead it as a defense or bring another action to recover it. If he could, he might bar the right of the parties to the warranty to recover damages for its breach, for there could not be two recoveries. The right would exist where the note of the surety was for only a small part of the purchase price, and would amount to a practical release of the vendor of the greater part of his liability. In conclusion the learned judge says: "In the case which was shown on the trial, there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced, by applying towards its satisfaction the damages which appear to be due Van Pelt for the breach of warranty. It is, however, an equity, in which Van Pelt is interested to as great, and possibly to a greater, extent than the defendant, and cannot be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected." There are many other cases to the same general effect, while the cases of Wade v. Scott, 7 Mo. 509, and Scroggin v. Holland, 16 Mo. 419, seem to be the other way. The difficulties in the way of this defense, as stated by Judge SELDEN, seem to me insurmountable, and they are not diminished by the Code provision, (section 438, Code Civil Proc.)

This reasoning, of course, applies only to the claim on the part of the defendants of a right to recoup damages for the breach of warranty by way of set-off to the plaintiff's demand. As to the defense of fraud more may be said. It is sometimes said that fraud vitiates the contract, but ordinarily that only means that a party may avoid the contract on that ground, but, if he does not elect to do so, he is bound by his contract, and in such case the surety cannot set it up as a defense. If the claim be for damages on account of fraud, the surety cannot avail himself of the defense, for the reasons already given. The surety may always avail himself of the defense of failure of consideration, in whole or in part, and it seems to me it would necessarily follow that he may avail himself of the fact that the sale has been rescinded on any ground whatever which would authorize the rescission. Under our Code, (section 1786, Civil Code,) a breach of warranty entitles the buyer to rescind. In the case of Gillespie v. Torrance, supra, it was assumed that no such right existed. On this point, therefore, that case is not authority here. The answer sets up facts which if true would constitute a rescission, and the questions which were ruled out called for evidence which would have tended to make out such defense. To such practice I can see no possible objection. If a contract has been canceled as between the original parties, there remains no consideration for the promise of the surety, except in the case of commercial paper which has passed into the hands of an innocent holder. We are not considering here what might be the consequences in another case. This suit is between the original parties to the contract. It would seem to follow that the court erred in excluding the evidence, as well as in instructing the jury to find for the plaintiff. I advise that the judgment be reversed and a new trial awarded.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and a new trial ordered.

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96 Cal. 117

GOLDBERG v. THOMPSON *et al.* (No. 13,945.)

(*Supreme Court of California.* Sept. 1, 1892.)

SWAMP LANDS—SUITABLE FOR CULTIVATION.

1. Const. art. 17, § 3, providing that state lands which are "suitable for cultivation" shall be granted only to actual settlers, applies to swamp lands granted as such to the state by congress, but which afterwards became dry and fit for cultivation. Fulton v. Brannan, 26 Pac. Rep. 506, 88 Cal. 454, followed.

2. In a contest between two persons over the right to purchase such lands, the court will not ignore the character of the land, and the question of residence or settlement by the parties, merely because such questions are outside of the issues made by the pleadings, but will decide against both parties, if neither is entitled to purchase; a party being required to allege and prove a complete case in order to prevail.

In bank. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by Joseph Goldberg against George Thompson and others in the nature of a contest to purchase state lands. From a judgment denying both plaintiff and defendants the right to purchase, plaintiff appeals. Affirmed.

Chas. E. Wilson and *T. M. McNamara*, for appellant. *W. B. Wallace* and *Garber & Bishop*, for respondents. *J. S. Clack*, *amicus curiæ*.

Beatty, C. J. This is a contest over the right to purchase state land, referred by the surveyor general to the courts for determination. Pol. Code, § 3414. The superior court decided that neither party had a right to purchase, and plaintiff appeals from the judgment, contending that it is not supported by the pleadings and findings. The land in controversy was "swamp and overflowed" on September 28, 1850, and as such passed to the state under the congressional grant of that date. Subsequently, and prior to plaintiff's application to purchase, it became, by the operation of natural and other causes, dry and fit for cultivation, but plaintiff has never been a resident or settler upon it. These facts bring the case within the decision in Fulton v. Brannan, 88 Cal. 454, 26 Pac. Rep. 506, and McNee v. Lynch, 88 Cal. 519, 26 Pac. Rep. 508, in which it was held that sections 2 and 3 of article 17 of the constitution apply to lands of this class which have become fit for cultivation before application to purchase, and forbid their sale to any but actual settlers. Appellant contends that the findings of the superior court, as to fitness for cultivation and want of settlement, being outside the issues made by the pleadings, must be disregarded. But the rule invoked has no application to this class of cases, in which each party is an actor, and must allege and prove a complete case in order to prevail. If land is of the class which can be sold only to residents, and neither contestant is a settler, the court cannot ignore the character of the land and the question of residence, because it is convenient to the parties to do so. On the contrary, it must decide against both, if neither is entitled to purchase. Garfield v. Wilson, 74 Cal. 178, 15 Pac. Rep. 620, and cases there cited. The judgment is affirmed.

We concur: De Haven, J.; Garoutte, J.; McFarland, J.; Paterson, J.; Sharpstein, J.

96 Cal. 53

Mahoney v. Bostwick. (No. 14,638.)

(*Supreme Court of California.* Aug. 30, 1892.)

Mortgages—Absolute Deed—Improvements—Equity.

1. In a suit by a grantor to have a deed absolute on its face declared a mortgage, and to compel a conveyance to plaintiff on payment of amount due, a finding by the court that the instrument is a mortgage, based on conflicting evidence and not resting on the uncorroborated testimony of plaintiff himself, will not be disturbed.

2. Where defendant wrongfully entered under such deed and ousted plaintiff, he is liable to plaintiff for the full rental value during such wrongful possession, and is not entitled to any credit for improvements made, even though it may appear that plaintiff would himself have made the same improvements had he not been ousted.

3. Where plaintiff gave such deed to secure advances and loans, and subsequently gave defendant a mortgage on future crops as further security for such "sums as he might thereafter advance to plaintiff to farm or improve said premises, and as additional security" for the amount already advanced, such subsequent advances under the mortgage are not proper items of credit against plaintiff's claim for rent, the mortgage under which they were advanced not constituting them a lien on the land.

4. The maxim that he who seeks equity must do equity has no application where the demand of defendant is based on a contract separate from that which forms the subject of plaintiff's action.

Department 2. Appeal from superior court, Stanislaus county; M. K. Harris, Judge.

Action by W. H. Mahoney against I. S. Bostwick. Judgment for plaintiff. Defendant appeals. Affirmed.

Baldwin & Campbell, *W. L. Dudley*, and *L. J. Maddux*, for appellant. *Stonesifer & Minor*, (*W. E. Turner*, of counsel,) for respondent.

De Haven, J. The complaint in this action alleges, among other matters, that in August, 1884, plaintiff was the owner of the land therein described, and at that date he executed to one William Inglis a deed thereof, as security for money then advanced by said Inglis to pay off a debt due from plaintiff to the Stockton Savings & Loan Society, and which indebtedness was a lien on said land; that upon February 5, 1885, the defendant by agreement, with plaintiff, paid to said Inglis the amount then due from plaintiff to Inglis, and plaintiff, in consideration thereof, caused said Inglis to convey to defendant the land which had theretofore been conveyed by plaintiff to Inglis, and that at the time it was agreed between plaintiff and defendant "that said deed, though an absolute conveyance on its face, * * * should be treated and considered as a mortgage of said lands" to secure the payment to defendant of the amount so paid by him to Inglis, at the request of plaintiff. The complaint further alleges that thereafter the defendant repudiated the agreement under which he received the deed from Inglis, and claimed that the same was an absolute conveyance, and on October 6, 1885, he ousted plaintiff from the possession of said land, and has ever since withheld the possession thereof from plaintiff, and has kept and enjoyed all the rents and profits thereof. The prayer of the complaint is that the deed from Inglis to defendant be declared a mortgage to secure the repayment of the money loaned by defendant to plaintiff, and the interest thereon; and that the court ascertain the value of the rents and profits of the land while in possession of defendant, and credit the amount thereof upon the indebtedness which the deed was intended to secure, and that upon payment of the balance due defendant he be required to convey such land to plaintiff. The answer of defendant contained a specific denial of all these allegations, and also pleaded a former judgment in an action between the same parties as at bar. The court below found all of the allegations of the complaint to be true, and also that plaintiff's cause of action was not barred by the former judgment referred to in the answer, and thereupon gave judgment in accordance with the prayer of the complaint, in which judgment the defendant was charged with the rental value of the land during the time he was in possession of the same, and was not allowed the value of certain improvements which he had placed thereon, or the amount of certain money advanced by him to plaintiff for the purpose of carrying on and improving the farm. The defendant appeals from the judgment and an order denying his motion for a new trial. There were many exceptions taken during the trial and preserved by the defendant in the bill of exceptions, which forms a part of the record before us, but only the grounds upon which he mainly relies for a reversal of the judgment and order require discussion here.

1. The appellant insists with great earnestness that the finding of the superior court that the deed executed to defendant by Inglis was in fact intended as a mortgage is not sustained by the evidence. But in our view the evidence upon this material issue was conflicting in a substantial degree, and, such being the case, under the rule which has often been declared by us, the finding of the trial court as to the fact must be allowed to stand. We fully agree with appellant that in actions of this character the presumption of law, independent of proof, is that the instrument is what on its face it purports to be,—an absolute conveyance, —and that this presumption should be allowed to prevail unless the evidence offered to show that the deed was in fact intended as a mortgage is entirely plain and convincing. Henley v. Hotaling, 41 Cal. 22; Cadman v. Peter, 118 U. S. 73, 6 Sup. Ct. Rep. 957; Coyle v. Davis, 116 U. S. 108, 6 Sup. Ct. Rep. 314; Whitsett v. Kershow, 4 Colo. 419; 3 Pom. Eq. Jur. § 1196. But whether the evidence is of such character and strength as to produce this conviction is a question for the trial court to determine. Brison v. Brison, 90 Cal. 329, 27 Pac. Rep. 186. That court ought always to be governed, in weighing the evidence and reaching its conclusion as to the facts, by this rule, which requires the plaintiff in an action like this to present a case free from doubt, and, unless the evidence is such as to leave in the mind of the trial judge a clear and satisfactory conviction that the instrument which in form is a deed was intended by all the parties thereto as a mortgage, the finding should be against the plaintiff. But we cannot say from the record which is before us that the superior court disregarded this rule in making its findings. The finding that the deed was a mortgage does not rest upon the uncorroborated testimony of the plaintiff himself.

2. It is claimed by appellant that the court erred in admitting evidence as to the rental value of the land, and in charging him with such value. In support of this contention, it is argued by appellant that he should only have been charged with the actual or net profits which he derived from the use and occupation of the land. It is unnecessary, in passing upon the question thus presented, to determine what would be the basis upon which the account should be taken, in the absence of an express agreement as to the method, in the case of a mortgagee in possession with the consent of the mortgagor, and occupying himself, and not by a tenant. In this case the appellant's mortgage gave him no right to the possession of the mortgaged premises, and he did not take possession with the consent of the plaintiff. Upon this point the court finds that appellant wrongfully entered upon the premises and ousted the plaintiff from the possession thereof, and in such a case it is very clear to us that the appellant is liable to be charged for rents and profits, precisely the same as any other disseisor would be, and he is not entitled to any accounting to determine how much he may have actually realized from this wrongful occupation, after deducting the necessary expenses of carrying on the farm.

3. The court did not err in refusing to credit defendant with the value of the checks, ditching, and fencing placed by him on the premises while he was wrongfully in possession and holding adversely to plaintiff. The possession of defendant, and all that he did upon the land, were acts hostile to the title of plaintiff, and plaintiff is not required in this action, upon any principle of law or equity, to account to defendant for the value of the improvements thus made by him. It is claimed, however, that the fences were built with the knowledge and consent of plaintiff. It does appear from the evidence that plaintiff intended to do this fencing, and that defendant, before plaintiff was ousted from possession, had delivered upon the land a part of the lumber which was afterwards used in the construction of the fence. If it should be assumed that this lumber was furnished by the defendant at the request of plaintiff, and that plaintiff had accepted the same and intended to build this fence with it, still this would not be sufficient to prove the fact contended for, that defendant, after he took possession, constructed this fence for plaintiff, and with his consent. The fence was constructed by defendant for himself, and in the assertion by him of a right to exercise dominion over the land upon which it was erected adversely to plaintiff, and plaintiff cannot be made to pay for it, although it may appear that he would himself have built it if he had not been ousted from possession. If defendant has any right to recover from plaintiff the value of the lumber which was delivered on the land by defendant, while plaintiff was in possession, such right cannot be asserted here, as it was not furnished upon any agreement that the price thereof should constitute a lien upon the land, and the payment thereof to be deemed as secured by the mortgage deed held by the defendant.

4. The court below found that, after defendant received from Inglis the deed already referred to, plaintiff executed to defendant a mortgage upon the crops to be raised upon the land during the year 1885, "as a further security to defendant for the payment to him (defendant) of such sum or sums as the defendant might thereafter advance to plaintiff, to farm or improve said premises, and as additional security for the payment by plaintiff of the amount paid by the defendant to Inglis" for plaintiff; and the court further found that defendant did advance to plaintiff "about the sum of eleven hundred dollars, for the purpose of farming and permanently improving said premises," and that plaintiff delivered to defendant all the grain raised on the ranch for the purpose of repaying the same, and the interest on the other loan made by plaintiff to defendant. The court does not find that the $1,100 referred to was repaid defendant, or that the grain delivered to him was sufficient for that purpose, and the appellant insists that he is entitled to a credit for the amount of this debt, whatever it may be, in his account with plaintiff in this action, and that the court erred in not ascertaining the amount, and providing in its judgment that the same should be paid before defendant is required to reconvey to plaintiff. We do not think the court committed any error in this respect. This indebtedness was not, by agreement of the parties, made a lien upon the land, but, on the contrary, the money seems to have been advanced by defendant upon an independent security; that is, upon a mortgage upon the growing crops. The general rule is that the mortgagee cannot require as a condition of redemption the payment of any other debt not a lien upon the land. Jones, Mortg. § 1083. It is argued, however, that as the plaintiff is here seeking the aid of a court of equity, he should be compelled to do equity; but this maxim of equity jurisprudence only applies when the relief sought by plaintiff, and the right demanded by defendant, belong to or grow out of the same transaction. It has no application where the demand of the defendant is based upon a contract separate and distinct from that which forms the subject of the plaintiff's action. 1 Pom. Eq. Jur. §§ 385, 387. The other matters referred to in the briefs of counsel do not require special discussion.

Judgment and order affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

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96 Cal. 106

MOFFITT v. BULSON. (No. 14,721.)

(*Supreme Court of California.* Sept. 1, 1892.)

MORTGAGES—HOMESTEAD—CONSIDERATION—FORECLOSURE—EVIDENCE.

1. Plaintiff agreed orally to sell to defendant certain lands, part of which plaintiff had filed upon under the "Homestead Act," but for which he had not yet made final proof or payment. Afterwards plaintiff conveyed to defendant all the lands except the homestead tract, and defendant executed to plaintiff a note and mortgage for a balance of the purchase money. *Held*, in an action to foreclose the mortgage, that the contract was entire, and, being void because it embraced the homestead lands, the mortgage executed in pursuance of it could not be enforced.

2. In such action, the fact that the contract is void because not in writing, and because it was afterwards merged in the deed executed by plaintiff to defendant, does not prevent defendant from showing by parol evidence that the consideration for the mortgage was illegal.

3. Where, in such action, the answer complains of failure by plaintiff to convey to him the homestead lands, and discloses the facts showing the consideration for the mortgage to be illegal, it is not error to refuse to enforce it on the ground that the answer does not set up illegality of consideration.

4. The fact that plaintiff, before the action was commenced, acquired the homestead land by certificate of purchase, gives him no right of action on the mortgage.

Commissioners' decision. Department 2. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

Action by James Moffitt against A. E. Bulson for foreclosure of a mortgage. Judgment for defendant, and plaintiff appeals. Affirmed.

E. T. Hogan, (*Reddy, Campbell & Metson*, of counsel,) for appellant. *Goodman & Goodman*, for respondent.

HAYNES, C. This action was brought to foreclose a mortgage made by respondent to appellant. The note and mortgage were made March 5, 1888, the note being for $5,000, payable in annual installments of $500, together with annual interest on the principal unpaid at 10 per cent. per annum. The answer alleged that on December 22, 1886, plaintiff was in the possession and actual occupancy of a certain ranch known as the "Moffit and Rable Ranch," containing 560 acres, 80 acres of which he had filed upon under the "Desert-Land Act." That another part of said ranch, containing 160 acres, plaintiff had filed upon under the "Homestead Act;" and that plaintiff had title in fee to the remaining 320 acres, but had not made final proof or payment for either of said tracts of government land; and that plaintiff also owned certain personal property then upon said ranch, consisting of horses, farming implements, furniture, etc. That on said 22d day of December, 1886, plaintiff and defendant made an oral contract whereby plaintiff agreed to sell to defendant the whole of said ranch and personal property for the sum of $10,000, and to convey to defendant said 320 acres to which he had title, and deliver said personal property, and to put defendant in possession of the whole of the ranch, upon the payment of one half of said purchase money, at which time defendant was to execute to plaintiff his promissory note for the remaining $5,000, and a mortgage upon the 320 so conveyed to him, to secure said note, and that plaintiff further agreed to obtain title as soon as possible to said tracts of government land, and, as soon as he had done so, to convey them to defendant. That on March 5, 1887, he paid plaintiff $5,000. That plaintiff then conveyed to him said 320 acres, and delivered to him the possession of all said ranch and personal property, and defendant made and delivered said note and mortgage upon which this suit was brought. That on the 24th of March, 1887, plaintiff made final proof and payment upon said homestead entry, and obtained his certificate of purchase thereof, and on September 24, 1888, he made final proof and payment under his desert-land entry, and obtained a certificate of purchase of the same. He further alleged that prior to March 5, 1888, and at sundry times afterwards, he demanded of plaintiff a conveyance of said desert-land and homestead tracts, but that plaintiff then and ever since refused to convey the same. It also appeared from the complaint, as well as from the answer, that on August 4, 1888, defendant paid on the note and mortgage $1,040.66. The court found upon all the issues raised by the answer in favor of defendant, and as conclusions of law found that the contract was entire; that it was illegal, so far as it related to the homestead land; that plaintiff and defendant were equally in the wrong in entering into said contract; that the consideration of said note and mortgage could not be enforced; and that the action should be dismissed, without costs. The appeal is taken from the judgment dismissing the action upon the judgment roll alone.

That a contract to sell and convey lands taken up under the homestead laws, made before final proof, is illegal and void is not disputed. U. S. Rev. St. § 2262. The learned counsel for appellant contend, however, that the oral agreement was void under section 1624, subd. 5, Civil Code, as well as illegal under subdivisions 1, 2, § 1667, Id. Upon these propositions they contend that as all the negotiations, including the offer of defendant to purchase, and the acceptance of the offer by plaintiff, were oral, the execution of the deed by plaintiff, and of the note and mortgage by defendant, on the 5th of March, 1887, not only eliminated the illegal element from the agreement, but that the execution of these instruments constituted the only contract between the parties, and superseded the oral negotiations or stipulations concerning the matter or subject referred to which preceded or accompanied their execution, and that what the subject-matter of the contract was is to be ascertained from the deed and mortgage. Citing Civil Code, § 1625. There is no doubt of the correctness of counsel's contention in a case to which section 1625 of the Civil Code applies; but that section has never been construed to prevent a defendant who has been sued on a promissory note, whether secured by mortgage or not, to show by parol evidence a want or failure or illegality of consideration. Section 1962, Code Civil Proc., enumerates all the conclusive presumptions of law, and section 1963 of the same Code provides: "All other presumptions are satisfactory, if uncontradicted. They are denominated 'disputable presumptions,' and may be controverted by other evidence. The following are of that kind: * * * (21) That a promissory note or bill of exchange was given or indorsed, for a sufficient consideration. * * * (39) That there was a good and sufficient consideration for a written contract." See, also, Civil Code, §§ 1614, 1615. Subdivision 2, § 1962, Code Civil Proc., excepts from the conclusiveness of a written instrument the recital of a consideration. The deed executed by the plaintiff to defendant is not in the record, and it cannot be presumed that it contained any recital or provision not necessary to its operation as a conveyance of the parcel of land conveyed thereby. Even if it did, it would not be conclusive; for, while "the general rule of law is that recitals in a deed bind all persons who are parties or privies thereto, it does not extend to that which is mere description, or an averment that is not essential." Osborne v. Endicott, 6 Cal. 153; Ingersoll v. Truebody, 40 Cal., at page 610; Rhine v. Ellen, 36 Cal. 362. These cases conclusively show that "the grantee may prove by parol that the consideration was wholly different from that expressed in the deed, and depends upon conditions which had not happened, and might never happen." If, therefore, neither a promissory note nor a deed excludes parol evidence of the consideration, it is difficult to conceive any reason or rule of law which could have precluded the court from receiving oral testimony showing the contract to have been entire, and that a single consideration existed for the transfer of all the property. Section 1625 of the Civil Code did not change the law in relation to written instruments. In Davenport v. Mason, 15 Mass. 90, the court, after reciting the general rule that parol evidence is inadmissible to contradict or vary the terms of a deed, added: "But parol evidence may be admitted to establish an independent fact, or to prove a collateral agreement incidentally connected with the stipulations of a deed or other written contract." See, also, McCrea v. Purmort, 16 Wend. 460. In the case at bar the only connection between the deed and the facts proved by parol and found by the court was incidental, and in no way tended to change or contradict any part of the deed essential to its operation as such. The facts that on the same day plaintiff delivered the personal property, and also put defendant in possession of both the tracts of government land, as well as that conveyed by the deed, were quite sufficient to show a prior agreement relating thereto, and were sufficient acts of part performance to have made oral testimony of the terms of such agreement competent as a basis for the specific performance of it. Pom. Spec. Perf. §§ 107, 115. Indeed, the contention of counsel, if carried to its logical conclusion, would defeat the equitable ground of relief based upon part performance of an oral agreement, at least in cases where more than one parcel of land was agreed to be conveyed, after one of them had in fact been conveyed. The court, so far as its legal right to do so was concerned, properly found that the contract was entire, and upon this record that finding can be questioned upon no other ground. Counsel's contention that the findings do not support the judgment, and that the answer does not state facts sufficient to constitute a defense, are based upon the ground already discussed, viz., that the deed, note, and mortgage superseded the oral negotiations which preceded, and that oral evidence of the original verbal contract could not be received or considered. It is, however, further urged that the answer does not set up either illegality or want of consideration, but, on the contrary, complains of the nonperformance of the contract on the part of the plaintiff. The answer alleges the facts from which the several conclusions mentioned may be drawn, and in a pleading they would be mere conclusions of law, not necessary to be alleged. If the answer had not alleged that one of these tracts of land was taken up under the "Homestead Act," no illegality would have appeared, and the defense would have been nonperformance of the contract on the part of the plaintiff. The court, however, found the contract to be entire, and so within section 1608 of the Civil Code, which provides: "If any part of a single consideration for one or more objects or of several considerations for a single object is unlawful, the entire contract is void." If the illegal element had not been introduced into the oral contract of December, 1886, defendant might have successfully insisted upon a specific performance of that contract; but, if that contract was illegal, no action can be maintained upon unexecuted portions of it, and upon that ground, also, plaintiff's action could not be maintained. The subsequent acquirement of the land by certificate of purchase did not confer a right of action. Ladda v. Hawley, 57 Cal. 51. No error appearing upon the record, I advise that the judgment be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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96 Cal. 73

SMITH v. DORN *et al.* (No. 14,655.)

(*Supreme Court of California.* Aug. 30, 1892.)

PLEADING—AMENDMENT—ANSWER AFTER—CORPORATIONS—ACTION BY STOCKHOLDER—SPECIAL MEETING OF DIRECTORS—DEFECT OF PARTIES—OBJECTION WAIVED.

1. Where plaintiff is permitted, when a case is called for trial, to sign an amendment to the complaint, which amendment had been previously filed and answered, it is not error to refuse to permit defendants to answer anew, especially when no substantial right of defendants is affected, and they are not injured thereby, and are permitted afterwards to file an amended answer to the amended complaint.

2. In an action by a stockholder to set aside a sale of property of a corporation by the directors on the ground of fraud it appeared that it was recited in the resolution authorizing the sale, and also in the deed, that the sale was made because the corporation was unable to pay its debts. The complaint negatived these recitals, and alleged specifically the means and ability of the corporation to meet its indebtedness, and these allegations were denied in the answer. *Held*, that the issues raised by the pleadings were material, and evidence pertinent thereto offered by plaintiff was properly admitted.

3. Where, in such action, it appears that any demand on the corporation, or on its controlling directors, for the remedy sought, or any remedy for the alleged wrongs, would have been useless, and this is, in substance, stated in the complaint, plaintiff, as a mere stockholder, is entitled to maintain the action without having first sought a remedy through the board of directors.

4. The by-law of a corporation relating to the manner of calling special meetings of the board of directors, and Civil Code, § 320, provide that notices calling such meetings shall be given on "the order of the president, or, if there be none, on the order of two directors." *Held* that, while there was a president of the board competent to act, a special meeting thereof called by two directors, on the refusal of the president to make the call, was illegal, and the action of a majority of the directors at such meeting in declaring the offices vacant, and electing new officers, and authorizing them to sell the corporate property, was void.

5. Where the question of defect of parties defendant is not raised by demurrer or answer, the objection is presumed to be waived.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by J. H. Smith against D. S. Dorn and the Southern California Motor Road Company to set aside a sale of the corporate property of said company to the defendant Dorn. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Chas. N. Fox, for appellants. *Rolfe & Freeman, Paris & Fox*, and *W. J. Curtis*, for respondent.

VANCLIEF, C. The Southern California Motor Road Company is a corporation organized in this state, which on April 15, 1890, owned a railroad leading from the city of San Bernardino to the city of Riverside, in the county of San Bernardino, in this state, with equipments and other real and personal property. At a specially called meeting of its directors, held on the 15th day of April, 1890, it was resolved to sell the road and equipments, with all other property of the corporation, to the defendant D. S. Dorn; and accordingly, on the same day, a deed was executed to Dorn, purporting to convey to him all the roads, franchises, rights of way, equipments, lands, and personal property of the corporation, including all debts owing and money belonging to the corporation; and possession of all the tangible property was then given to Dorn. The plaintiff, as a mere stockholder of the corporation, brought this suit to set aside and cancel the deed to Dorn on the grounds of fraud, and that the special meeting of the board, at which the sale of the property is claimed to have been authorized, was not called according to law; and therefore that the directors who acted at that meeting were not lawfully assembled as a board. Judgment was rendered in favor of the plaintiff, and the defendants have appealed from the judgment, and from an order denying their motion for a new trial.

1. When the case was called for trial, and after the amended complaint and the answer thereto had been read, plaintiff's counsel discovered that the amended complaint had not been signed by plaintiff or his attorney, and thereupon asked leave to sign the same, to which counsel for defendants objected, except on the condition that defendants should be allowed to demur to the complaint as thus amended.

The court overruled the objection. Counsel for defendants then asked leave to answer or demur to the complaint as signed by counsel, but stated no other ground for their motion than that the signing of the complaint was an amendment thereof, without which it would have been totally invalid, and therefore that defendants had a legal right to answer it anew. The court denied this motion. Counsel for appellants contend that this action of the court was error, for which the judgment should be reversed. While I think the court did not err, it is enough to say that its action did not affect any substantial right of the defendants, and that defendants were not thereby injured. Code Civil Proc. § 475; Lattimer v. Ryan, 20 Cal. 630. After the close of plaintiff's evidence in chief, the defendants, by leave of the court, did file an amended answer to plaintiff's amended complaint before they introduced any evidence whatever, and upon this amended answer the case was tried.

2. The resolution authorizing the sale of the corporate property to Dorn recited, among other things, that the corporation is indebted in the sum of about $50,000, in addition to its bonded indebtedness of $150,000, and "is unable to meet the same, and has no prospects of being able to liquidate said demands from its own resources;" and the deed to Dorn, which is set out in the complaint, contains substantially the same recitals. The complaint negatives these recitals by an allegation "that it is not true that said corporation had no means at its command to meet said outstanding indebtedness, as stated in said instrument of conveyance to defendant D. S. Dorn;" and then proceeds to show that for the purpose of paying said indebtedness the corporation had previously levied an assessment amounting to $31,350, which must have been paid or the delinquent stock sold on the 16th day of April, 1890, (the day after the execution of the deed to Dorn;) and that the owners of a majority of the stock were ready, able, and willing to pay that assessment, and would have paid it on April 16, 1890, if the assessment had not been repealed and annulled, as it was, by a resolution of the directors at said special meeting of April 15th; and further alleged that the delinquent stock would have been sold on April 16th, so that the full amount of the assessment would have been paid, and applied to the debts of the corporation; and also alleged that no sale of the property of the corporation was necessary for the payment of corporation debts, as all such debts could and would have been paid by means of assessments on the stock, etc. All these allegations were denied by the defendants' in their amended answer. Each of several distinct questions asked witnesses for plaintiff, pertinent to the issues thus taken upon these allegations, was objected to by counsel for defendants on the ground that it was "irrelevant and immaterial to any of the issues in this cause." Appellants insist that the court erred in overruling these objections.

The questions certainly were relevant to issues expressly raised by the answer of defendants, and I think those issues were material. The recitals in the resolution authorizing the sale of all the property of the corporation, and in the deed to Dorn, were evidently intended to justify or excuse that sale on the ground that the debts of the corporation could not otherwise be paid, and to repel any imputation of bad faith to those directors who passed the resolution authorizing the sale. Under these circumstances, after having properly set out the deed in his complaint, it was proper and material that the plaintiff should negative those recitals, and aver that the debts of the corporation could and would have been paid by assessments and other means than by a sale of all the corporate property. These averments of the circumstances under which the sale was ordered were proper specifications or constituent parts of the fraud charged. Fraudulent acts are generally characterized as such by circumstances which are required to be specially alleged in a pleading charging the fraud.

3. It is contended for appellant that, as a mere stockholder, plaintiff is not entitled to maintain this action, because it does not appear that he ever sought or demanded a remedy for the wrongs complained of through the board of directors. But it is alleged in the complaint that the board consisted of seven members, four of whom participated and assisted in the acts complained of, and have ever since controlled the action of the board, "and therefore it would be useless to make a demand of said corporation, or of the board of directors thereof, to bring this action, or any action, to set aside the instruments or pretended conveyance to the said D. S. Dorn;" and these allegations are not denied. Besides, the answer of the corporation shows that any demand upon it, or upon its controlling directors for the remedy sought by this action, or any remedy for the wrongs alleged, would have been useless. Therefore no such demand was necessary. Parrott v. Byers, 40 Cal. 620; Moyle v. Landers' Adm'rs, 83 Cal. 580, 23 Pac. Rep. 798; Ashton v. Dashaway Ass'n, 84 Cal. 70, 22 Pac. Rep. 660, and 23 Pac. Rep. 1091.

4. It is claimed that several of the findings of fact are not justified by the evidence, particularly the seventh finding, which is as follows: "That R. W. Button and E. J. Gilbert, who executed the instrument of conveyance referred to in the pleadings to the defendant D. S. Dorn, as president and secretary, respectively, of said corporation, had not, nor had either of them, any power or authority to execute the same, nor to sell or convey the property of said corporation." This finding necessarily results from probative facts found by the court, or admitted by the pleadings: (1) It is admitted that Button and Gilbert had no other authority to sell the property of the corporation than such as was conferred by the resolution of the special meeting of directors held on April 15, 1890. (2) The only bylaw of the corporation providing the manner of calling special meetings of the board of directors is, in substance, nearly identical with section 320 of the Civil Code,

as follows: "All special meetings of the directors shall be called by special notice in writing to each director, either delivered in person one day before the time of meeting, or depositing in the United States post office at San Bernardino, postage prepaid, addressed to the directors at their last-known places of residence or post office address, two days before the time of meeting. Such notice shall be given upon the order of the president, or, if there be none, on the order of two directors, by the secretary, or by any person or persons selected by the president or directors calling such meeting." (3) At the time said special meeting was called, and at the time it convened, the board of directors was composed of seven members, viz., J. W. Hall, Joseph Brown, R. B. Taylor, R. W. Button, H. W. Button, S. H. Ferris, and Wilson Hays. At the same times Hall was president of the board, Brown was vice president, and J. N. Young was secretary. (4) On or about April 12, 1890, Director R. W. Button successively requested the president, the vice president, and the secretary to call a special meeting of the board, but did not state to either of them for what purpose, nor any reason for calling such meeting. Each of these officers declined to make the call requested. Thereupon the two directors—R. W. Button and H. W. Button—called a special meeting for April 15th, at 10 o'clock A. M., at the office of the company, and served written notice thereof on each of the other directors; but the notice did not state any purpose for which the meeting was called. (5) On April 15th, at the appointed time, four directors, viz., the two Buttons, Ferris, and Hays, met and proceeded to business in the absence of the other three, and also in the absence of the secretary, and without the minute book of the board. They first passed resolutions declaring the offices of president, vice president, and secretary vacant, and elected R. W. Button president, Ferris vice president, and E. J. Gilbert secretary. They next resolved that a former order of the board of February 28, 1890, levying an assessment on stock, "be, and the same is hereby, repealed and annulled." At this point the following entry appears in the minutes of the meeting: "The hour having arrived for the meeting of the stockholders, the directors' meeting did, on motion, suspend until after the said stockholders' meeting." The only business which appears to have been done by this stockholders' meeting was the adoption of a resolution purporting to ratify the action of the directors, in declaring the officers of president, vice president, and secretary vacant, and in filling the vacancies as above stated. (6) At 3 o'clock P. M. of same day, and after the adjournment of the stockholders' meeting, the directors reconvened. At this time the directors Hall, Brown, and Taylor were present in the office attending to other business, but took no part in the business of the directors' meeting, except to protest against the whole proceedings thereof. The only business transacted at this afternoon meeting of directors was the adoption of the resolution purporting to authorize the sale of all the property of the corporation to the defendant D. S. Dorn, of which the following is a copy: "Whereas, this corporation is largely indebted to various persons outside of any indebtedness which may be claimed to exist against this company by reason of any issue of bonds of the corporation heretofore made; and whereas, said outside indebtedness will aggregate in the neighborhood of not more than fifty thousand dollars; and whereas, the corporation is unable to meet the same, and has no prospects of being able to liquidate said demands from its own resources; and whereas, D. S. Dorn has agreed to assume said indebtedness outside of said bonded indebtedness as aforesaid, on the execution to him of a conveyance and grant of all the property in this corporation: Now, therefore, resolved that this corporation execute to said D. S. Dorn, upon his executing to this company a written assumption of the indebtedness of this corporation to the extent and as heretofore set forth, a written grant, conveyance, and transfer absolute, in fact and in terms, of all property, real and personal, choses in action, franchises and demands, of this corporation, and the president of this corporation, R. W. Button, is hereby authorized to execute such conveyance and transfer, which shall bear date April 15, 1890."

It seems clear that the directors were not lawfully assembled as a board at the time they adopted this resolution, and that for this reason the court properly found that the resolution was not a corporate act, and did not confer upon R. W. Button or E. J. Gilbert power or authority to convey the property of the corporation to the defendant Dorn. While there was a president of the board competent to act, the directors (Button) had no authority to call the meeting at which the resolution was adopted; this being the effect of both the by-law and section 320 of the Civil Code. The assumptions of counsel that it was the duty of the president to call a meeting whenever requested to do so by a director, and that the president's refusal, under any circumstances, to comply with such request makes it lawful for any two directors to make the call, are unwarranted by authority or reason. Neither the by-law nor the Code will bear this construction. The bare delegation of power to make the call implies that the exercise of the power shall be discretionary. Whether there may be a remedy for an abuse of this discretionary power is not involved, since there is no evidence of such abuse in this case. It appears that the president was not informed of any reason why the call should be made. Section 303 of the Civil Code provides that "a corporation may, by its by-laws, where no other provision is specially made, provide for (1) the time, place, and manner of calling and conducting its meetings." If the by-law in this case is not valid, it is only because another provision to the same effect is made by section 320 of the Civil Code as to the applicability and authority of which there can be no question. Beach, Priv. Corp. § 308. Section 308 of the Civil Code provides that "a majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act." And it follows that no decision or act, made or done by any number of the directors, while not duly assembled as a board, is a valid corporate act. Gashwiler v. Willis, 33 Cal. 11; Ditch Co. v. Zellerbach, 37 Cal. 544-596; Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. Rep. 373; Thompson v. Williams, 76 Cal. 153, 18 Pac. Rep. 153; Manufacturing Co. v. Vassault, 50 Cal. 534; Reilly v. Oglebay, 25 W. Va. 36; Beach, Priv. Corp. §§ 272, 273; Spelling, Priv. Corp. § 392. The evidence is clearly sufficient to justify all other findings excepted to.

5. It is claimed that there was a defect of parties defendant; that those directors who were charged with fraud, as being interested in the sale sought to be annulled, should have been made parties defendant. But, as this point was not made by demurrer nor by answer, it must be deemed to have been waived. Besides, the defense by the corporation was conducted and controlled by those directors who were charged with fraud; and they were at liberty to make every defense, on behalf of the corporation, to the charge of fraud, which they could have made if they had been parties. But, however this may be, the judgment of the court does not depend upon a finding of fraud. It is well sustained by the finding that Button and Gilbert had no authority to execute the deed to Dorn, and, indeed, there is no finding of fraud, as an ultimate fact. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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96 Cal. 95

JONES v. DURRER. (No. 14,863.)

(*Supreme Court of California.* Aug. 30, 1892.)

LANDLORD AND TENANT—WHEN RELATION EXISTS—BREACH OF COVENANTS—ACTION FOR POSSESSION.

1. Where the owner of a ranch "lets the same" by a covenant in writing for a term of years, for a share of the produce, with certain conditions as to the sale by the tenant of the stock and produce and division of the proceeds, the fact that such covenant constitutes a tenancy in common as to the produce does not destroy the relationship of landlord and tenant as to the land, and the lessor may sue for possession for condition broken. Walls v. Preston, 25 Cal. 59, and Smith v. Schultz, 26 Pac. Rep. 1087, 89 Cal. 526, followed.

2. Where such lessor accepts rents from his tenant after covenants broken, he may still maintain an action for possession for renewed breaches occurring thereafter.

3. Where a suit for forfeiture of the lease was brought by the lessor, who thereafter accepted rents and dismissed his suit without prejudice, such action is not a waiver by the lessor of his right in a subsequent action to insist on the forfeiture of the lease, and to re-enter.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; W. H. GRANT, Judge.

Action by Laura Jones against Frank Durrer. Judgment for plaintiff. Defendant appeals. Affirmed.

McKune & George and *Henry C. Ross, Jr.*, for appellant. *R. T. Devlin* and *Armstrong & Platnaur*, for respondent.

FOOTE, C. This action of unlawful detainer was brought to recover possession of a tract of land alleged to have been leased by the respondent and plaintiff to the defendant, for damages for its detention, and that an alleged lease be declared forfeited. The grounds claimed in favor of the plaintiff's recovery are that the defendant had forfeited his right to possession by virtue of certain conditions contained in the lease, and that plaintiff's right of recovery was complete. The main ground upon which the defendant resists plaintiff's claim seems to be that he insists that the agreement set out in the complaint is not such as creates the relation of conventional landlord and tenant. The instrument in question is lengthy, so much so as to preclude its insertion here, but we have given it very thorough examination, and are satisfied that it comes strictly within the rule laid down in Walls v. Preston, 25 Cal. 59, and in Smith v. Schultz, 89 Cal. 526, 26 Pac. Rep. 1087. It is a letting for a share of the produce of the land, and the increase of certain hogs, cattle, fowls, etc. It provides certain conditions as to the cultivation of certain lands in corn, for the grubbing of other lands and putting it in alfalfa for the year 1891, for the making of butter and cheese, etc., "the party of the first part to own one half of all such produce and one half of all the increase of said stock;" how, when the butter made is fit for market, the party of the first part "shall in his discretion be entitled to one half, to be delivered to her, or the parties may sell together and divide the proceeds;" how, as to the increase of cattle kept on the ranch, "there shall annually be a count taken thereof, and the same shall be branded in the private brand of each or any common brand, at the option of the party of the first part;" that the taxes on the "common property shall be paid by both." The owner of the land, the party of the first part, "lets the same," with certain exceptions, to the party of the second part, the defendant here, for a period commencing in March, 1890, and ending on the 1st of October, 1894. The party of the second part is to take possession of the premises, which he did immediately, and is to take care of the same in a good husbandlike manner "for and during the whole of said term," and at the end of the term return them to the party of the first part in as good condition as he "now receives them, reasonable wear and tear and damages by the elements excepted;" also certain conditions as to the sale from the farm of certain steers. Admitting the contention of the appellant that there is constituted under this agreement a tenancy in common of the parties, as to the produce of the farm or the greatest part thereof, yet under the views expressed in Walls v. Preston, supra, and affirmed in Smith v. Schultz, supra, there is no necessary inconsistency between that relation as to the crops, and that of a tenancy of the land by the appellant. It was said in the case first mentioned, at page 66: "There certainly is no rule of law so absolute in its nature as to prevent the occupant of land, under a contract which constitutes him a tenant in common with the owner in the crops, from having an entire control over the premises during the term, if the party so agree, as a tenant covenanting to pay a money rent would have. In other words, from being a tenant of the land under a lease, and at the same time a tenant in common of the crop or some part of it." It being established that as to the land the agreement in question was a lease to continue for a term of several years unless forfeited by condition broken, it becomes necessary to determine if the evidence sustains the findings that any of such conditions were broken. Of this we entertain no doubt. But the appellant insists that there was a waiver of the right to insist upon the breach of conditions, and to re-enter by the landlord, because of the reception of rent after the covenants were violated and known to be violated by the lessor. It may be conceded, without deciding, that the evidence does show that produce and increase of turkeys and a share of the butter and some money, paid upon what account not appearing, were received by the respondent as claimed. It may be further conceded that under some circumstances such reception would be conclusive that the lessor had elected to waive the right to re-enter under the forfeiture clause of the lease. It may be also conceded that notwithstanding these receptions of rent were during the time from the 15th of October, 1890, until the 20th of January, 1891, when the plaintiff had instituted an action claiming a forfeiture of the lease, which was dismissed without prejudice on the 20th of January, 1891, and the present action instituted, nevertheless such action brought would not have the effect of a nonwaiver of the right to insist on the forfeiture of the lease, and to re-enter, under the rule announced in section 497, 2 Tayl. Landl. & Ten. And it may be admitted there is no difference in principle in receiving a nominal sum from the tenant, and receiving produce from the farm and increase from the fowls, when the title is vested in the landlord as tenant in common; and yet from the fact that certain of the covenants broken by the tenant were continuing in their nature, and violations of the same have taken place since the reception of rent by the plaintiff, it must be held here that there was no waiver of the breaches thereof, and of the right to re-enter and maintain the present action. Tayl. Landl. & Ten. § 500; McGlynn v. Moore, 25 Cal. 384.

It appearing, among other things, from the third finding, that at the date of the bringing of the action, and continuously afterwards, defendant refused and still refuses to sell the butter and cheese produced on the farm together, and divide the proceeds thereof as he covenanted that he would do, and that certain steers which defendant covenanted to sell and remove from the farm during the current year of 1890 had not been sold, but still remain on the farm, these renewed breaches since the reception of rent are sufficient, without mentioning others which perhaps exist of the same nature, to remove from the case any question of waiver so as to defeat the plaintiff's right to maintain the action. These seem to be the principal points made for the reversal of the judgment and order denying a new trial, and we do not perceive that, with reference to them and others made and not necessary to be determined, any prejudicial error has been committed. We therefore advise that the judgment and order be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(64 Cal. 338)

PEOPLE v. KING.[1]

(*Supreme Court of California.* Nov. 26, 1883.)

CRIMINAL LAW—FORMER CONVICTION—ADMISSIONS OF DEFENDANT.

Pen. Code, § 1025, provides that where defendant is charged in the indictment with having suffered a previous conviction of felony he must be asked, at the time of pleading, whether he has suffered such conviction, and that his affirmative answer shall be conclusive of that fact. *Held*, since the repeal of that section, that it is necessary that such previous conviction be charged, that defendant plead thereto, and that the plea be passed upon by the jury, notwithstanding an admission of such previous conviction by defendant when improperly asked by the clerk as to the fact.

In bank. Appeal from superior court, Alameda county.

Information against John King for grand larceny. From a conviction, defendant appeals. Reversed.

J. H. Smith and *Thos. F. Barry*, for appellant. *Atty. Gen. Marshall* and *Dist. Atty. Gibson*, for the People.

McKEE, J. The defendant was convicted of petit larceny upon an information which charged him with the commission of grand larceny, and with having suffered a previous conviction for felony. At his arraignment he admitted that the charge of a previous conviction was true; and upon the verdict rendered against him, and his admission of the former conviction, the court sentenced him to imprisonment in the state prison for a term of five years. The sentence was imposed under subdivision 3, § 666, of the Penal Code. By the provisions of that section, when a defendant in a criminal case is convicted of grand or petit larceny, after having suffered a previous conviction for felony, the court in which the conviction is had is authorized to punish him by imprisonment in the state prison not exceeding five years. A conviction for petit larceny and a former conviction for grand larceny, therefore, subject a party to be punished as for a felony. Such legislation has been held constitutional. Ex parte Gutierrez, 45 Cal. 429; Plumbly v. Com., 2 Metc. (Mass.) 413. The increased punishment is not regarded as a part of the penal consequences of the first offense, but applies exclusively to the last as aggravated by the repetition of the same offense. But although the information against the defendant contained a charge of a previous conviction of grand larceny, there was not, at the time the information was made and filed, or when the defendant was arraigned upon it, any existing law which required the court to ask the defendant whether he had suffered such a previous conviction, and permitted him to answer that he had or had not. Before April 9, 1880, there was a section of the Penal Code which provided that, "in charging in an indictment the fact of a previous conviction of a felony, * * * it is sufficient to state, 'that the defendant, before the commission of the offense charged in this indictment, was [giving the title of the court, etc.] convicted of a felony.'" Section 969, Pen. Code, 1873–74. There was also a section which provided as follows: "When a defendant, who is charged in the indictment with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted, he must be asked whether he has suffered such previous conviction. If he answer that he has, his answer shall be entered by the clerk in the minutes of the court, and shall, unless withdrawn by consent of the court, be conclusive of the fact of having suffered such previous conviction in all subsequent proceedings. If he answer that he has not, his answer shall be entered by the clerk in the minutes of the court, and the question whether or not he has suffered such previous conviction shall be tried by the jury which tries the issue upon the plea of 'not guilty,' or, in a case of a plea of 'guilty,' by a jury impaneled for that purpose. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction. In case the defendant pleads 'not guilty,' and answers that he has suffered the previous conviction, the charge of previous conviction shall not be read to the jury, nor alluded to on the trial." Section 1025, Pen. Code, 1873–74. The court below proceeded against the defendant under the last section. When the defendant appeared for arraignment he was asked by the court whether he had suffered the previous conviction charged in the information, and he answered that he had, but that he was not guilty of the subsequent offense with which he was charged. According to the section referred to, that made but a single issue to be tried by the jury, namely, the guilt or innocence of the subsequent offense. But both sections, 969 and 1025, were absolutely repealed on April 9. 1880, (Amendments to Penal Code, pp. 15, 19,) and there was no substituted legislation which authorized the proceeding which was taken against the defendant as to the charge against him of the previous conviction. The question asked him at the time of his arraignment was therefore illegal. He was not legally bound to answer it; and his answer could not be used against him as the equivalent of a verdict of guilty, upon which, in connection with a verdict of petit larceny, he could be adjudged guilty of felony and punished.

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[1] This case, filed November 26, 1883, is now published, by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

Manifestly, the legislature intended that a previous conviction of grand larceny, followed by a subsequent commission of the same offense, or of petit larceny, should constitute an aggravated offense, for which the offender ought to be punished as for a felony. But the charge of the previous conviction which entered into and made part of the aggravated offense was one to which the accused had the right to plead, and for which he had the right to be tried as in other cases. It is true that section 1158 of the Penal Code provides: "Whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense for which the defendant is indicted or informed against, must also find whether or not he has suffered such previous conviction, unless the answer of the defendant admits the charge," etc.; but that exception to the rule requiring the trial of an issue of fact having been swept away by the repeal of the section of the Code which required such an answer to be made, the defendant stood for trial upon his plea of "not guilty," and he could be tried only upon the issue raised by that plea, and be convicted only by a verdict of the jury that tried him. No person accused of a public offense can be required, by an unauthorized question asked him at his arraignment, to criminate himself, (section 688, Pen. Code;) nor can he be tried or convicted under the provisions of a law which has been repealed; nor can he be convicted unless by the verdict of a jury accepted and recorded by the court, or upon a plea of "guilty," etc., (section 689, Id.) Where, therefore, a person who has been convicted of a public offense, punishable by imprisonment in the state prison, commits another offense after such conviction, it is necessary, since the repeal of sections 969 and 1025 of the Penal Code, in proceeding against him by indictment or information, not only to charge the facts of the previous conviction and subsequent commission of crime, but to prove them. The defendant must plead to both charges; and, upon the issue raised by his plea, both must be proved on his trial, and be passed upon by the jury. There is no other mode of proving the facts. "A more severe penalty is denounced by the statute for a second offense; and all the facts to bring the case within the statute must be established on the trial." (Johnson v. People, 55 N. Y. 514;) and the jury must, by their verdict, find the charge of a previous conviction true or not true, (section 1158, supra.) Until there is such a verdict there can be no judgment of conviction upon the charge, and no punishment for an offense of which there has been no conviction. Being convicted only of petit larceny, the defendant was punishable, under section 490 of the Penal Code, by fine or by imprisonment in the county jail, or by both, within the limits fixed by the law; but he was not punishable as for a felony under subdivision 3, § 666, supra. The judgment pronounced was therefore erroneous.

Judgment reversed, and cause remanded, with directions to the court below to pronounce sentence within the limits prescribed by section 490 of the Penal Code.

ROSS, SHARPSTEIN, and THORNTON, JJ., concurred.

MCKINSTRY, J., concurred in the judgment.

(64 Cal. 342)

PEOPLE v. FAHEY.[1]

(*Supreme Court of California.* Nov. 26, 1883.)

FELONIOUS ASSAULT — CHARACTER OF WEAPON — JURISDICTION OF SUPERIOR COURT.

1. An assault with a brickbat weighing five pounds is within Pen. Code, § 245, which makes "an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury," punishable by confinement in the state prison or county jail.

2. The offense charged being a felony, the fact that it includes a possible misdemeanor, of which the superior court has no jurisdiction, does not deprive that court of jurisdiction to try and determine the offense charged.

In bank. Appeal from superior court, Merced county.

Information against William Fahey for felonious assault. A demurrer to the indictment was sustained, and the state appeals. Reversed.

Atty. Gen. Marshall and *Dist. Atty. Farrar*, for the People. *S. W. Geis* and *R. H. Ward*, for respondent.

MCKEE, J. To an information charging the defendant with having committed the crime of "an assault by means likely to produce great bodily injury, to wit, with a brickbat weighing about five pounds," a demurrer was filed upon the grounds that the court had no jurisdiction of the offense charged, and that the complaint did not conform to the requirements of sections 950–952 of the Penal Code, and the court sustained the demurrer on the ground that it had no jurisdiction of the offense charged. This was error. Section 245 of the Penal Code provides that "every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the state prison or in a county jail not exceeding two years, or by fine not exceeding five thousand dollars, or by both." The offense charged was therefore a felony, of which the court had jurisdiction, (section 5, art. 6, Const.,) and the fact that the offense charged included within it a lesser offense, of which the defendant might be convicted, or that the court, in the exercise of its discretion, could inflict punishment within the limits prescribed by law upon any conviction which might be rendered in the case, in no way affected the jurisdiction of the court to try and determine it. Judgment reversed, and cause remanded for further proceedings, with direction to overrule the demurrer.

ROSS, MYRICK, MCKINSTRY, SHARPSTEIN, and THORNTON, JJ., concurred.

(64 Cal. 343)

Ex parte KELLOGG.[2]

(*Supreme Court of California.* Nov. 28, 1883.)

CONTEMPT—EXAMINATION BEFORE REFEREE—FAILURE TO DELIVER PROPERTY LIABLE TO LEVY.

An execution debtor, on examination before a referee, disclosed his possession and ownership of personalty liable to levy. During a continuance of the proceeding, while the referee had under advisement a motion for an order directing the debtor to deliver such property to the sheriff, the debtor delivered the property to another creditor in satisfaction of a debt. *Held*, that the debtor was rightly adjudged guilty of contempt.

In bank. Application by Calvin W. Kellogg for writ of *habeas corpus*. Writ denied.

Cowdery & McCutchen, for petitioner. *I. B. L. Brandt*, opposed.

ROSS, J. The petitioner claims to be illegally restrained of his liberty by the sheriff of the city and county of San Francisco, and seeks to be discharged on *habeas corpus*. The facts appear to be these: In 1882 one Rankin recovered a judgment in the superior court of the city and county of San Francisco against the petitioner and others for the sum of $1,800, or thereabouts, on which execution was issued and placed in the hands of the sheriff. The execution having been returned wholly unsatisfied, an order was duly made by the court pursuant to section 714et seq. of the Code of Civil Procedure, requiring the petitioner to appear before a referee named, at a time and place specified, to answer concerning his property. Pursuant to that order the petitioner appeared before that referee on the 25th of June, 1883, and his examination was thereupon commenced. Pending the examination an *alias* execution upon the judgment was issued and placed in the hands of the sheriff. The next day—June 28th—the petitioner and the sheriff with the execution again appeared before the referee, and the examination of the petitioner continued, during which petitioner testified to his ownership and possession of certain articles of jewelry. Thereupon counsel for Rankin moved the referee for an order directing petitioner to deliver the property to the sheriff, to be applied towards the satisfaction of the execution. The referee took the motion under advisement, and continued the further hearing until July 2d, at which time, upon the request of petitioner, it was further continued until the next day, July 3d. During the last continuance petitioner delivered the property to one Cassin, to whom he claimed to have been indebted; and when, on July 3d, he, together with the other parties interested, appeared before the referee to receive his ruling upon the motion addressed to him, and the referee had made the order asked, petitioner responded by saying that he could not comply with the order for the reason that he had already turned the property over to Cassin. Upon these facts being brought to the notice of the superior court, that court cited petitioner to appear at a time and place stated, and show cause why he should not be punished for contempt in refusing to obey the order directing him to deliver the property to the sheriff, to be applied towards the satisfaction of the execution against him. At the time and place stated in the order to show cause petitioner duly appeared with his counsel, and answered the allegations against him, whereupon the court took proof, and from the evidence and papers in the case found the facts already detailed, and, further, that the delivery of the property by petitioner to Cassin was at his (petitioner's) own suggestion, and was made in anticipation of and for the purpose of defeating the order Rankin had asked for, and that to accomplish his purpose to defeat the process of the court petitioner had procured upon his own motion a delay in the proceedings, pending which he voluntarily and contumaciously disabled himself from complying with the order he anticipated being made, and, finally, that his acton "was but a bold attempt to defeat the order of the referee, duly and properly made, and cause the plaintiff's proceedings to be barren of any result." Finding such facts, the superior court rightly adjudged petitioner guilty of contempt, and imposed upon him appropriate punishment. Sections 128, 1209, Code Civil Proc.; Galland v. Galland, 44 Cal. 478; Myers v. Trimble, 3 E. D. Smith, 612. Writ dismissed, and petitioner remanded.

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[1] This case, filed November 26, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

[2] This case, filed November 28, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in volume 64, California Reports.

MYRICK, THORNTON, and McKEE, JJ., concurred.

Rehearing denied.

95 Cal. 548

COMBINATION LAND CO. v. MORGAN *et al.*

(Nos. 14,345, 14,346.)

(*Supreme Court of California.* Aug. 6, 1892.)

APPEAL—NUNC PRO TUNC ORDERS—BILL OF EXCEPTIONS—SUFFICIENCY—SALE OF LAND—VENDOR'S LIEN—LIABILITY OF SECOND PURCHASER.

1. A nunc pro tunc order of a trial court, amending a former order, and made after the first order is appealed from, does not supersede the latter, but takes effect as of the date of the first order; and an appeal from the nunc pro tunc order is not necessary to give the supreme court jurisdiction of the case.

2. Plaintiff prefaced his specifications in the bill of exceptions with the statement that "the evidence introduced on said trial is insufficient to support said decision, and said decision is against law in the following particulars." *Held*, that the bill was not insufficient because it embraced two distinct grounds of motion, when it appeared from the specifications following the statement that the real ground of attack upon the decision was insufficiency of the evidence.

3. Where the purchaser of real estate receives notice that his vendor has not paid therefor, before he pays the purchase money, he takes the land subject to the prior vendor's lien to the extent of the purchase money unpaid by him, although he had no knowledge of such lien at the time he purchased.

In bank. Appeal from superior court, San Diego county; JOHN R. AITKEN and GEORGE PUTERBAUGH, Judges.

Action by the Combination Land Company against A. C. Morgan and Clara Foltz to foreclose a vendor's lien upon certain lands. From a judgment for plaintiff against defendant Foltz, plaintiff appeals. Reversed.

Noah Hodge, (*George Fuller*, of counsel,) for appellant. *Hunsaker, Britt & Goodrich*, for respondent.

BEATTY, C. J. In this case the plaintiff gave one notice of appeal from the judgment and from the order denying its motion for a new trial, and one transcript of the record would have sufficed for both appeals, but two transcripts of the same record have been filed,—one labeled "Transcript on appeal from the judgment," numbered 14,346, and the other labeled "Transcript on appeal from order refusing new trial;" numbered 14,345, thus apparently making two cases of what is practically one. All errors assigned and referred to in the argument are presented by the appeal from the order, and to that I shall confine my attention.

The objections urged by the respondent to the right of the appellant to be heard on this appeal are untenable. The order denying a new trial was made and entered June 21, 1890, and the notice of appeal designates it as of that date. After the appeal had been taken and perfected, the appellant, on the 19th of January, 1891, obtained a *nunc pro tunc* order of the superior court amending its order of June 21, 1890, by adding a recital, to the effect that the motion for a new trial was based and submitted on a bill of exceptions filed at the date of the hearing. The contention of the respondent is that the last order superseded the first, and was and is the only order denying a new trial, and that it never has been appealed from. We think, on the contrary, the second order merely corrected the first, and took effect as of the date of the order corrected. In legal effect there was but one order. The new trial was denied June 21, 1890, and the time for appealing began to run at that date. Another objection of the respondent to the consideration of the errors assigned (which relate solely to the sufficiency of the evidence to sustain the findings) is that the bill of exceptions contains no specifications of the particulars in which the evidence is alleged to be insufficient. The plaintiff, in framing his bill of exceptions, prefaced his specifications with this statement: "Plaintiff says that the evidence introduced on said trial is insufficient to support said decision, and said decision is against law in the following particulars." The respondent claims that, because this statement embraces two distinct grounds of motion, he was not apprised by the following specifications whether the attack upon the decision was on the ground of insufficiency of the evidence to sustain it, or on the ground that it was against law. But we think that whatever view may be taken as to the distinction between a decision against evidence and a decision against law, and however ambiguous the expression above quoted may be held to be, the specifications by which it was followed in this bill of exceptions were amply sufficient to remove the ambiguity, and apprise the defendant that the real ground of attack upon the decision was insufficiency of the evidence to justify the findings of the court, to the effect that he was a *bona fide* purchaser without notice and for a valuable consideration.

The case, as presented, entitled the appellant to a hearing on the merits. The material facts are as follows: In December, 1887, the defendant Clara Foltz and the respondent, Morgan, agreed together that they would purchase from the plaintiff a small tract of land known as the "Sorrento." The price of the tract was $3,351.50. Foltz and respondent agreed that each would contribute one half of the purchase money; that Foltz should make the purchase, take a conveyance of the land in her own name, and hold a half interest in trust for respondent. In pursuance of this agreement, respondent gave Foltz his half of the purchase money, and she procured the conveyance to be made to herself. But she did not pay the entire purchase price in cash. There was a balance of $574.84, for which she gave her promissory note. Subsequently she and respondent agreed to make an exchange of lands; that is to say, respondent agreed to sell her a house and lot valued at $5,300, for which she was to pay by assuming a mortgage thereon, amounting to $2,400, by conveying the Sorrento,—her half interest therein being valued at $1,250,—and by making up the balance in money. In pursuance of this agreement she paid $1,000 in cash, conveyed the Sorrento to respondent, and gave him her note for the balance of $650. He placed her in possession of the house and lot, but retained the title as security for the payment of her note. Her conveyance of the Sorrento was made May 9, 1888, and it is found by the superior court, upon evidence which is sufficient to sustain such finding, that up to this date respondent had no notice of the fact that she had not paid to plaintiff the full purchase price of said tract at the date of her purchase; but before the respondent made any conveyance to her of the house and lot, and while he still held the title as security for her note, he was fully informed that there was still due from her to the plaintiff, upon the purchase price of the Sorrento, the amount of her note for $574.84.

This action is to foreclose the vendor's lien of the plaintiff on the Sorrento for said amount. The defendant Foltz suffered judgment by default. Her codefendant, the respondent, Morgan, defended upon the ground that he was a *bona fide* purchaser for value. The evidence, as above stated, is sufficient to sustain the finding of the court that he purchased in good faith, without any previous knowledge of the fact that his vendor had not fully paid her vendor, the plaintiff. But this is not sufficient to make out his defense. It was also necessary for him to show that he had paid for the land before he received notice of the vendor's lien, and this he had not done. The only payment he was to make was by conveyance of the house and lot which he exchanged for the Sorrento, and that he had not done before notice. The fact that he had placed Mrs. Foltz in possession was immaterial, so long as he held the title as security for the balance due. If, upon receiving notice of the amount of her indebtedness to plaintiff, he had paid it, there is no doubt that he could have enforced repayment from her. The amount so paid would simply have been deducted from the valuation placed on her interest in the Sorrento, leaving her indebted to him on the house and lot that much more, secured, like her note for $650, by the title which he held, and its collection enforceable by the same means. The authorities cited in the appellant's brief amply sustain the proposition that notice before payment is equivalent to notice before purchase, and that, when there has been a partial payment before notice to a second vendee of the original vendor's lien, he is affected *pro tanto* as to the residue. It is unnecessary to repeat these citations here. There is no direct and explicit finding that respondent paid for the Sorrento before notice of plaintiff's lien, nor is there any general finding which very clearly embraces such fact, though finding 3 was perhaps intended to embrace it. If the fact is not found, the judgment is erroneous; if it is found, the finding cannot be sustained. Upon either hypothesis, the appellant is entitled to a new trial. Judgment and order reversed, and cause remanded.

We concur: HARRISON, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.; GAROUTTE, J.

(3 Cal. Unrep. 556)

Huse *et al.* v. Den *et al.* (No. 14,282.)

(*Supreme Court of California.* Aug. 13, 1892.)

Appeal—Insufficient Record—Dismissal.

Where an appeal is taken from an order refusing to vacate a judgment, and there is no bill of exceptions, the appeal will be dismissed.

Department 1. Appeal from superior court, Santa Barbara county; John Reynolds, Judge.

Action by Charles E. Huse and Jose Maria Hill against Richard S. Den and others. From an order refusing to vacate a judgment in favor of plaintiffs, defendants appeal. Dismissed.

Page & Eells and *Philip G. Galpin*, for appellant. *O. P. Evans* and *Garber, Boalt & Bishop*, for respondent.

Per Curiam. This is an appeal from an order refusing to vacate a judgment. There is no bill of exceptions. On the authority of Kubli v. Hawkett, 89 Cal. 638, 27 Pac. Rep. 57, and the cases therein cited, and White v. White, 88 Cal. 429, 26 Pac. Rep. 236, the appeal is dismissed.

Janes v. De Azevedo *et al.* (No. 14,875.)

(*Supreme Court of California.* Sept. 8, 1892.)

Appeal—Review—Statute of Limitations.

A finding by the court that the cause of action was barred by the statute of limitations will not be disturbed on appeal where the evidence is not brought up, and nothing appears in the record to the contrary.

Department 2. Appeal from superior court, Marin county; E. B. Mahon, Judge.

(Not to be published in California Reports.)

Action by Louis L. Janes against Joaquin P. De Azevedo and others for the legal title to some land. From a judgment in favor of defendants, plaintiff appeals on the judgment roll alone. Affirmed.

A. L. Rhodes, for appellant. *E. M. Wilson, Craig & Meredith*, and *S. L. Rogers*, for respondents.

McFarland, J. This action was brought against a large number of defendants to compel each of them to convey to plaintiff the legal title to the undivided one fifth of the part of a certain tract of land which each defendant claims to hold. Judgment was rendered for the defendant, and plaintiff appeals from the judgment upon the judgment roll alone, there being no bill of exceptions or statement. The answer of the defendants sets up several valid defenses; the findings of the court fully support those defenses; the conclusion of law is that the plaintiff should take nothing by his complaint, and that defendants should be dismissed with their costs; and the conclusion of law is amply warranted by the findings of fact. Moreover, the answer avers that the alleged causes of action stated in the complaint are barred by the provisions of several named sections of the Code of Civil Procedure, between sections 318 and 343; and the court finds that they were barred by the sections named. And as there is no evidence before us, and nothing in the record inconsistent with the finding as to the statute of limitations, this finding is itself conclusive of the case against appellant. We do not deem it necessary to state here the facts of this case, which extend over a period of more than 30 years. Counsel for appellant seems to contend only for these two propositions: *First*, that the grantee of the legal title from one who held it subject to some trust can never, under any circumstances, hold it adversely to the beneficiary; and, *second*, that although a beneficiary has fully settled with the trustee, and has completely and finally released and discharged him from all the obligations of the trust, such discharge cannot inure to the benefit of a *bona fide* purchaser of the title from the trustee. Neither of these propositions can be maintained. Appellant does not point out any specific error committed by the trial court, and we see no reason, either in law or equity, for disturbing the judgment. The judgment is affirmed.

We concur: De Haven, J.; Sharpstein, J.

(96 Cal. 113)

In re Westerfield's Estate. (No. 18,023.)

Smith *et al.* v. Westerfield *et al.*

(*Supreme Court of California.* Sept. 1, 1892.)

Distribution of Estates — Appeal — Time of Taking — Review — Right to Jury Trial — Cross-Examination.

1. An appeal from a judgment of heirship and final distribution cannot be considered unless taken within 60 days after the entry of such judgment, as required by Code Civil Proc. § 1664.

2. Where defendant, some days before trial, orally demanded a jury, plaintiff making no objection, and the day before trial defendant withdrew his demand, whereupon plaintiff served written demand, and at the opening of the trial asked for a jury, and defendant objected to a jury and to the submission of issues thereto, on the ground that no special issues had been settled, the overruling of defendant's objections, where the issues to be tried were made by the pleadings, and where the court itself found on all the issues submitted, was not prejudicial error; Code Civil Proc. § 1717, providing that, "if no jury is demanded, the court must try the issues; if, on written demand, a jury is called by either party, and the issues are not sufficiently made up" by the pleadings, the court, on due notice, must frame the issues and submit the same, with the evidence, to the jury for a verdict.

3. Errors apparent on the face of a judgment will only be reviewed on appeal therefrom, and cannot be considered on an appeal from an order denying a motion for a new trial.

4. Where a witness in her direct examination neither referred to a certain subject nor to anything connected therewith, she cannot be interrogated thereon in her cross-examination.

5. A ruling that incompetent evidence contained in a certain register is admissible is not prejudicial error where the record does not show that the register, though offered, was read to the jury.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county; Stanley A. Smith, Judge.

Proceeding for the distribution of the estate of William Westerfield, deceased. From the decree, Charles Westerfield and others appeal. Affirmed.

J. M. Walling and *Jas. A. Stidger*, for appellants. *T. S. Ford* and *A. D. Mason*, for respondents.

FOOTE, C. This contest arises on a cross petition for a decree of distribution of the estate of William Westerfield. The court below seems to have treated the matter as requiring incidentally, before final decree of distribution, under the provisions of section 1664, Code Civil Proc., that the question of heirship of the parties contestant should be determined, and did by its decree make such determination, and that "the plaintiffs, Mary B. Smith, Emma Danuser, Charles Westerfield, and Fred Westerfield, are the lawful heirs at law of, and the only heirs of, William Westerfield, deceased, and as such are entitled to inherit his estate, share and share alike." Afterwards a decree of final distribution was made, based upon the decision in this proceeding. No appeal is prosecuted from this last decree. But an appeal has been taken from the judgment or decree determining the question of heirship, and from an order denying a new trial. The appeal from the judgment cannot be considered, for the reason that the appeal was not taken until more than 60 days after the entry of the judgment. Sections 1664, 1715, Code Civil Proc.; In re Backus' Estate, (Cal.) 30 Pac. Rep. 796.

The point is made by the respondent that the notice of motion for a new trial is not sufficient, and that, therefore, the motion must necessarily have been properly denied. The motion was made upon the minutes of the court, and that which seems to us to be a statement on motion for a new trial, under section 661, Code Civil Proc. Respondent argues that the notice of motion does not show a sufficient statement of the grounds of the motion, and shows no sufficient specification of errors of law occurring at the trial and excepted to, and no sufficient specification of the particulars wherein the evidence was insufficient to justify the decision, nor any specification that the decision is against law. We have examined the notice with minute attention, and, while it is not in the form which would have rendered it most commendable, it is sufficient. It becomes necessary, then, to look into the statement with a view to determine if any errors were committed by the trial court in denying the motion for a new trial. Appellant claims that the court below committed error in submitting special issues to the jury upon the question of heirship, under section 1717, Id.; and that, as no written demand was made for a jury, the court erred in allowing one to be called and try the issues joined. The Code provision referred to provides as follows: "If no jury is demanded, the court must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either may move for a new trial upon the same grounds and errors, and in like manner, as provided in this Code for civil actions." It appears from the statement that the defendants and appellants some days before had orally demanded a jury to try the issues raised. Plaintiffs made no objection, and the defendants did not put their demand in writing, but the day before that on which the trial commenced they withdrew their demand for a jury. The plaintiffs thereupon filed and served a written demand for a jury to try the special issues. At the opening of the court on the first day of the trial, plaintiffs asked for a jury in accordance with their written demand. The impanelment of the jury was objected to by the defendants, as well as the submission of the issues joined, because it was claimed that no special issues had been framed or settled. The court overruled this objection, for the reason that the issues to be tried were made up by the written pleadings filed. We perceive no prejudicial error in these acts of the court, particularly in view of the fact that the record shows that the court itself found upon all the issues submitted to the jury. Estate of Moore, 72 Cal. 339, 13 Pac. Rep. 880.

As to the point made that, in the form as made, the judgment was not authorized by law, we do not perceive how that can be considered on the appeal from the order denying the motion for a new trial; for errors apparent on the face of the judgment roll will only be reviewed on an appeal from the judgment, which appeal, as we have seen, is not before us. Thompson v. Patterson, 54 Cal. 543.

It is further assigned for error that on the cross-examination of Mary B. Smith, one of the plaintiffs, she was not allowed to answer the following question: "Question. When did you learn about the date your father came to the United States, and the vessel upon which he and your mother came?" The objection made was that it was not cross-examination, and irrelevant and immaterial, and that it was not founded upon a proper predicate that her father came to this country. It does not appear that the witness on the examination in chief had testified as to any of the matters referred to in the question, or anything connected therewith; hence we see no error in the ruling. Other questions were asked this witness in relation to the date on which her father and mother came on a vessel to the United States, and the name of such vessel, which were not allowed to be answered, on objection that they were not cross-examination, or the answers to which were on motion stricken out. We perceive no error in these rulings; the matters called for were not of a character proper to be adduced on cross-examination. So, also, the question asked the same witness with reference to whom she heard her mother say was the minister by whom she was married to the father of the witness, and the place where they were married, was improper, for it was not as to anything connected with what the witness had testified to in chief.

We perceive no error in the ruling excluding answers to other questions asked on cross-examination of this witness, or striking such answers out on motion of plaintiffs' counsel. As to the evidence contained in the great register of the county, to the offer of which in evidence defendants objected, it does not appear, although offered, and the court ruled that it was admissible, that it was read to the jury as evidence, and that makes it doubtful, at least, that it was so read. Page v. O'Brien, 36 Cal. 559. Therefore on the record it is not shown that error was actually committed, even if it would not have been permissible to read it to the jury. We have carefully examined the other alleged matters of error claimed to have been prejudicial to the defendants, but we do not agree with their contention in that behalf, and advise that the appeal from the judgment be dismissed, and the order refusing a new trial be affirmed.

We concur: Haynes, C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the appeal from the judgment is dismissed, and the order denying a new trial will stand affirmed.

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96 Cal. 102

Bradford v. Parkhurst. (No. 14,745.)

(*Supreme Court of California.* Sept. 1, 1892.)

Sale of Real Estate—Purchase Money—Action to Recover Back—Abandonment of Contract.

1. Where time is of the essence of a contract for the sale of land, a failure by the vendor to tender a deed until after the time limited for performance does not constitute an abandonment of the contract so as to enable the purchaser to maintain an action to recover the part of the purchase money paid.

2. Where the purchaser of real estate refuses to pay the balance of the purchase money according to contract, he cannot recover back the money he has paid, while the vendor is willing and able to perform his part of the contract.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Ward Bradford against D. W. Parkhurst to recover back the part of purchase money paid on a contract for the sale of land. From a judgment for defendant and an order refusing a new trial, plaintiff appeals. Affirmed.

Geo. B. Graham, for appellant. *Church & Cory*, for respondent.

Temple, C. This appeal is from a judgment and an order refusing a new trial. The action is for money had and received for plaintiff's use, and for interest on "divers sums forborne by plaintiff to defendant at his request." The statement shows that between January 9 and March 31, 1888, defendant executed to plaintiff and his assignors seven contracts for as many distinct parcels of land. The contracts are alike, and are in the form of receipts for specified sums of money, part of the purchase price, followed by a recital as follows: "Leaving a balance * * * to be paid on said purchase, which by the terms of this sale is to be paid in three equal payments, with interest at the rate of ten per cent. per annum till paid, in like gold coin, within six, twelve, and eighteen months from date hereof. If paid as above stated, with all taxes, assessments, and charges of every nature that are or may be levied thereupon before the final payment and costs of conveyance, the above-named W. Bradford will be entitled to a deed for the above-described lot; otherwise this agreement becomes null and void, and the amounts now paid, together with all improvements on said land made, shall be forfeited. * * * If forfeited, the said W. Bradford shall thereafter be, and he hereby consents to be, tenant of D. W. Parkhurst, liable to be dispossessed upon three days' notice," etc. The contracts are signed only by the vendor. It was not shown, or attempted to be shown, that defendant had failed or refused to perform any part of his contract. On the other hand, it appears from the evidence that plaintiff, after having made the first payment, on being asked whether he intended to perform, said that he would make no more payments, and "I will see my attorney, and would like to see you get it." The evidence also shows that defendant tendered to plaintiff a deed in pursuance of the contract, but the tender was after the time limited for performance, and appellant contends that, time being of the essence of the contract, the tender was not effectual, and that defendant was in default; in short, that there had been a mutual abandonment and rescission of the contract, under the rule laid down in Cleary v. Folger, 84 Cal. 316, 24 Pac. Rep. 280. As that case has been overruled on this point by the recent case of Newton v. Hull, 90 Cal. 487, 27 Pac. Rep. 429, this contention must fail.

Now if we concede the law to be as appellant contends, that the contract could not have been enforced by defendant, because the agreement of the plaintiff was not put in writing, it does not follow that this suit can be maintained. Although defendant might not have been able to maintain an action for the purchase money, he was compelled to accept the money when tendered as payment upon the contract. This follows necessarily if it could have been enforced by plaintiff. The payment was founded upon a valuable consideration, and the consideration has not failed.

Appellant relies upon Drew v. Pedlar, 87 Cal. 443, 25 Pac. Rep. 749, as sustaining his position. But that case does not go to the extent of holding that a vendee can elect to consider the contract at an end, and recover what he has paid, when the vendor has not abandoned the contract. On that point that decision is explained by the more recent case of Phelps v. Brown, (No. 13,277,) filed August 9, 1892, 30 Pac. Rep. 774, as follows: "When a contract of sale and purchase of lands is abandoned or rescinded by the parties, the vendee, though in default, may recover back installments paid of the purchase money, less the actual damage to the vendor occasioned by his breach of the contract." This proposition cannot be controverted. It is old law. Palmer v. Temple, 9 Adol. & E. 508. The debatable point before these decisions was whether, in all cases when one party to a contract declines to go on with it because some material condition precedent has not been performed by the other party, he thereby abandons it so as to entitle a recovery for sums paid. No such question is involved here. The payments were made in part consideration for a conveyance, which the plaintiff can have whenever he chooses to comply with his contract. I advise that the judgment and order be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(96 Cal. xvii; 3 Cal. Unrep. 548)

MILLAN v. HOOD. (No. 14,756.)

(*Supreme Court of California.* Sept. 1, 1892.)

NEW TRIAL—STATEMENT—DEMURRER.

1. Code Civil Proc. § 659, subd. 3, provides that, if a notice of motion for a new trial designates that the motion will be made upon a statement of the case, on the grounds of insufficient evidence and errors of law, the statement must specify wherein the evidence is insufficient, and the particular errors relied upon, otherwise it must be disregarded on the hearing of the motion. *Held,* that if the statement on which such a motion was made does not make the specification required, the motion should be denied.

2. The overruling of a demurrer to a cross complaint, which makes the issue identical with that raised by the original pleadings, does not prejudice the party demurring.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; B. F. MYRES, Judge.

(Not to be published in California Reports.)

Action by W. G. Millan against Christopher Hood to enforce a trust in land. Judgment for defendant. Plaintiff appeals. Affirmed.

John M. Fulweiler and *Ben. P. Tabor,* for appellant. *A. L. Hart* and *F. P. Tuttle,* for respondent.

VANCLIEF, C. Action to enforce an alleged trust in land. Judgment for defendant, from which, and from an order denying his motion for a new trial, the plaintiff appeals.

1. The notice of intention to move for a new trial stated, as the grounds upon which the motion would be made, only insufficiency of the evidence to justify the findings, and errors in law committed at the trial. It further stated that the motion would be made "upon a statement of the case." But the statement of the case, which was thereafter made and allowed by the court, contains no specifications of any particular in which the evidence is insufficient to justify the findings, nor of any error in law committed by the court. Therefore, in obedience to section 659 of the Code of Civil Procedure,[1] the trial court must have disregarded the statement, and consequently did not err in denying the motion for a new trial.

2. The plaintiff demurred to the following addition to the answer of defendant, on the ground that the same does not state facts sufficient to constitute a cause of action against the plaintiff: "And further answering, and for a cross complaint, the defendant avers: (1) That he now is, and for a long time prior to the commencement of this action he was, the owner, in the possession and entitled to the possession of all that certain real estate described in the complaint, and particularly described as follows, to wit: The east half of the southwest quarter, and the southeast quarter of the northwest quarter, of section 13, in township 14 north, range 9 east, Mount Diablo base and meridian; (2) that the plaintiff herein claims some interest in said property adverse to the said defendant, but that said claim of plaintiff is without any right whatever, and that the said plaintiff has not any estate, right, title, or interest whatever in said land or premises, or any part thereof." The court overruled the demurrer, and thereupon plaintiff's counsel, who was present in court at the time, asked the court to allow him 20 days' time in which to answer the so-called cross complaint, and the court granted his request, but, plaintiff having failed to answer within 20 days, the clerk entered his default. Thereupon the plaintiff moved the court to open the default, and for leave to answer the alleged cross complaint, on the grounds that the default "was improperly entered, and, if properly entered, was the result of mistake, inadvertence, and excusable neglect." The motion was presented and heard on affidavits, and the proffered answer to the cross complaint. The court denied the motion, and plaintiff excepted. This motion, with the affidavits, proposed answer, minutes of the court, and other facts upon which it was heard, are made to appear by a bill of exceptions, settled and allowed before the trial, which may be considered on the appeal from the judgment. It is contended by counsel for appellant that the court erred in overruling the plaintiff's demurrer to the so-called cross complaint, and also in denying plaintiff's motion to open the default and to allow the plaintiff to file his proposed answer.

So far as the averments in the alleged cross complaint are material, they are mere repetitious facts alleged in the answer or in the complaint. They tendered no issue not made or tendered by the answer. They might have been stricken out without necessitating any change in the trial of the case. All the averments of the so-called cross complaint were redundant, superfluous, and, upon motion, should and probably would have been stricken out, (Code Civil Proc. § 453; Mora v. Le Roy, 58 Cal. 8;) yet the plaintiff could not have been injured by them, since, so far as they were not mere repetitions of material parts of the answer which constituted a valid defense, they affirmed only that plaintiff claimed the property in question adversely to defendant, which he expressly admitted in his proffered answer to the alleged cross complaint, and which is in perfect accord with his complaint, and there is in his said proffered answer no denial of any averment of the alleged cross complaint, except the averment that defendant is the owner of the property in controversy, and the issue made by this denial is identical with an issue raised by the pleadings independently of the alleged cross complaint. Were it deemed necessary, the action of the court probably might be justified on other grounds, furnished by the bill of exceptions; but, conceding that the court erred, it is sufficiently apparent that plaintiff's cause could not have been prejudiced thereby. I think the judgment and order should be affirmed.

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[1] Code Civil Proc. § 659, provides that when a notice of motion for a new trial states that the motion will be made on a statement of the case, and "designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient; when the notice designates as the ground of the motion errors in law occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion."

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(95 Cal. 553)

LILLIS *et al.* v. EMIGRANT DITCH CO. (No. 14,509.)

(*Supreme Court of California.* Aug. 9, 1892.)

DIVERSION OF WATER—RES ADJUDICATA—QUESTIONS DETERMINED—ADMISSIONS BY PLEADING—EVIDENCE.

1. Suit was brought to restrain a ditch company from diverting water from a slough. Defendant alleged that it had acquired a prescriptive right to divert, by means of a ditch of certain dimensions, about 100 cubic feet per second. The court found merely that defendant had acquired the right to divert sufficient water to fill such a ditch without specifying the number of feet which might thus be diverted or the capacity of the ditch. *Held,* that this was not an adjudication, under Code Civil Proc. § 1911, as to the number of feet which might be diverted, since the same did not appear on the face of the judgment, or as necessarily included therein, but only as to the right to divert a certain indeterminate amount, and defendant, therefore, was not confined in a subsequent action denying its right to take more than 40 feet, to the amount alleged in the previous action, but was entitled to prove its right to take a greater amount.

2. The fact that the capacity of the ditch several miles from the point of diversion was shown by uncontradicted testimony to have been much less than at the point of diversion would not impair the testimony as to its capacity at the point of diversion, where it appeared that much of the water was taken from the ditch before it had gone such distance.

3. The failure of the court to find upon the claim of plaintiffs that defendant had no right to divert any of the waters, except at times when there was more than 500 feet, could not be regarded as error, where the only evidence as to the said claim was the finding to that effect made by the court in the former action, and which, as being outside the issues in such action, could not have any greater effect as evidence than would any other declaration of the court.

4. An allegation in the complaint, stating that the court had, in the former action, determined defendant's right to divert a certain amount of water sufficient to fill its ditch, and that it had found defendant to have continuously diverted that amount, carried with it an admission that the court was right, and did not allow any contradiction of the plaintiffs by showing that a part of the water was taken down some distance into the ditch, and then returned through a waste way; nor was the effect of the admission qualified by a previous allegation that defendant had never permanently diverted more than 40 feet per second; for such allegation, being contradictory to that of which the court had rendered its determination, was to be taken as against the plaintiffs, and of the lesser weight.

Department 1. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by Lillis and others against the Emigrant Ditch Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

Brown & Daggett and *Daggett & Adams,* for appellants. *W. D. Tupper,* for respondent.

HARRISON, J. The plaintiffs brought this action against the defendant to obtain a judgment declaring that the defendant is not entitled to divert from the channel of Cole slough any greater quantity of water than 40 cubic feet per second, or to divert from said channel any water whatever, except at times when there is more than 500 cubic feet of water per second passing down the channel, and by the head of defendant's ditch; and that the defendant be perpetually enjoined from diverting any water from said channel, except at such times and in such an amount. In their complaint the plaintiffs allege as grounds for such judgment that, in an action brought by them in the superior court of Tulare county, in October, 1883, against the defendant, for the purpose of obtaining a perpetual injunction against it from placing or maintaining a dam or other obstruction in Cole slough, and from diverting from said channel any of the waters thereof by means of its ditch or otherwise, the defendant in its answer to their complaint alleged that it had acquired a prescriptive right to divert from said channel, by means of a ditch 20 feet wide at the bottom and 40 feet wide at the top, about 100 cubic feet of water per second, measured under a four-inch pressure, and that plaintiffs' right of action was barred by the statute of limitations; and that upon the trial of the issues in said action the court found that the plaintiffs' right of action was barred by the statute of limitations, and that the defendant in the month of December, 1875, had acquired, and ever since had the right, as against the plaintiffs, to divert from the channel of said slough, by means of said dam and ditch, a sufficient amount of the waters flowing in said slough to fill a ditch 20 feet wide at the bottom and 40 feet wide at the top; upon which findings judgment was rendered that the plaintiffs take nothing by their action. The complaint herein further alleges that, at the time of the construction of said ditch by the defendant in 1875, it claimed the right to divert from said slough sufficient water to fill the ditch at such times when there was more than 500 cubic feet of water per second flowing down the channel by and beyond the head of the ditch, but that prior to October, 1883, of the 100 cubic feet of water per second which were diverted into said ditch, 60 cubic feet were at all times turned back into the channel; and that the defendant had not permanently turned away, or claimed the right to turn away, more than 40 cubic feet per second, and had not prior to October, 1883, acquired the right to divert and permanently turn away from said channel more than 40 cubic feet of water per second; that since the 12th day of October, 1883, and during the pendency of the aforesaid action, the defendant had deepened its said ditch and enlarged its carrying capacity, and had diverted and permanently turned away from the channel of the slough 190 cubic feet of water per second, and had threatened to, and unless enjoined from so doing would, permanently divert said quantity of water from said channel. The defendant in its answer herein traversed the allegations in the complaint which deny its right to divert the waters of the channel, and alleged, in substance, that by virtue of its acts in December, 1875, and subsequent thereto, it has acquired the right to divert from the channel of said slough a sufficient quantity of water to fill its said ditch; that the capacity of said ditch is sufficient to carry 190 cubic feet of water per second, and that it has by means of its said ditch and dam continuously since December, 1875, diverted that amount of water from the channel of said slough; and that the plaintiffs' cause of action is barred by the statute of limitations. Upon the trial of these issues the court found in favor of the defendant, and in its judgment adjudged and decreed "that in the month of December, 1875, the defendant acquired the right, and has ever since had and now has the right, as against the plaintiffs and the whole world, to divert from the waters flowing in Cole slough a sufficient amount thereof to fill a ditch twenty feet wide at the bottom and forty feet wide at the top, to wit, about one hundred and ninety cubic feet of water flowing per second, for the purposes of irrigation." From this judgment, and from an order denying a new trial, the plaintiffs have appealed.

The complaint in the judgment roll in the former action between the parties in the superior court of Tulare county, which was offered in evidence on the part of the plaintiffs at the trial herein, set forth the rights of the plaintiffs as riparian proprietors to the waters of Cole slough, and alleged that the defendant had prior to February, 1883, constructed a dam in the channel of the slough, by means of which, and through a ditch leading therefrom, which it had also constructed, it had diverted the waters away from the plaintiffs' lands, and had thereby caused them damage to the amount of $10,000, and that it threatened to continue said trespass and damage, for which the plaintiffs asked for a judgment of $10,000 damages, and that defendant be perpetually enjoined from maintaining said dam, or diverting any of the waters of said slough. The answer of the defendant therein traversed the allegations of trespass and damage, and, as a separate defense to the plaintiffs' right to maintain the action, alleged that, by virtue of its acts commenced in the year 1875, it had acquired a prescriptive right, by means of a ditch 20 feet wide at the bottom and 40 feet wide at the top, and a dam across the channel of the slough just below the head of said ditch then constructed by it, to divert from said slough about 100 cubic feet of water flowing per second, measured under a 4-inch pressure; and that the plaintiffs' cause of action was barred by the statute of limitations. Upon these issues the court found that the plaintiffs had not been damaged in any sum of money whatever by any act of the defendant, and also found that the defendant had acquired a prescriptive right to divert from the waters of the slough a sufficient quantity of water to fill its ditch 20 feet wide at the bottom and 40 feet wide at the top, and that the plaintiff's cause of action was barred by the statute of limitations. The court also found that the defendant had never claimed the right to divert, and had never in fact diverted, any of the waters of said slough except at times when there was more than 500 cubic feet of water flowing per second in said slough by the head of the defendant's ditch; and upon these findings judgment was rendered that the plaintiffs take nothing by their suit, and that the defendant recover from them its costs. It is contended by the plaintiffs that this judgment was a conclusive determination by the court that the right of the defendant to divert waters from said slough can be exercised only to the extent of 100 cubic feet of water per second, and to that extent only when there shall flow in the channel of the slough, by the head of its ditch, more than 500 cubic feet of water per second, and that by said judgment the defendant is estopped from claiming any other right of diversion of said waters.

A judgment rendered in any action upon the merits is a conclusive determination respecting the plaintiff's right of action upon the demand sued on, and operates as an estoppel in any subsequent action upon the same demand between the same parties. If the judgment be in favor of the plaintiff, it estops the defendant from afterwards setting up any other defense to the claim than was presented in that action, and if it be in favor of the defendant, it estops the plaintiff from afterwards presenting any other argument of evidence in support of that claim. It is for such a judgment that it is frequently said that it is conclusive, not only as to the matters which were therein litigated, but as to any other matter which might have been litigated therein. It has become a final determination of the rights of the parties in reference to the demand upon which it was rendered. If, however, the defendant in such action sets up a defense which is sufficient to defeat the plaintiff's demand, although the judgment is conclusive against the plaintiff as to any ground or matter which he might have presented in support of such demand, yet in an action by him against the defendant upon another demand it is not conclusive upon the defendant, either as to the defense which was pleaded therein, or as to any other defense which he might have interposed to the action. A judgment in favor of a defendant, upon an affirmative defense to the plaintiff's demand conclusively establishes the existence of the fact which constitutes that defense, and estops the plaintiff from questioning its sufficiency to defeat his cause of action, or from maintaining another action upon the same demand. It does not, however, estop the defendant in an action upon another demand from showing that the evidence by which that fact was established is sufficient to establish a different fact, nor does it limit such evidence to the determination of the defense which was then before the court. The issue then tried by the court was the right of the plaintiff to maintain his action, and the judgment as an estoppel is limited in its operation to that issue; but the fact by which the defendant defeated the plaintiff's right of recovery is not so limited, and may be invoked by him in support of a defense to any other demand by the same plaintiff. As to the successful party, the judgment is conclusive in favor of his right, but not as to all the means which he might have presented for the purpose of establishing that right. In other words, it is conclusive upon the issues, but not upon the facts necessary to establish those issues. In any other action between the same parties upon a different demand, though involving facts which were litigated in the former action, such judgment is conclusive only as to the same matters in issue which were determined in the former action, and which were also essential to the rendition of the judgment. In Caperton v. Schmidt, 26 Cal. 494, it is said: "Neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which only comes collaterally in question, though within the jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment. The matter, to become as a plea, a bar, or as evidence conclusive, must have been directly in issue. 1 Greenl. Ev. 528; Fulton v. Hanlow, 20 Cal. 451, 486; McDonald v. Mining Co., 15 Cal. 145; Hopkins v. Lee, 6 Wheat. 109. It will be seen from the rule as here stated that the matter adjudicated, to become as a plea, a bar, or as evidence conclusive, must have been directly in issue, and not merely collaterally litigated. It must be a fact 'immediately found according to the pleadings, not that on which the verdict was merely based,—a fact in issue, as distinct from a fact in controversy.' Potter v. Baker, 19 N. H. 166; McDonald v. Mining Co., supra." "A fact or matter in issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings, while collateral facts are such as are offered in evidence to establish matters or facts in issue; and notwithstanding they may be controverted at the trial, they do not come within the rule." Garwood v. Garwood, 29 Cal. 521.

In Cromwell v. Sac Co., 94 U. S. 351, the plaintiff had brought an action against the defendant upon certain coupons in which judgment was rendered in favor of the county upon the ground of fraud and illegality in the original issuance of the bonds. Subsequently the plaintiff in this action, who was the real party in interest in the former action, brought another suit upon other coupons on the same bonds, and, although it was contended that the former judgment was an estoppel against the recovery, yet it was held otherwise, and that the plaintiff was not estopped from proving that he had paid value, and was a *bona fide* purchaser, since the former judgment was not a conclusive determination that the bonds were invalid, but was conclusive only upon the fact that they were invalid in the hands of one who had not paid value for them. In Campbell v. Consalus, 25 N. Y. 613, an action had been brought to declare a mortgage satisfied on the ground that it had been paid, and an accounting between the parties was had therein, from which it was ascertained that there were $2,788 unpaid thereon, and thereupon judgment was rendered dismissing the action. Afterwards an action was brought to foreclose the mortgage, and it was contended that the former judgment was conclusive as to the amount unpaid thereon, but it was held otherwise upon the ground that the amount due on the mortgage was not put in issue in the former action, but only the fact whether the mortgage had been fully paid, and that the amount that was unpaid was only incidental and collateral to this main issue. See, also, Lewis and Nelson's Appeal, 67 Pa. St. 153; King v. Chase, 15 N. H. 9; Moulton v. Libbey, Id. 480; Stannard v. Hubbell, 123 N. Y. 520, 25 N. E. Rep. 1084. In Sweet v. Tuttle, 14 N. Y. 465, it was held that where the defendant, together with five others as plaintiffs, had brought an action in which a judgment was rendered against them, he was not estopped in a subsequent action against him by the defendant in the former action, arising out of the same transaction, from showing that seven others were jointly liable with him, and ought to have been joined as defendants in said action.

When, therefore, in the second action the former judgment is offered in evidence, it is necessary to ascertain in the first instance whether the cause of action upon which it was rendered is the same as that under prosecution, and, if so, it becomes, as a matter of law, conclusive upon the rights of the parties in the second action. If, however, the cause of action or demand upon which the former judgment was rendered is different from the one prosecuted in the second action, it is then necessary to ascertain as a question of fact what issues or matters were determined in the former action, and then to determine as a matter of law whether those issues and their determination were essential to the former judgment; for it is only issues upon which that judgment depends that the parties are estopped from litigating in any other action. Matters which were merely collateral or incidental to the former determination do not constitute an estoppel, even though they were litigated and decided therein; and the evidence which was introduced in support of such issues may always be introduced in support of a defense in any other action. The judgment in such a case does not become an estoppel as to all matters which might have been litigated therein, but only as to such as were actually litigated, and which were necessary to be determined by the court before rendering its judgment upon the demand or the defense. For example, if, in a suit in ejectment, the defendant alleges and proves a right to the possession of the land by virtue of having acquired an estate therein for years, he will not be precluded, in a subsequent action against him by the same plaintiff to quiet title to the same land, from showing that he was, at the time of the former judgment, the owner in fee of the land. "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto." Code Civil Proc. § 1911.

The former action between the parties hereto was brought by the plaintiffs for the purpose of recovering damages resulting from the diversion of the water, and to prevent the defendant from making any further diversion. The issue presented by the plaintiffs for determination by the court was the right of the defendant to make any diversion of the water, and for the purpose of meeting that issue it was incumbent upon the defendant to establish a right of diversion to such an extent as would preclude the plaintiffs from a recovery, but the limit of the extent to which that right had been acquired was immaterial, except as a matter of evidence upon the controverted fact in issue. If it had such right, the plaintiffs had no right to recover damages therefor, however much loss they might have suffered. The first question, then, to be determined, and the real issue before the court, was the right of the defendant to do the act which the plaintiffs charged as an invasion of their rights. If that right existed, the plaintiffs' cause of action fell, and, for the purpose of showing that such right did exist, the defendant pleaded and the court found that all the water which the plaintiffs showed to have been diverted by the defendant was taken under a right acquired by it by prescription. The amount of the diversion to which that prescriptive right extended was not an issue in the case. The court was not called upon to determine the extent of the prescriptive right, but only whether the diversion shown by the plaintiffs was within the limits of that right. The defendant did not seek any affirmative relief by reason of the prescriptive right thus set up, but had merely pleaded it as a defense to the plaintiffs' demand. It was incumbent upon the plaintiffs, in order to maintain their demand, to show to the court the entire extent of the diversion complained of, but it was only necessary for the defendant to show such facts as would defeat the showing made by the plaintiffs. If the judgment had been in favor of the plaintiffs, it would have been a conclusive determination against the defendant, by which it would have been estopped from afterwards showing a right to any diversion of the water; but the judgment in favor of the defendant only determined that the plaintiffs had no right to recover damages for any diversion that had been made by it, and did not estop the defendant from showing in another action that its prescriptive right was greater than was necessary for the defeat of the plaintiffs' claim in that action. In McDonald v. Mining Co., supra, the plaintiff, in a former action to recover damages for the diversion of water, had alleged the right to 1,000 inches of water, as against the defendants, and had recovered a verdict against them for damages. In a subsequent action, to enjoin them from diverting water from the stream, it was contended that the plaintiffs' right to this quantity of water had been determined in the prior action, but the court held that the averment in regard to the quantity of water to which the plaintiff was entitled was immaterial, and that his right to recover could not have depended upon such proof.

Upon the allegations and the evidence before it the court found in the present case that in the month of December, 1875, the defendant, under a claim of right, appropriated and diverted a portion of the waters flowing in said Cole slough, sufficient to fill a ditch 20 feet wide on the bottom and 40 feet wide on the top, leading out from Cole slough, and had each and every year since said month continuously, and by means of the same ditch and the same dam, under the same claim of right, taken and diverted sufficient water to fill said ditch for the purposes of irrigation, adversely to the plaintiffs and the whole world, and that said ditch is of sufficient capacity to carry about 190 cubic feet of water flowing per second, and that defendant has, by means of said ditch and dam as aforesaid, under the same claim of right, and in the same manner, during the same time, carried, taken, and diverted from said slough about 190 cubic feet of water flowing per second; and, as a conclusion of law, that it had acquired a prescriptive right to divert that amount of water from the slough. The evidence before the court was sufficient to sustain this finding, unless the judgment in the former action was conclusive against the right of the defendant to divert more than 100 cubic feet of water per second, but, as we have before seen, that judgment cannot be regarded as conclusive against the defendant upon this point. The judgment itself was merely a determination that the plaintiffs had no right to recover damages against the defendant for any diversion that it had made, and, aside from its determination of the facts implied in its finding upon the statute of limitations, the only issue determined by the court which was essential to the judgment was that the defendant had acquired a right "to divert from the waters flowing in Cole slough a sufficient amount thereof to fill a ditch twenty feet wide at the bottom and forty feet wide at the top, to be used for the purposes of irrigation." The effect of this judgment, and also of the determination of this issue, is not limited by the fact that the defendant therein in its answer, in addition to its plea of the statute of limitations, alleged that it had acquired the right to divert 100 cubic feet of water per second. That allegation was only a statement made by the party for the purpose of meeting the plaintiffs' demand. As an admission in the action in which it was made, the defendant would have been bound, but in any other action it would have no higher effect than any other statement. Boileau v. Rutlin, 2 Exch. 681. "As a mere statement or allegation, it had no greater effect than any other mere admission or assertion of a party respecting a material fact. As an admission, it was evidence, but not conclusive. In the judgment there was no determination of the fact. On the contrary, it simply shows that the plaintiffs failed in their action, and that the defendant recovered his costs." Sweet v. Tuttle, 14 N. Y. 470. The court did not purport, either in its finding or in its judgment, to determine the extent to which the defendant had acquired the right to divert the waters. It did determine that it had the right to divert a sufficient amount to fill a ditch of certain dimensions, but did not determine what that amount was, or the capacity of the ditch. In the present case it determines that that ditch is of sufficient capacity to carry about 190 cubic feet of water flowing per second, and that that is the amount which the defendant has during the exercise of its prescriptive right taken and diverted from said slough. The evidence was sufficient to sustain the finding of the court that the capacity of the ditch was sufficient to divert this amount of water per second. The contention of appellants that there was uncontradicted testimony that in a certain part of the ditch its capacity was much less does not impair the testimony respecting the capacity of the ditch at the point of diversion. The section of the ditch to which this evidence of the plaintiffs was directed was about three miles below the point of diversion, and the testimony as to its capacity at that point is not inconsistent with the testimony respecting its capacity at the point of diversion, since it was shown that much of the water was taken from the ditch before it reached that point.

The failure of the court to find upon the claim of the plaintiffs that the defendant had no right to divert any of the waters of the slough, except at times when there is more than 500 cubic feet of water in the channel, flowing past the head of the defendant's ditch, cannot be regarded as error. The plaintiffs were not entitled to a finding upon this issue, unless there was evidence before the court in support of their claim, nor unless a finding thereon would counteract the other findings to such an extent as to invalidate the judgment. The only evidence in support of the averment is the finding to that effect made by the court in the former action, but, as that finding was outside of the issues in that action, and did not enter into the judgment therein, it could not have any effect in that action, and cannot have any greater effect as evidence in the present action than would any other declaration made by the judge who tried the former action. See People v. Johnson, 38 N. Y. 63; Springer v. Bien, 128 N. Y. 99, 27 N. E. Rep. 1076.

The plaintiff Lillis was asked whether prior to the 12th day of October, 1883, the water that was diverted at the head of defendant's ditch was carried down to a point between two and three miles below the headgate of the defendant's ditch, and then a portion of it at that point turned back into a waste way, through which it returned to the slough. This question was objected to, and the answer excluded by the court. In this ruling the court did not err. The plaintiffs had alleged in their complaint that in the action brought by them against the defendant, October 12, 1883, it had been decided by the court that the defendant had prior thereto acquired the right to divert, by means of its ditch and dam, from the waters flowing in the slough, a sufficient amount thereof to fill a ditch 20 feet wide at the bottom and 40 feet wide at the top, and had since the month of December, 1875, continuously, by means of that ditch, and under its said claim of right, taken and diverted sufficient water to fill said ditch. This averment of such decision by the court carried with it the admission that the decision was sustained by sufficient evidence, and was in accordance with the fact, and was itself an admission of record which was inconsistent with the evidence thus offered, and the plaintiffs could not be permitted to contradict this admission. The effect of the admission was not qualified by a previous averment in the complaint that the defendant had not in fact at any time prior to October 12, 1883, permanently diverted more than 40 cubic feet of water per second from the slough, for such averment was itself contradictory to the averment of what the court had decided, and, between the two inconsistent averments, that respecting the decision of the court has the greater weight, and must be taken against the plaintiffs. Upon the case presented in their complaint, the plaintiffs, by this averment of the decision of the court, conceded, in legal effect, the right of diversion from the slough of water enough to fill the ditch, and it was immaterial that, after such diversion had been rightfully made by the defendant, some of the water found its way back to the slough. The plaintiffs, moreover, did not attempt to show that the defendant caused any of the water that had been diverted by it to be returned to the slough. The judgment and order are affirmed.

I concur: GAROUTTE, J.

PATERSON, J. I concur. I do not think it was essential in the former action for the court to determine the quantity of water flowing through the ditch, but, if it was material, such quantity was not fixed. The court by its decree in this action has made certain that which was left uncertain in that respect in the former case, where the findings described the quantity as being "sufficient to fill a ditch twenty feet wide at the bottom and forty feet wide at the top." Neither the findings nor the judgment in that case attempt to fix the number of cubic feet of water; and, as neither the depth of the ditch nor its grade is given, it is impossible to tell what the capacity of the ditch was. It is true the defendants in their answer in that action claimed that they had acquired by appropriation "the right to divert from said Cole slough, and to use for the purposes of irrigation and other purposes, as aforesaid, about one hundred cubic feet of water flowing per second, measured under a four-inch pressure of the waters thereof;" but as counsel for appellants himself states, the addition of the words "measured under a four-inch pressure" makes the whole description "an hydraulic absurdity. One hundred cubic feet of water per second is one thing. One hundred cubic feet of water, measured under a four-inch pressure, is altogether a different thing. In calculating the discharge of flowing water, the principles of hydraulics require that the discharge shall be measured by time or by pressure, and a discharge cannot, in the nature of things, be estimated by time and pressure together." The decree in this case describes the ditch exactly as it was described in the former action.

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96 Cal. 155

WARD v. MARSHALL. (No. 14,430.)

(*Supreme Court of California.* Sept. 2, 1892.)

OFFICER—REMOVAL—REVERSAL OF JUDGMENT—SALARY.

Pen. Code, § 770, provides that from a judgment of removal from office "an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action; but, until such judgment is reversed, defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy." *Held* that, where a judgment removing a justice of the peace from office for willful misconduct therein is reversed on appeal, the justice is entitled to his salary during the period of removal, though another has filled the vacancy and been compensated therefor.

In bank. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

Action by F. P. Ward against John Marshall to recover unpaid salary. Judgment for defendant. Plaintiff appeals. Reversed.

Raleigh Barcar, for appellant. *O. P. Dobbins*, for respondent.

DE HAVEN, J. The plaintiff was a justice of the peace within the county of Solano, and on April 29, 1889, was accused by the grand jury of that county of willful misconduct in office. He was tried upon this accusation, and convicted, and on June 17, 1889, the superior court made and entered its judgment in the proceeding, removing him from his office. In December following the plaintiff took an appeal to this court from that judgment, and on September 10, 1890, the judgment was reversed. One of the grounds for the reversal was that the accusation against plaintiff did not state facts sufficient to authorize the judgment. People v. Ward, 85 Cal. 585, 24 Pac. Rep. 785. On July 22, 1889, the board of supervisors of the county appointed one Parker to the office from which plaintiff had been removed by the judgment of the superior court. Parker qualified and discharged the duties of such office until the judgment removing plaintiff was reversed by this court, and the county paid to him the amount of the salary of such office during that period. The defendant here is the auditor of Solano county, and this is a proceeding to compel him to draw his warrant on the treasurer of that county in favor of plaintiff for the salary attaching to the office referred to between the date of the judgment of the superior court removing plaintiff therefrom and the reversal of that judgment by this court. The superior court gave judgment in favor of defendant, and the plaintiff appeals.

It will be seen from the foregoing statement of facts that the sole question for decision here is whether appellant is entitled to the salary of the office to which he was elected, and for which he had duly qualified, during the time he was suspended from the performance of its duties by the erroneous judgment of the superior court. It is claimed by respondent that, under section 770 of the Penal Code, which provides for an appeal from a judgment of removal from office, this question must be answered in the negative. That section is as follows: "From the judgment of removal an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action; but, until such judgment is reversed, the defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy." This section does very clearly provide that until the judgment of removal is reversed the defendant in the proceeding is suspended from his office, and that pending the appeal the office must be filled as in case of a vacancy; but there is nothing in this provision inconsistent with the right of such officer to receive the salary attached to his office if the final judgment in the proceeding shall be in his favor. The section must be construed as a whole, and the first sentence thereof, which gives to a defendant in such a proceeding the right to appeal from the judgment, must be allowed to accomplish its obvious purpose. Nothing can be clearer than that the legislature, by this provision, intended that the rights of a defendant in such a proceeding—his right to hold the office and receive its emoluments—should not be finally determined against him by the judgment of the superior court; and the right of appeal given by this section, in the absence of clear and explicit declaration to the contrary, must be held to secure to a defendant, if successful upon such appeal, the usual results which as between the parties flow from the reversal of a judgment, to wit, the restoration of all rights which had been taken from him by such erroneous judgment. The effect of a reversal of a judgment is to leave the parties where they stood before its rendition. Phelan v. San Francisco, 9 Cal. 16; Crispen v. Hannovan, 86 Mo. 168; Elliott, App. Proc. § 580. And this was the effect of the reversal of the judgment in the proceeding brought by the people of the state to remove plaintiff from his office, and he then became entitled to recover the salary of which he had been deprived by the erroneous judgment of the superior court. This right to receive such salary was not finally lost by him by such judgment, but only suspended during the period it remained unreversed. The plaintiff, by virtue of his election and qualification as justice of the peace, became entitled to the salary attached to such office during the term, if he should live so long, and was not guilty of any misconduct for which he should be removed, or did not otherwise forfeit his legal title to such office. The right to receive the salary is an incident which attaches itself to the legal title to the office. Dorsey v. Smyth, 28 Cal. 21; Burke v. Edgar, 67 Cal. 182, 7 Pac. Rep. 488; People v. Potter, 63 Cal. 127; Fitzsimmons v. City of Brooklyn, 102 N. Y. 536, 7 N. E. Rep. 787; Andrews v. Portland, 79 Me. 484, 10 Atl. Rep. 458. And when an officer is accused of misconduct in office, and an action brought to remove him therefrom, the question of his guilt or innocence can only be determined by the final judgment in the proceeding; and when in the action brought against plaintiff it was finally adjudged that he was not guilty of the misconduct charged against him, or that the accusation itself did not state facts which would justify his removal, the litigation was then terminated in his favor, and it would be unreasonable to hold that notwithstanding the final judgment, to the effect that he had done nothing to warrant his removal from office, yet he had by the erroneous and reversed judgment been deprived of all that made the office of any pecuniary value. The fact that during the time of his suspension from office its duties were performed by a person properly appointed for that purpose, and that the county has paid him the salary, does not affect the right of plaintiff to recover. He was, without fault on his part, and against his consent, released from the performance of the duties of such office for the period named. Fitzsimmons v. City of Brooklyn, 102 N. Y. 536, 7 N. E. Rep. 787; Andrews v. Portland, 79 Me. 485, 10 Atl. Rep. 458. Judgment reversed.

We concur: McFarland, J.; Harrison, J.; Sharpstein, J.

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96 Cal. 152

Rose v. Foord. (No. 14,060.)

(*Supreme Court of California.* Sept. 2, 1892.)

Sale of Shares of Stock—Failure to Issue—Recovery of Purchase Money—Statute of Limitations—Demand.

1. Where the purchaser of shares of stock to be issued by a mining corporation pays the purchase price, and the corporation is prevented by an injunction from issuing the stock so that the vendor cannot perform his contract, the purchaser, after waiting a reasonable time and making demand for the repayment of the purchase money, may maintain an action therefor against the vendor's administrator.

2. Where, in such case, it appears that the sale was made in 1882, and demand for repayment of the purchase money was made on the vendor's administrator in 1888, the action is not barred by the statute of limitations, since it did not accrue until demand was made.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Rose against Foord, as administrator of the estate of N. R. Vail, deceased, to recover the purchase money paid for shares of stock to be issued by a mining corporation. From a judgment for plaintiff, and an order refusing a new trial, defendant appeals. Affirmed.

Lee & Scott, for appellant. *Chapman & Hendrick*, for respondent. *John J. Roche* and *Gordon & Young*, *amici curiæ*.

Beatty, C. J. In November, 1882, the plaintiff and defendant's intestate, N. R. Vail, made an agreement in writing by which said Vail sold and promised to deliver to plaintiff 18,750 shares of stock in a mining corporation then about to be formed in the state of New York; the shares so to be delivered being one half of the whole number to which said Vail claimed he would be entitled on the completion of the incorporation. The purchase price of the stock ($4,000) was paid by the plaintiff at the date of the contract. The corporation was subsequently formed, but the issuance of its stock was enjoined at the suit of third parties, and the injunction has never been dissolved. In March, 1888, Vail died, and in due time thereafter plaintiff presented a proper demand to his administrator for the repayment of the $4,000 advanced by him as the purchase price on said stock. His demand being refused, plaintiff commenced this action to recover said $4,000, as money had and received to his use. The findings and judgment of the superior court were in favor of the plaintiff, and defendant appeals from the judgment and from an order denying a new trial.

The appellant contends that the superior court erred in finding that plaintiff was a purchaser of stock to be issued, claiming upon the evidence that he was really a purchaser of an interest in the mine, and upon this proposition mainly he bases his defenses to the action. We think, however, that the evidence very fully and clearly sustains the findings of the court as to the real nature of the contract which is embodied in a series of letters written and received by the respective parties. But, admitting that the contract was as the court found it, the appellant still contends that the plaintiff mistook his cause of action, and that the action is barred by the statute of limitations. Without noticing specially the various points made in the argument, it is sufficient to say that the stock which was the subject of the sale, never having been issued, must be regarded as never having come into existence, and the plaintiff, therefore, after waiting a reasonable time for its issuance, had a right to demand and receive back the money advanced upon the purchase. He was not confined to an action for damages for breach of contract to sell and deliver, and, indeed, such an action would have afforded him no redress; for the stock, never having had an existence, had no market value, and the rule of damages in such actions (Civil Code, §§ 3309, 3336) could not have been applied. The right to recover the purchase money and interest in such a case is affirmed in Peat Fuel Co. v. Tuck, 53 Cal. 304, and in Maher v. Riley, 17 Cal. 415.

The proposition that the statutory rule of damages for breach of contract to sell personal property does not apply, and that other rules do apply when the subject of the sale has no market value, is sustained by the decision in McKay v. Riley, 65 Cal. 623, 4 Pac. Rep. 667. The plaintiff, then, we repeat, had a right, after waiting a reasonable time for the issuance of the stock, to demand back the purchase money; and, until he made such demand, its retention by the vendor was lawful, there was no cause of action to recover it, and the statute of limitations did not begin to run. No doubt the plaintiff might reasonably have made such demand long before Vail's death, but he never did. On the contrary, he accepted Vail's excuses for the delay, and offered to contribute to the expenses of procuring a dissolution of the injunction, which alone prevented the issuance of the stock. In short, he stood by the contract and waited for the stock till Vail died, and it does not lie in the mouth of the defendant to say that he waited too long. When he chose to wait no longer, and to demand back his money, he had an undoubted right to receive it. The judgment and order are affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; HARRISON, J.; PATERSON, J.; MCFARLAND, J.

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96 Cal. 125

PEOPLE v. WONG ARK. (No. 20,919.)

(*Supreme Court of California.* Sept. 2, 1892.)

JURY—ACTUAL BIAS—APPEAL—RES GESTÆ.

1. Pen. Code, § 1170, subd. 2, providing that exceptions may be taken by defendant in a criminal case to a decision of the court "in admitting or rejecting testimony on the trial of a challenge to a juror for actual bias," does not authorize an exception to a ruling on the challenge, or a review of such ruling.

2. Such statute, so far as it denies the right of appeal from a decision as to actual bias of a juror, is unconstitutional, as denying the right of trial by an impartial jury. Per Garoutte and De Haven, JJ.

3. On a trial for murder, evidence that, a few minutes after the shooting, deceased said that defendant shot her, is not admissible as part of the res gestae. People v. Vernon, 35 Cal. 51, disapproved.

4. Under Pen. Code, § 1123, providing that, if a juror becomes sick and is discharged, a new juror may be sworn and the trial begin anew, when a new juror is sworn defendant is entitled to all the peremptory challenges he had in the first instance. People v. Stewart, (Cal.) 28 Pac. Rep. 112, followed.

In bank. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Wong Ark was convicted of murder. From an order denying a motion for a new trial, and from the judgment, defendant appeals. Reversed.

Jesse Hardesty, for appellant. *Atty. Gen. Hart*, for the People.

PATERSON, J. The appellant was convicted of murder, and sentenced to imprisonment in the state prison for life. A motion for a new trial was made and denied, and from the order denying the motion, and from the judgment, the defendant has appealed. The appellant's chief contention is that the court abused its discretion in overruling the defendant's challenge for actual bias, made to several of the persons who were examined as to their qualifications to serve as jurors. Section 1170 of the Penal Code does not provide for the exception to a challenge for actual bias, and it has been held here in several cases that there is no exception, and that there can be no review of the ruling upon such a challenge. The appellant contends, however, that the section referred to is unconstitutional and void, because "it deprives the accused of the right to except to the decision of the trial court in disallowing a challenge for actual bias, urged by the accused against a proposed juror, and takes away from the accused the safeguard of a trial by an impartial jury, and deprives him of his life or liberty 'without due process of law.'" But we are not called upon to determine the constitutionality of the act. We have examined the testimony of each juror, given upon his *voir dire*, and are satisfied that the challenges were properly denied. To establish actual bias there must be shown "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality, and without prejudice to the substantial rights of either party." Section 1170, Pen. Code. The testimony fails to show that there existed in the mind of any of the jurors any prejudice, either with reference to the facts of the case or the parties to the action.

At the trial a police officer of the city of Los Angeles was permitted to testify that, after the shooting, he ran to the place where the deceased was lying on the porch, (a distance of about 140 yards,) and "had a conversation with her for possibly half a minute, or a little longer;" that, when he reached the place where she was lying, there were several persons present. Against the objection of the defendant, the witness was permitted to state that the deceased declared that the defendant was the man who had shot her. This ruling of the court was erroneous. The declaration was not made in the presence of the defendant, and it was not admissible as a dying declaration, because no foundation therefor was laid. If admissible at all, it was only as a part of the *res gestæ*.

It is often difficult to determine what acts or declarations are part of the *res gestæ*. There is an apparent conflict in the authorities on the subject. Each case must be determined upon its own peculiar facts. Wharton says: "The distinguishing feature of declarations of this class is that they should be necessary incidents of the litigated act; necessary in this sense: that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. * * * The rule before us, however, does not permit the introduction under the guise of *res gestæ* of a narrative of past events, made after the events are closed, by either the party injured or by the bystander." At the time the declaration referred to was made, the shooting had been done, and the assailant had escaped from the scene of the shooting. The declaration was not the fact talking through the party, but the party's talk about the facts. Whart. Crim. Ev. §§ 266, 691. The subject under consideration was carefully considered by Mr. Justice Sharpstein in People v. Ah Lee, 60 Cal. 85, and the views therein expressed we think are correct, and applicable to the case at bar.

During the impanelment of the jury, and after nine jurors had been selected and sworn to try the case, two of the jurors were excused on the ground of illness. At that time the defendant had exercised 9 of the 20 peremptory challenges allowed him by law. The remaining 7 jurors were retained, and additional men were called to fill the panel. When 11 jurors had been sworn to try the case, the defendant had exercised in all 20 of the peremptory challenges. The defendant attempted to excuse by peremptory challenge the twelfth juror called, but the court held that he had already exhausted the peremptory challenges allowed him by law, refused to allow the challenge, and directed the clerk to swear the juror, which was done. The court erred in not allowing the defendant to exercise the peremptory challenge. Section 1123, Pen. Code;[1] People v. Stewart, 64 Cal. 61, 28 Pac. Rep. 112; People v. Brady, 72 Cal. 492, 14 Pac. Rep. 202.

We have examined the instructions given to the jury, and think they state the law applicable to the case fully, fairly, and correctly. The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: McFarland, J.; Sharpstein, J.

Harrison, J. I concur in the reversal upon the ground that the court erred in permitting the police officer to give evidence of the declarations of the deceased.

Garoutte, J. While concurring in the opinion of Mr. Justice Paterson, I deem some of the matters presented by this appeal to be of such grave importance that a further consideration of them will not be labor lost. The case of People v. Vernon, 35 Cal. 51, is the leading case in this state upon the question of *res gestæ*, and it was undoubtedly upon the authority of that case that the trial court admitted the evidence of which appellant now complains. Measured by the doctrine there declared, the ruling of the court in this case was correct; but I think that decision rests upon no sound legal principle, and it should be expressly so declared, in order that it shall no longer serve as a shining light held in the hands of *res gestæ* for the sole purpose of leading *nisi prius* courts upon fatal rocks of error. The term "*res gestæ*" is defined as the "things done," or, liberally speaking, may be said to be "the facts of the transaction." Was this statement made by the deceased, under the circumstances disclosed by the record, part of the *res gestæ* or things done, or was it a statement of a matter pertaining to a past event,—a matter entirely completed and concluded? While, owing to the varying phases of human affairs, it is not possible to lay down a rule which will determine what is the *res gestæ* in every case, yet all criminal law writers agree that declarations merely narrative of a past occurrence cannot be received in evidence as proof of the existence of such occurrence upon the principle of *res gestæ*. Wharton on Evidence, § 259, says: "The '*res gestæ*' may be therefore defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. * * * Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. They are admissible through hearsay, because in such cases, from the nature of things, it is the act that creates the hearsay, not the hearsay the act. It is the power of perception, unmodified by recollection, that is appealed to, not of recollection modifying perception; whenever recollection comes in,—whenever there is opportunity for reflection and explanations,—then statements cease to be part of the *res gestæ*."

Weighed in the balance furnished by Mr. Wharton, the Vernon Case meets no requirement of the law. The facts of that case were as follows: "It appears from the evidence, as presented in the record that a witness, Dainty, resided about two hundred feet from the residence of the prisoner; that deceased called at witness house on Friday evening, the 21st of December, between ten and eleven o'clock, and requested him to go with deceased to the house of the prisoner for the purpose of amicably arranging a recent difficulty between prisoner and deceased. Dainty told deceased to wait till he put on his clothes and he would go along, to which deceased replied that he would go along and see prisoner if he was up, and if he was in bed he would call him up, and witness could come along. Witness dressed himself and started, had passed about half the length of his porch, when he heard a shot; continued to advance towards prisoner's house, and immediately heard three more shots in quick succession, and when he got about halfway to prisoner's house met deceased walking fast from the direction of prisoner's house. That it was about half a minute, and not exceeding three quarters of a minute, from the time witness heard the first shot till he met deceased, who immediately said he had been shot treacherously by defendant; that he (deceased) was sitting down on defendant's porch; that defendant came out to the door and spoke to him, and said, 'Wait till I go and put my boots on;' and, instead of going to put his boots on, he came out with a gun and shot him when he was sitting on the porch; that, when he [deceased] got up to go away, defendant followed after, and shot him in the back." Upon this state of facts the court admitted the statements of the deceased as being part of the *res gestæ.* The assignment of error in this regard was disposed of in a somewhat summary manner upon the authority of Greenl. Ev. § 108; Mitchum v. State, 11 Ga. 615; and Com. v. McPike, 3 Cush. 181. It is perfectly apparent that the statements of the deceased to the witness were purely narrative of a past event. They formed no part of the transaction, were no element of the thing done, and in no sense spontaneous or automatic, and we find nothing in the citation from Greenleaf as authority to support the decision.

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[1] Pen. Code, § 1123, provides that "if, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled."

In Com. v. McPike the record is as follows: "The attorney for the commonwealth called Benjamin D. Shaw as a witness, who testified that, about the time mentioned by the preceding witness, he heard the voice of a woman crying 'Murder!' as she was going upstairs. He got up, and, going towards the room, met the last witness coming out, who told him not to go up, for the defendant would kill her, and he then saw the defendant coming out of the room. The witness then went for a watchman, and, coming back, went immediately up to the room where the deceased was, and there found her on the floor bleeding profusely. She asked the witness for some water, and to go for a physician. She said that John (meaning the defendant) had stabbed her, and told the witness what she wanted done if she died." Upon appeal the court held the statement of the deceased admissible upon the ground that the period of time at which these acts and statements took place was so recent after receiving of the injury as to justify its admission as part of the *res gestæ,* and upon the further ground that in the admission of testimony of this character much must be left to the exercise of the sound discretion of the presiding judge. These grounds are untenable. Neither upon principle nor authority does the fact (of itself) that the statement was made within a very few moments after the injury was received, stamp such statement as *res gestæ.* As to the second ground relied upon to support the admission of the evidence, the same court said, in Lund v. Inhabitants of Tyngsborough, 9 Cush. 41, referring to the admission of evidence as *res gestæ:* "Its admission is not left to the discretion of the presiding judge, as has been sometimes supposed, but is governed by principles of law, which must be applied to particular cases as other principles are applied in the exercise of a judicial judgment." In the decisions of the New York courts we find the McPike Case referred to, as carrying the doctrine of *res gestæ* to exteme lengths, and in the subsequent adjudications by the Massachusetts courts upon this question Com. v. McPike does not appear to be recognized as a precedent for future guidance. From the facts of that case it appears that, after being wounded, the woman went upstairs to a room. The witness then went for a watchman, and upon his return to the room found her lying upon the floor, and then she said that "John had stabbed her," asked for water, and requested that he should go for a physician. It is entirely apparent that her statement as to the stabbing was the narrative of a past event, and should not have been admitted as *res gestæ.* It was no more a part of the *res gestæ* than if the statement had been made to the witness upon his return after calling the physician.

We will not pause to review the Georgia case, the remaining authority relied upon to support People v. Vernon, but will only say it appears to possess some substantial marks of difference from the other cases, although probably in line with them. There are a few English cases also supporting People v. Vernon, notably Rex. v. Foster, 6 Car. & P. 325, and Thompson v. Trevanion, Skin. 402; but in Rosc. Crim. Ev. p. 29, the learned author in referring to these cases says: "These two cases are difficult to reconcile with established principles." In the case of Reg. v. Bedingfield, 14 Cox, Crim. Cas. 341, the evidence disclosed that the deceased went into her house, from which she emerged quite suddenly in a minute or two, coming towards the witness, who was in the yard. Her throat was cut. She was bleeding very much. She said something, pointed towards the house, and died within a few minutes. Her statement was offered as *res gestæ,* and excluded by Chief Justice COCKBURN, upon the ground that it was not part of anything done or said, but something said after the act was completed and concluded. The chief justice said: "Anything uttered by the deceased at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as 'Don't, Harry.' But here it was something stated by her after it was all over, whatever it was, and after the act was completed." The legal soundness of this decision was attacked by some of the law writers of the day, and the chief justice answered these attacks in a pamphlet supporting his decision, and, among other cases, reviewed and dissented from Com. v. McPike, heretofore cited. The tendency of the later decisions of the court has been to restrict within narrow limits this species of testimony, and modern authority would seem to support the Bedingfield Case. In referring to it in Rosc. Crim. Ev., at page 40, the author says: "This decision gave rise to some discussion. * * * It should seem that the ruling of COCKBURN, C. J., was correct, if it is to be taken as a fact that the transaction was entirely at an end, which appears to be the case." The case at bar presents a much stronger array of facts for appellant than is disclosed in that case.

No rule can be laid down for all cases. Each case must be tested to a great extent by its own facts, but the fact that the statements may have been made immediately subsequent to the wounding or killing is in no sense true *indicium* that they are *res gestæ.* When the statements are the spontaneous outgrowth of the main fact, when, as Mr. Wharton says, "they are the act talking for itself, and not what people say when talking about the act," then they become *res gestæ*; otherwise they are merely narrative of a past event, and, in the interest of truth and justice, should be rejected. Again, statements made with a view to the apprehension of the offender are in no sense *res gestæ*, and the statement of the deceased here considered is of that character. In this case the "thing done" was the shooting. The officer was not present at the time, but was 140 yards distant. He traveled that distance, and found the deceased lying upon the sidewalk, and several Chinese in her immediate presence. An opportunity for reflection and recollection had presented itself, and corrupt influences may have suggested her statement. It was a statement that defendant did the shooting. It was a narrative of a past event; in no respect an automatic or spontaneous incident of the shooting; no part of the thing done; and should not have been placed before the jury.

It is insisted by appellant that the court erred to the prejudice of his substantial rights during the formation of the jury by overruling his challenge to certain jurors upon the ground of actual bias, to wit, the existence of a state of mind on the part of the juror, in reference to the case and to the defendant, which would prevent him from acting with entire impartiality and without prejudice to the substantial rights of the defendant. The appellant excepted to the order of the court denying his challenge, and now asks that such ruling be reviewed. The accused exhausted all the peremptory challenges given him by law, and these men whose competency as impartial jurors is now attacked formed part of the jury which rendered the verdict. We are met at the threshold of the examination by the objection that under section 1170 of the Penal Code, supported by a long line of decisions, there is no exception allowed to a defendant from a ruling of the court denying a challenge for actual bias, and that consequently there is no appeal to this court from such ruling. This brings us to a consideration of that section of the Code before we can look into the evidence. It reads as follows: "On the trial of an indictment or information exceptions may be taken by the defendant to a decision of the court: (1) In disallowing a challenge to the panel of the jury, or to an individual juror, for implied bias; (2) in admitting or rejecting testimony on the trial of a challenge to a juror for actual bias; (3) in admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law upon the trial of the issue."

When the legislature said the accused was entitled to an exception to a decision of the court in admitting or rejecting testimony on a trial of a challenge to a juror for actual bias, that enactment was of little practical benefit to a defendant charged with crime. We are acquainted with but a few cases from our reports, (and there the question arose under peculiar circumstances) in which an appellant has ever secured a new trial by availing himself of the benefits of the exceptions therein secured, although the right of a person charged with crime to have his guilt or innocence passed upon by 12 impartial jurors has been recognized and declared sacred, not only by the common law, but by the supreme law of every state of this Union. While it is not clear that any valuable rights are given to the defendant under this provision of law, it is very apparent therefrom that the legislature intended to deprive him of the right to review the action of the lower court in denying a challenge to a juror for actual bias. That is not only apparent from the section, but this court has repeatedly held such to be its object and effect. In other words, each of twelve jurors may state upon his *voir dire* that he has a fixed and settled opinion of the defendant's guilt, or that he has such a bias and prejudice against the defendant that he could not act with entire impartiality in the trial of the case, and if thereupon the court should deny a challenge to each of the said jurors upon the ground of actual bias, and impanel them as a jury to try the case upon a verdict of guilty by such a jury, the defendant might suffer death, for the legislature has said that he should be forever barred from raising in the higher court any inquiry as to the condition of mind of the men who convicted him at the time they took their places in the jury box. This section of the Code, under the construction given it by the various decisions of this court, is unconstitutional, and no extended examination of fundamental principles is necessary in order that its unconstitutionality may be made plain. The legislature of the state has power to formulate and regulate the practice of the law and the procedure under the law, but subdivision 2 of section 1170 involves principles broader and deeper than any mere question of practice or procedure.

Article 6 of the amendments to the constitution of the United States says: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. * * *" Section 7, art. 1, of the constitution of the state of California, reads: "The right of trial by jury shall be secured to all and remain inviolate." And when the constitution of this state guaranties to all the right of trial by jury, it means an impartial jury; as Blackstone says, (book 4, p. 350,) a jury of "freeholders without just exception." Cooley, in his work on Constitutional Limitations, pp. 390-393, says: "Accusations of criminal conduct are tried at the common law by jury; and, whenever the right to this trial is guarantied by the constitution without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law, and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused. * * * Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the commonwealth." See, also, People v. Powell, 87 Cal. 348, 25 Pac. Rep. 481. In Stokes v. People, 53 N. Y. 171, the court said: "The position of the counsel for the accused is that the right of trial by jury is secured to persons accused of felony by the constitution, and that this secures the further right of trial by an impartial jury. We shall assume the correctness of the latter position. Any act of the legislature providing for the trial otherwise than by a common-law jury composed of twelve men would be unconstitutional and void, and any act requiring or authorizing such trial by a jury partial and biased against either party would be a violation of one of the essential elements of the jury referred to in and secured by the constitution." In the case of State v. McClear, 11 Nev. 39, principles similar to those here involved were exhaustively discussed, and the entire range of authorities bearing upon the question reviewed, by HAWLEY, C. J., and it was there decided that it was not within the power of the legislature to deprive a citizen accused of crime of the right to challenge a juror for actual bias, and an act of the legislature to that effect was declared unconstitutional. That act was declared invalid upon the ground that the accused, under the supreme law of the land, was entitled to a trial by an impartial jury, a jury indifferent between the people and the accused, and to deprive him of the right to challenge jurors for actual bias was to deprive him of the right to be tried by an impartial jury. Section 1170 of the Penal Code does not go to the extent of the act which was under consideration in the McClear Case, but does go to the extent of declaring that, when the trial court has adjudged that a juror is an impartial juror, the matter is foreclosed, and no further inquiry shall ever be made. In other words, upon such an adjudication the court could commit no error, could do the defendant no wrong, and therefore no right of appeal should exist.

The constitution of this state vests in this court appellate jurisdiction in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone, and no act of the legislature, or omission to act, can subtract anything from the jurisdiction conferred by the constitution, or fetter this court in the exercise of that jurisdiction. As the legislature has no power to grant the court jurisdiction, it has no power to deprive the court of jurisdiction. The jurisdiction of this court came from a source of power above and beyond the legislature of the state, and the court can only be deprived of it by the power from whence it came. This court has appellate jurisdiction of the present case upon all questions of law, and when the accused comes before the court, saying that he has been convicted of a felony by a verdict of a jury composed of 12 men, who were not impartial jurors, presents in a legal manner the evidence upon which he relies to establish such facts, and asks us to review that question as an error of law committed by the lower court, we are bound under the constitution to grant his request, notwithstanding the legislature may have declared that he shall not be entitled to an appeal as to such matter.

If the defendant has been tried and convicted by a jury of men whose minds were biased against him when they entered the jury box, he has been deprived of substantial rights; for he has been deprived of rights guarantied to him by the constitution,—the same constitution that created this court, and imposed upon it the duty of protecting all men in the enjoyment of every right vouchsafed to them by that instrument. The legislature could as well have enacted that the accused should not be entitled to an exception from an order of the court compelling him to be tried by an impartial jury of 10 men, or from an order depriving him of the right to any jury trial whatever. Justice would probably overtake him under these conditions, but it would be a mockery of justice to submit his guilt or innocence to a jury of his enemies. This court decided in People v. Powell, supra, that the defendant was deprived of his constitutional rights by an act of the legislature, which allowed the court, upon motion of the district attorney under certain circumstances, to change the place of trial of the accused to an adjoining county, and thereupon declared such act unconstitutional, as being violative of that provision of the constitution previously quoted, that "the right of trial by jury shall be secured to all and remain inviolate." It will thus be seen that the constitutional rights of the accused are guarded by the courts with untiring care and a jealous eye. And, while there may be differences among the courts of this country as to what particular incidents of a common-law jury are carried into the constitutions of the various states, all courts agree that the incidents that the jury must consist of 12 impartial men, men who stand indifferent between the parties, are included in the term "jury" wherever found in the organic law of the land. If the legislature has the power to deprive the accused of an exception to the ruling of the court, admitting into the jury box a juror to try defendant who was biased against him and his cause, it would have the same power to deprive him of all exceptions to the rulings of the court. It would have the same power to deprive him of all appeal, for, of the many rights of the accused guarantied to him by the law and the constitution, no one is so important as that he shall be tried by a fair and impartial jury.

The decision of the court upon the challenge of a juror for actual bias in many instances is a decision of a matter of law, and in all such cases there is an appeal to this court given by the constitution. If a juror upon his *voir dire* should state that the accused was his enemy, and such fact would affect his verdict if taken as a juror, no issue of fact would be created; no question of the court's discretion would be involved; but the decision upon a challenge for actual bias based upon such conditions would be a decision upon a question of law. From the existence of such a state of facts it would follow as matter of law that the juror was incompetent to act. In speaking upon this question in Holt v. People, 13 Mich. 227, the court, by Justice COOLEY, said: "Here the juror was himself placed upon the stand, and a single question was put to him. It is upon his reply to that question that the judge's decision was based. The facts were undisputed, and the question of their sufficiency as a cause for challenge was purely a question of law. The decision of the judge upon that question is as fairly presented for review by the exception thereto as if the judge had proceeded to find the facts in the words of the juror, and had then spread upon the record his conclusion that the state of mind in the juror thus found was not, as matter of law, a ground of disqualification." As was said in Eason v. State, 6 Baxt. 477: "It is our duty, and the highest and most responsible imposed upon us, to guard the constitution against infractions. When we are called upon to determine constitutional questions, if we are in no doubt, our path of duty is plain and straightforward. Such is our present position. We are satisfied that the act in question violates the constitution, * * * and we are bound so to declare." It follows that section 1170 of the Penal Code, to the extent that it denies to a defendant the right to take an exception to the ruling of the court upon the trial of the issue of actual bias of a juror, is unconstitutional and void.

De Haven, J., concurs.

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(96 Cal. 223)

DENIS v. VELATI. (No. 14,651.)

(Supreme Court of California. Sept. 20, 1892.)

RESCISSION OF DEED—COMPLAINT.

The complaint, in an action to set aside a deed, alleged that the deed in question was made by plaintiff to defendant in view of death and to take the place of a will; that it was placed in defendant's hands only to enable her to prove the same after plaintiff's death; that it was understood that the deed was not to take effect until after plaintiff's death; that, after acknowledging the deed, plaintiff retained possession of it, and it was understood that he should retain possession of it until his death; that defendant thereafter wrongfully obtained possession of the deed, and had the same recorded. *Held*, that the facts stated were sufficient to entitle plaintiff to a trial as to the delivery of the deed.

Department 2. Appeal from superior court, Alameda county; F. W. HENSHAW, Judge.

Action by Denis against Velati to set aside a deed. Judgment for defendant on the pleadings. Plaintiff appeals. Reversed.

P. C. Trusseau, (*N. B. Malville*, of counsel,) for appellant. *A. Comte, Jr.*, for respondent.

SHARPSTEIN, J. The plaintiff in his complaint alleges that on the 29th day of April, 1890, he made a deed of certain real estate, in said complaint described, wherein and whereby he granted, bargained, and sold said real estate to the defendant. "That said deed was made in view of death, and was intended by plaintiff to take the place of a will, for the purpose of avoiding and doing away with the necessity of probate proceedings after the death of plaintiff, all of which was explained to the defendant, and understood by her. That by understanding with defendant said deed was placed in her hands, ostensibly for the purpose of enabling defendant, after the death of plaintiff, to establish the necessary proof as to the validity of said deed; but in fact it was understood, by and between plaintiff and defendant, that said deed should not take effect until after the death of plaintiff. That after the acknowledgment of said deed by plaintiff, the same was retained by him, and remained in his possession until the wrongful taking thereof by defendant, as hereinafter stated. Said deed was never delivered to defendant. That it was further understood, by and between plaintiff and defendant, that plaintiff should retain the possession of said deed until he would die, and that said deed should not be recorded or take effect before the death of plaintiff. Plaintiff further alleges herein that said defendant wrongfully, and in violation of said understanding in relation to said deed, afterwards, on or about the 24th day of June, 1890, unknown to plaintiff and without his consent and during the time he was sick at the French hospital in San Francisco, obtained possession of said deed from the place plaintiff had it deposited, and had the same filed for record in the county recorder's office of said county of Alameda. That said record of said deed was and is against plaintiff's wish and consent, and has the legal effect of depriving him of the right and legal ownership of his said real estate, upon which he heretofore resided and now resides, and which was and is his home. Wherefore plaintiff prays for the judgment and decree of this court, adjudging and decreeing that the plaintiff was and is still the owner of said land, and the improvements thereon, and that the said deed to defendant was never delivered to her, and was merely intended to take effect after the death of plaintiff, and that the record thereof be annulled and declared invalid, and for such other and further relief in the premises as may be just, lawful, and equitable, and for costs of suit." The complaint was demurred to by defendant, one of the grounds of demurrer being that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The court, in an opinion filed at the time, held that the complaint showed that the deed of plaintiff to defendant was duly delivered, but that the complaint stated another ground upon which the plaintiff might be entitled to other relief, and for that reason the demurrer was overruled, in order that the proper relief might be granted. The defendant filed an answer in which she admits that plaintiff made a deed of the property described in the complaint, but denies that it was made in view of death, or was intended to take the place of a will, for the purpose of avoiding or doing away with the necessity of probate proceedings after the death of plaintiff, "except that it was understood between plaintiff and defendant that, notwithstanding said deed to the defendant, plaintiff should be permitted to occupy the premises conveyed by said deed free from rent during the term of his natural life." She denied that by understanding with her said deed was placed in her hands for the purpose of enabling her, after the death of plaintiff, to establish its validity; "but, on the contrary, avers that said deed was absolutely and unconditionally delivered to her by plaintiff in the presence of witnesses immediately upon the execution of said deed by plaintiff." She denies that she wrongfully, or in violation of the alleged understanding in relation to said deed, or any understanding without plaintiff's consent, obtained possession of said deed, and avers that plaintiff authorized her to do what she wished with said deed. Finally, she avers that she has always been willing and ready to execute any paper document to protect plaintiff in the use and occupation of said premises during the time of his natural life, without rent and free of charge. Wherefore defendant prays that the prayer of plaintiff be denied, and the action dismissed, and that defendant recover her costs, and for such further and other relief as may be proper in the premises. Defendant then gave notice of motion for judgment on the pleadings, as follows: (1) A judgment adjudging defendant to be the owner in fee of the premises described in the complaint; (2) that plaintiff have the use, occupation, and enjoyment of said premises during the term of his natural life free from rent; and (3) that defendant execute unto plaintiff a deed conveying to him a life estate in said premises. The motion was granted, and the court made and entered a judgment in accordance therewith, from which the plaintiff appeals.

The only ground upon which the action of the court could be justified would be that the complaint does not state facts sufficient to constitute a cause of action. If the plaintiff in his complaint sufficiently alleges that he never delivered the deed which he seeks to avoid, the court erred in granting defendant's motion for judgment upon the pleadings. There are allegations in the complaint that said deed was never delivered to defendant. The following paragraph contains such allegation: "That, after the acknowledgment of said deed by plaintiff, the same was retained by him, and remained in his possession until the wrongful taking thereof by the defendant, as hereinafter stated. Said deed was never delivered to the defendant." But the contention of respondent is that the decision of the court below was based upon another paragraph of the complaint, which immediately precedes the one above quoted. The paragraph relied on to justify the action of the court reads as follows: "That, by understanding with the defendant, said deed was placed in her hands, ostensibly for the purpose of enabling defendant, after the death of plaintiff, to establish the necessary proof as to the validity of said deed. But, in fact, it was understood by and between plaintiff and defendant that said deed should not take effect until after the death of the plaintiff." In Prutsman v. Baker, 30 Wis. 644, Dixon, C. J., after reviewing the authorities, says: "To constitute delivery, the grantor must divest himself of all power and dominion over the deed." In Ford v. James, 2 Abb. Dec. 159, Grover, J., says: "A deed may be deposited with the grantee or handed to him for any purpose other than as the deed of the grantor, or as an effective instrument between the parties, without becoming at all operative as a deed." The purpose for which the deed in the case at bar was placed in defendant's hands is stated as other than as an effective instrument between the parties. It was not to take effect until after the death of the grantor. He did not intend it should be an operative conveyance so long as he lived, and he alleges that it was understood between him and the grantee that it should not take effect until after the grantor's death. We think the complaint states facts sufficient to entitle appellant to a trial of the question, whether or not he delivered the deed which he alleges he did not, and the defendant avers that he did deliver, as an operative conveyance of the premises described in the complaint. Judgment reversed, and cause remanded to the court below to try the issue raised by the complaint and answer.

We concur: De Haven, J.; McFarland, J.

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96 Cal. 702

BUSH v. BARNETT. (No. 14,666.)

(Supreme Court of California, Sept. 15, 1892.)

Carriers—Injury to Passengers—Instructions—Evidence.

1. In an action for personal injuries resulting from the overturning of defendant's stagecoach, on which plaintiff was a passenger, there was no error in charging the jury that the proof by plaintiff that she was injured "cast on defendant the burden of proving that the injury was occasioned by inevitable casualty, or by some other cause which human care and foresight could not prevent." Paterson, J., dissenting.

2. On the trial of such case, defendant put in evidence a writing signed by plaintiff after the accident, in which she stated that she did not blame defendant or his driver for the injury. Plaintiff testified that the paper was signed at a time when she was unable to comprehend its meaning. *Held*, that the statement was admissible to enable the jury to weigh plaintiff's evidence, and determine her credibility, and not in mitigation of damages.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action for personal injuries by one Bush against one Barnett. Plaintiff had judgment, and defendant appeals. Affirmed.

Ernest Sevier and *H. L. Smith*, for appellant. *J. D. H. Chamberlin*, for respondent.

Harrison, J. The defendant was the proprietor of a line of stagecoaches running between Hydesville, in the county of Humboldt, and Laytonville, in the county of Mendocino, and on the 2d of October, 1888, received the plaintiff as a passenger to be conveyed in one of his coaches over a portion of the route. While making this trip the coach was overturned, and the plaintiff received certain injuries thereby, for which she brought this action, and recovered a verdict of $900. From the judgment entered thereon, and an order denying a new trial, the defendant has appealed.

The main proposition urged upon this appeal is that the court erred in its instruction to the jury that the proof by the plaintiff that she had been injured "would cast upon the defendant the burden of proving that the injury was occasioned by inevitable casualty, or by some other cause which human care and foresight could not prevent." There was no direct evidence of the immediate cause of the overturning of the coach, other than that, while driving in the nighttime down a steep hill, one of the horses became frightened, and began to kick, and thereupon the team began to run until it got beyond the control of the driver, and ran down the hill until the coach struck some obstacle which upset it, and threw the plaintiff to the ground. Upon these facts the appellant insists that it was incumbent upon the plaintiff to show what was the real cause of the accident, or, at least, to give evidence in disproof of the proposition that it was caused by some inevitable casualty; that, in the absence of any affirmative evidence that the accident was caused by some negligence on the part of the defendant, the jury should have been instructed to find a verdict in his favor. It is, however, a well-established rule that a common carrier is liable for any injury caused by his negligence, and that upon the proof of the injury the presumption is that it was the result of some negligence upon his part, and that, if he would absolve himself from liability therefor by showing that the injury resulted from some unavoidable accident, or from some cause beyond the power of human care or foresight to prevent, such defense is an affirmative one upon his part, which the rule as to the burden of proof requires him to establish by a preponderance of evidence, as in any other affirmative defense. This rule was very clearly enunciated in Boyce v. Stage Co., 25 Cal. 460, and has since been affirmed in Lawrence v. Green, 70 Cal. 417, 11 Pac. Rep. 750; Treadwell v. Whittier, 80 Cal. 583, 22 Pac. Rep. 266. A mere reference to these cases, without repeating the arguments therein presented, is sufficient to show that such is the established rule in this state.

The presumption that the injury was caused by the negligence of the carrier, which is raised upon the proof by the plaintiff that he was injured while being carried as a passenger, is itself a fact which the jury must consider in determining its verdict, and which, in the absence of any other evidence in reference to the negligence, necessitates a verdict in favor of the plaintiff. A presumption which the law raises from admitted or established facts is itself evidence sufficient to sustain a verdict in accordance therewith, and cannot be disregarded by the jury or by the court in any instruction which it may give with reference thereto. Kidder v. Stevens, 60 Cal. 419.

At the trial the defendant introduced in evidence a document which the plaintiff had authorized to be signed in her name after the accident, wherein she purported to exonerate the defendant from liability for damage, and to admit that the injury was the result of an unavoidable accident. The plaintiff gave testimony tending to show that she had no recollection of the paper, and that it was signed at a time when she was unable to comprehend its meaning. Upon its introduction in evidence the defendant stated that he did not offer it as a release from the plaintiff to the defendant, but "only for the purpose of discrediting the testimony of the plaintiff, and in mitigation of damages." The court instructed the jury with reference thereto that it was to be considered by them for the purpose of enabling them to weigh the evidence of the plaintiff, and determine her credibility, and for no other purpose. The defendant assigns this instruction as error, for the reason that, as he had offered it in mitigation of damages, the court should have instructed the jury to so consider it. The defendant did not present to the court a request for any instruction of this character, and the jury were instructed, in assessing any damages they might award, to take into consideration and make allowance for any payments the defendant might have made in behalf of the plaintiff on account of the injuries received by her. We think that the jury was fully and fairly instructed upon this point, and that the court committed no error in its instruction. The statement by the plaintiff after the accident that it was unavoidable, and that she did not blame the defendant or his driver, was not conclusive upon her right of action. It was, at most, only an admission upon her part which she was at liberty to explain, and the jury was to determine the weight to be given to the admission, as well as the sufficiency of the explanation. Smith v. Whittier, (Cal.) 30 Pac. Rep. 529. Certain rulings upon the admission of testimony were excepted to at the trial, which the appellant has assigned as error, but, as the evidence received under these rulings could not have affected the liability of the defendant as shown at the trial, they cannot be regarded as error. The judgment and order are affirmed.

I concur: GAROUTTE, J.

3 Cal. Unrep. 551

PATERSON, J. I concur in the judgment only, because I am not prepared to say the rule is universal that proof of injury in an accident raises a presumption that it occurred through the negligence of the carrier. There are authorities which hold that "each case must depend upon its own circumstances." Madden v. Steamship Co., 86 Cal. 448, 25 Pac. Rep. 5.

BARRETT v. AUSTIN. (No. 14,753.)

(Supreme Court of California. Sept. 1, 1892.)

CONSTRUCTION OF CONTRACT—ABANDONMENT OF WORK—RIGHT TO DAMAGES.

1. In an action on a contract for boring a well on plaintiff's land it appeared that he agreed to furnish the casing, fuel, and board for defendant and his men "at his own expense," and pay-

a certain sum when the well was completed. Defendant agreed to continue boring the well, "barring bad weather or other unavoidable hindrances," till a certain depth was reached or impenetrable rock was encountered. When about half the agreed depth was reached, defendant's auger broke near the lower end, and became fastened in the well. Defendant claimed he could remove the broken piece, and, after striving unsuccessfully for three weeks, plaintiff refused to furnish further fuel and board, and defendant abandoned the work. *Held*, that plaintiff was not entitled to recover for the value of supplies furnished defendant to the date the work was abandoned, since by the contract he was not released from furnishing them while boring was prevented by "unavoidable hindrances."

2. In such action defendant is not entitled to recover on a cross complaint for the number of feet bored, at the contract price, since he was not prevented by plaintiff, nor by encountering impenetrable rock, from performing his contract.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by B. H. Barrett against O. A. Austin on a contract for boring a well. From a judgment for plaintiff, defendant appeals. Reversed.

R. B. Terry and *Geo. B. Graham*, for appellant. *Church & Cory*, for respondent.

BELCHER, C. This is an action to recover damages for breach of contract. It is alleged in the complaint that on the 4th day of February, 1890, plaintiff and defendant entered into a written contract, a copy of which is set out, for the boring of a well on plaintiff's land; that plaintiff complied with all the conditions of the contract to be performed on his part, and in pursuance thereof furnished the materials and supplies provided for of the value of $1,000; and that defendant failed and refused to comply with any of the conditions to be performed on his part, and that, by reason of such failure and refusal, plaintiff had been damaged in the sum of $1,000, for which he asked judgment. By the contract the plaintiff bound himself "to furnish all the tubing and casing at his own expense; also all necessary fuel for the use of engine, and all the casing clay needed in the boring of a certain well, now commenced and sunk about one hundred and forty feet, on the following described land," etc.; "also to board and furnish house room for the men—three in number—employed in boring said well;" "also to pay to the party of the second part (defendant) seventy cents per foot in depth, commencing from the top of the ground, for each and every foot in depth of said well, and to make said payment in full, as aforesaid, at the completion and cessation of the boring of said well." And the defendant bound himself "to continue the boring of said well, commencing on the 11th day of February instant, barring bad weather or other unavoidable hindrances, until the depth of one thousand feet shall have been secured," provided that if a satisfactory flow of water should be secured, or impenetrable rock be encountered, before the depth of 1,000 feet should be reached, then the boring was to cease, and the defendant was to be paid for the work done, as before provided. By his answer, the defendant admitted the execution of the contract, but denied that plaintiff had complied with all the conditions thereof as alleged; and also denied that he had sustained damages in the sum of $1,000, or in any sum, by reason of any failure, neglect, or refusal on the part of defendant to perform the conditions of the contract to be by him performed; and alleged that plaintiff was the party in default, and by his own acts had prevented the completion of the work. Defendant also filed a cross complaint, in which he set up the contract, and alleged that under and in pursuance of its terms he commenced boring the well on the 11th day of February, 1890; that he had at the place of performance all necessary machinery and assistance for the full execution and completion thereof; that he steadily and industriously continued the work until the 9th day of April, 1890, when the plaintiff failed and refused to furnish any more fuel for the engine or board for the men; and that by reason of such failure and refusal he was then, and ever since had been, prevented from proceeding and fully completing the work required of him by the terms of the contract, although he was, and at all times since had been, ready, willing, and able to perform all the conditions required to be kept and performed by him; that, in accordance with the terms of the contract, he bored the well to a depth of 563 feet, and at the request of plaintiff furnished and used therein 34 feet of casing of the value of $15.30, and loaned to the plaintiff $2.50; that there was due to defendant from plaintiff, for the boring done, the casing furnished, and the money loaned, the sum of $411.90, for which he prayed judgment. At the trial it was proved, without contradiction, that the defendant commenced boring the well on the 11th of February, and continued the work a little more than a month, when his boring pipe and auger broke near the lower end thereof. He then tried to remove the broken pieces, and to that end worked diligently until the 9th of April. Up to that time the plaintiff furnished fuel for the engine and board for the men, but he then refused to furnish them any longer. The plaintiff testified: "The boring was stopped by reason of his boring pipe breaking off and leaving the auger at the bottom of the well. Defendant worked about two or three weeks trying to get the auger out, * * * but he never succeeded in getting it out, and finally I quit, because I never agreed to dig his tools out, if he got them fast. I quit furnishing him provisions after he got the auger stuck in the well, I think about two or three weeks. * * * I saw no way to get the auger and boring pipe out of the well. Mr. Austin says he can get it out. He always contended that he would get it out. Said he could bore the well. * * * I didn't propose to keep furnishing him with fuel and provisions to dig out his tools. I didn't consider that I had agreed to do that. After he got them down there he could not get them out, and I quit. He told me that he could get the tools out and complete the well."

When the plaintiff refused to furnish any more fuel or provisions, defendant notified him that, unless they were furnished, he would be compelled to stop all further work. He testified: "I remained there and worked all the time steadily at the work until the time he quit furnishing me and refused to furnish me the supplies that is required of him by the contract. I was compelled to quit for want of these supplies." When the work was stopped defendant had bored the well to a depth of 563 feet, and had used 438 feet of the casing furnished by plaintiff, the cost price of which was 75 cents a foot. The court found that the plaintiff had complied with all the conditions of the contract to be performed on his part, and that he caused to be delivered at the proper place casing of the value of $400, and furnished board and lodging to the defendant of the value of $30, and wood of the value of $150; that defendant failed, neglected, and refused to comply with the conditions of the contract to be performed on his part, and abandoned the contract before the commencement of the action; and, as a conclusion of law, that the plaintiff was entitled to judgment against the defendant for the sum of $580, damages for breach of the contract and costs. Judgment was accordingly so entered, from which, and from an order denying a new trial, defendant appeals.

1. It is apparent that the judgment as entered was erroneous. It allowed the plaintiff $400 for the casing delivered, when, at most, he was entitled only to recover for so much as was used, the cost of which was $328.50. Besides, the casing is still in his land, and belongs to him, and it may perhaps be taken out, and then have some value over the cost of its recovery. The judgment also ignores the defendant's claim for the casing furnished and the money paid out by him.

2. If the judgment might be modified so as to correct the errors above noted, still we are unable to see how, under the facts shown, the plaintiff was entitled to any relief. By the contract he obliged himself to furnish the casing, fuel, and board "at his own expense," and the defendant obligated himself to commence and continue the boring, "barring bad weather or other unavoidable hindrances." There was no provision that the plaintiff should be released from furnishing the supplies during the continuance of bad weather or other hindrances, and that he did not understand that he was so released is shown by the fact that he continued to furnish them for about three weeks after the auger was broken. It is difficult to define the words "unavoidable hindrances," but we think they must have been intended to include accidents such as occurred here. It is a matter of common knowledge that tools and machinery often unexpectedly break, and that augers used in boring wells frequently break in the ground, without any carelessness or fault on the part of the parties using them. The plaintiff, therefore, was not justified in refusing to furnish any more supplies, because he thought the broken pieces could never be removed, when the defendant, an experienced well borer, was trying diligently to remove them, and insisting that he could and would remove them, and complete the boring of the well. It is true that it might have been a hardship on plaintiff to be compelled to continue furnishing the supplies for an indefinite time, but the hardship on defendant would have been equally great or greater, as he had to employ three men and keep and use costly machinery during the period of delay. It was, of course, an unfortunate accident, but, in the absence of a stipulation to the contrary, each party must bear his share of the loss. The covenants were mutual, and, when the plaintiff refused to furnish any more supplies, the defendant was justified, if he chose to do so, in stopping the work, but his stopping did not give the plaintiff any cause of action for damages.

The defendant claimed in the court below, and claims here, that he was entitled to have judgment entered in his favor, according to the prayer of his cross complaint. We do not agree with him in this. By the terms of the contract he was only to be paid when he had bored the well to a depth of a thousand feet, or had found a sufficient supply of water, or had met with impenetrable rock. Now, while he may have been justified in stopping the work as he did, still he was not prevented by the acts of the plaintiff from going on and performing the contract on his part. Cox v. McLaughlin, 52 Cal. 590, and 54 Cal. 605. He might have furnished the necessary supplies himself, and doubtless when the well was sunk to the required depth could have maintained an action to recover their value. Our conclusion is that when the action was commenced the plaintiff had no cause of action against the defendant for the materials furnished, and the defendant none against the plaintiff for the work then done. We therefore advise that the judgment and order be reversed, and the cause remanded.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded.

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96 Cal. 188

McBEAN v. MARTIN. (No. 14,678.)

(Supreme Court of California. Sept. 13, 1892.)

SEWER ASSESSMENTS—ACTION TO FORECLOSE—PLEADING.

Under Act March 18, 1885, (St. 1885, p. 147,) § 10, providing that, when the owner of premises assessed for constructing a sewer "cannot conveniently be found," or is unknown, payment of such assessment shall be publicly demanded on the premises, the complaint, in an action to foreclose a lien of assessment, where payment was publicly demanded on the premises, and the owner thereof is known, must allege that the owner could not "conveniently be found."

Department 2. Appeal from superior court, San Bernardino county; J. W. MCKINLEY, Judge.

Action by McBean against Martin to foreclose a lien of assessment on defendant's lot. From a judgment for plaintiff, defendant appeals. Reversed.

Chas. R. Gray and *J. P. Hargrave*, for appellant. *C. W. C. Rowell* and *Ezra Crossman*, for respondent.

De Haven, J. Action upon an assessment for the construction of a sewer along G street, in the city of San Bernardino, and to foreclose the alleged lien of such assessment upon a lot belonging to defendant. The court found all the allegations of the complaint to be true, and gave judgment in favor of plaintiff, in accordance with the prayer of the complaint. The defendant appeals.

The judgment cannot be sustained upon the findings, as the complaint does not state facts sufficient to constitute a cause of action. The complaint alleges, in substance, among other matters, that the superintendent of streets made the assessment sought to be enforced, and attached thereto a warrant and diagram, and recorded and delivered the same to the contractor, as required by sections 8 and 9 of the "Act to provide for work upon streets, * * * and for the construction of sewers within municipalities," approved March 18, 1885. St. 1885, p. 147. We also construe the complaint as alleging that, by said assessment and diagram, the lot upon which plaintiff claims that said assessment is a lien was assessed as the property of defendant, and that defendant was then and still is the owner of said lot. But the complaint fails to show a proper demand for the payment of this assessment within 30 days after the date of the warrant, and such a demand was necessary in order to preserve the lien of the assessment. Section 10 of the act of March 18, 1885, before referred to, provides with particularity the manner in which the demand of payment shall be made, and is as follows: "Whenever the person so assessed, or their agents, cannot conveniently be found, or whenever the name of the owner of the lot is stated as 'unknown' on the assessment, then the said contractor or his assigns, or some person in his or their behalf, shall publicly demand payment on the premises assessed." The complaint in this case alleges that the demand for payment of the amount of the assessment was made by going upon the premises and making a public demand therefor, but it is not alleged that the defendant or his agent could not be conveniently found; and it is only in such cases, or when the assessment is made to unknown owners, that the statute permits a public demand upon the premises. This was so held by this court in Guerin v. Reese, 33 Cal. 292, in construing a similar provision found in the act of 1862, relating to streets in San Francisco. St. 1862, p. 397. In that case, Mr. Justice Rhodes, speaking for the court, said: "There are three modes in which the demand may be made: *First*, of the person assessed; *second*, of his agents; and, *third*, a demand publicly made on the premises assessed. The purpose of the demand is very obvious. Up to that time the owner has only constructive notice of the proceedings, from their initiation up to the recording of the warrant, assessment and diagram; and as, by the record, a lien is cast upon his property, he is required to be notified in order that he may take the proper steps for its discharge. * * * Before the contractor is permitted to resort to the third mode of making the demand, he must have exhausted the second as well as the first mode." The failure to give defendant actual notice of the assessment under consideration by making a personal demand for its payment, when it could have been conveniently made as required by the statute, may have prevented him from exercising the right of appeal to the city council given by section 11 of the act under which the assessment was made, and which appeal must be taken within 30 days after the date of the warrant. The object of the statute is to guard against the possibility of such a result in all cases where the owner of property is known, and it has been assessed to him, by requiring a personal demand to be made upon him, when it can be conveniently done. It will thus be seen that the right to receive this notice is substantial, and the failure of the plaintiff to show in his complaint a strict compliance with this essential requirement of the statute is fatal to the judgment. Judgment reversed.

We concur: McFarland, J.; Sharpstein, J.

96 Cal. 194

WINDERS v. SPERRY et al. (No. 14,781.)

(Supreme Court of California. Sept. 13, 1892.)

Promissory Note—Execution by Joint Maker after Delivery.

In an action on a note for money loaned, it appeared that the borrower, at the time of the loan and the execution and delivery of a note signed by himself alone, promised that another would sign as joint maker. *Held*, that the execution and delivery of the note was incomplete until the other had signed, and his subsequent signing bound him, without a new consideration.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by David Winders against Charles E. Sperry and others on a promissory note. Judgment for plaintiff. From the judgment and an order refusing a new trial, Sperry appeals. Affirmed.

L. J. Maddux, for appellant. *John Heenan*, for respondent.

Temple, C. This appeal is taken by defendant Charles E. Sperry from the judgment and from an order refusing a new trial. The action is by the indorsee of a nonnegotiable note against the two makers, and the appellant separately defended, on the ground that his contract was without consideration. The trial was by the court, which found for the plaintiff. On only one important point is there a conflict in the evidence. Resolving that, as we are bound to, in favor of the decision, we have this state of facts: E. N. Sperry, being without credit, but desiring to borrow some money from Charles Sperry, who was his nephew and son-in-law, told Charles that he had spoken to his son (the appellant) in regard to the matter, and that his son said, if he (Charles) would loan the money to him, (E. N.,) the son would be responsible for the payment of it, and would sign the note as joint maker. Thereupon Charles gave E. N. his check for the amount, and took a note signed only by E. N., but in form joint and several, reading, "We, or either of us, promise to pay," etc. Charles knew when he loaned the money that E. N. was not able to pay, and told him then that he looked wholly to appellant for payment. E. N. Sperry, when the note was taken by Charles, said that his son would be down soon, and, as Charles Sperry testified: "I said: 'Perhaps you had better take this note. You will see him before I will.' And he said, 'No, you had better take it, and send it up there;' and I sent it up the next day, I think." As matter of fact, E. N. Sperry had never spoken to his son in regard to the matter, and appellant knew nothing of the loan until he received a letter from Charles, the contents of which do not appear further than indicated by the reply of appellant, which was as follows: "Ceres, Sept. 22, 1888. Brother Charles: Received your letter this morning, and say in reply that I think it will be all right. Send note up, and I will sign it and send it back. Respectfully, C. E. SPERRY." The money was given to E. N. Sperry on the 19th, and the note received by Charles, signed only by E. N. Sperry, at the same time. The signature of appellant must have been at least four days afterwards.

The court found, in effect, that the note was not delivered as a complete instrument on the 19th, and that it was understood that it should not be so considered until signed by appellant. This conclusion is warranted by the testimony of Charles Sperry, and it does not matter here that this testimony was contradicted by other evidence. It is true, in general, that one who adds his signature to a promissory note after its execution and delivery is not bound unless there is a new consideration. But this is not that case. The execution and delivery were not complete until it was signed by appellant. But if we are bound to conclude that it had been executed and delivered as to one of the makers, there was a consideration for the subsequent signature of the appellant. As the contract was that he should sign the note, and the note was accepted only upon that understanding, the payee could have canceled it or tendered it back if appellant had refused to sign, and maintained a suit at once for his money. The note was payable one year after date, and the credit was given on the promise, and in consideration, of appellant's signature. Had he not signed the note this consideration would have failed. But, while the general rule as to a signature obtained after the execution and delivery of the note is as above stated, it has been held where the borrower promises at the time of the loan, and the execution and delivery of a note, signed by himself alone, that he will procure another signature, that the person so signing afterwards is bound; that the subsequent signature is not without consideration. McNaught v. McClaughry, 42 N. Y. 22; Harrington v. Brown, 77 N. Y. 72. The exigencies of this case do not require us to go so far as that. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

96 Cal. 191

McBEAN v. REDICK et al. (No. 14,680.)

(Supreme Court of California. Sept. 13, 1892.)

PUBLIC IMPROVEMENTS—UNAUTHORIZED CONTRACT.

Where a board of city trustees adopts a resolution of intention to construct a sewer along a portion of a street, but lets a contract for constructing the sewer along only a part of the portion specified in the resolution, the contract is void, and an assessment under the same creates no lien on property benefited.

Department 2. Appeal from superior court, San Bernardino county; J. W. McKINLEY, Judge.

Action by McBean against Redick and others to recover on an assessment and foreclose a lien for the same. Judgment for defendants. Plaintiff appeals. Affirmed.

Ezra Crossman and *C. W. C. Rowell*, for appellant. *Paris & Fox* and *Chas. R. Gray*, for respondents.

DE HAVEN, J. This is an action to recover upon an assessment for the construction of a sewer upon one of the streets of the city of San Bernardino, and for the foreclosure of the alleged lien of such assessment upon a lot owned by defendants. The superior court made and filed findings, and thereupon rendered judgment for the defendants. The plaintiff appeals. There is no bill of exceptions in the record, and the only question to be considered is whether the findings support the judgment. The foundation of plaintiff's right to maintain the action rests upon the resolution of intention passed by the board of city trustees to do the work for which the assessment sought to be foreclosed was made. In relation to this the court finds that such trustees duly adopted a resolution of intention to construct a sewer along that part of Third street, in the city of San Bernardino, which lies "between the center of the intersection of B with said Third street and the center of the intersection of I and Third streets," and that said resolution was duly posted and published according to law. The court further finds: "That subsequently, and in due time, and without any further resolution of intention, or other notice to the property owners along said Third street, an advertisement calling for bids for the sewering of said Third street under said resolution aforesaid was duly made, except that such bids were called for for the sewering of said Third street between I and C streets, which said call was less by one whole block * * * than the resolution of intention specified as the distance to be sewered on said Third street;" and that in due time a contract was let as specified in said advertisement, and under it the work was done which resulted in the assessment sought to be enforced in this action. It is clear that upon these facts the contract for the construction of the sewer was void, and the work done thereunder, and the subsequent assessment and proceedings, created no lien upon the property of defendants.

The precise question was before this court in the case of Stockton v. Whitmore, 50 Cal. 554, and in its decision the court said: "It is objected that the council acquired no jurisdiction to order to be done only a portion of the work specified in the resolution, and we think the point is well taken. The object of the notice is to inform the property owners of the particular work proposed to be done. If it is proposed to improve a street for its whole length through several blocks, the property owners may be perfectly content to have the work done, and would have no motive to attend at the hearing. But they might have grave objections to improving the street for only a portion of the distance. For example, if it were proposed to grade a street for six blocks the property owners might consider it a desirable improvement, but would have serious objections to grading detached portions of it." The cases of Fanning v. Leviston, 93 Cal. 186, 28 Pac. Rep. 943; Himmelmann v. Hoadley, 44 Cal. 279; and Boyle v. Hitchcock, 66 Cal. 129, 4 Pac Rep. 1143,—cited by appellant,—are not in conflict with the case from which we have just quoted. In this case the contract was absolutely void, and in all its parts, and its invalidity could not have been remedied or avoided by the trustees of the city; and, this being so, the property owner was not required to appeal to the trustees for its correction. Dougherty v. Hitchcock, 35 Cal. 512.

2. There is no conflict in the findings, nor can finding No. 5 be construed as a finding that the assessment under consideration was duly made; that is, that it was based upon a valid contract, and, as such, that it constitutes a valid lien upon the property of defendants. Judgment affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

96 Cal. 119

BUCKLEY v. SUPERIOR COURT OF FRESNO COUNTY. (No. 15,079.)

(Supreme Court of California. Sept. 1, 1892.)

WRIT OF REVIEW—DISMISSAL OF APPEAL—JURISDICTION.

Code Civil Proc. § 1068, provides that a writ of review may be obtained when a lower court has exceeded its jurisdiction. *Held*, that the hearing of a motion to dismiss an appeal from justice's court is within the jurisdiction of the superior court, and, though erroneously granted, a writ of review will not lie. Beatty, C. J., and Paterson, J., dissenting. Carlson v. Superior Court, 11 Pac. Rep. 788, 70 Cal. 628, overruled.

In bank. Appeal from superior court, Fresno county; S. A. HOLMES, Judge.

Petition by Joseph Buckley for a writ to review an order of the superior court of Fresno county dismissing an appeal from a judgment of the justice's court. Writ dismissed.

L. L. Cory, for petitioner. *Church & Walser*, for respondent.

GAROUTTE, J. A motion was made in the superior court of Fresno county to dismiss the appeal then pending before that court in the case of Hulen v. Buckley, the case having been originally tried in the justice's court. The motion was made upon the grounds that (1) the judgment appealed from was entered by default, and is not appealable; (2) that no motion was made in the lower court to set aside the default before the appeal was taken; (3) that said appeal was taken upon questions of both law and fact. The court granted the motion, and we are now asked to review that action by a writ of review. Section 1068 of the Code of Civil Procedure reads: "A writ of review may be granted by any court, except a police or justice's court, when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."

It will be noticed that the foundation of the writ is essentially and necessarily an excess of jurisdiction; for no act of tribunal, board, or officer exercising judicial functions, done or made within its jurisdiction, can ever be the subject of attack by writ of review. In the matter now before us it is apparent that the court had jurisdiction of the subject-matter and of the persons; all the parties were before the court; the appeal was regularly taken; and we are at a loss to understand why the court had not the same jurisdiction to hear a motion to dismiss the appeal as it had to proceed to a trial of the cause upon its merits. If it had jurisdiction to hear the motion,—and as to that matter there can be no question,—then its ruling upon the motion was simply an exercise of that jurisdiction, and, however erroneous such ruling might be, it would only be an error of law, in no manner subject to review by an original proceeding in this court. In this case the court had jurisdiction to hear the motion, and it would be an absurdity to say that, upon the submission of the matter, the court had jurisdiction to deny the motion to dismiss the appeal, but no jurisdiction to grant it. As was said in Central Pac. R. Co. v. Placer Co., 46 Cal. 670: "It has been settled by a long series of decisions in this state that a writ of *certiorari* brings up for review only the question whether the inferior officer, court, or tribunal has exceeded its jurisdiction, and cannot be used as a mere writ of error for the correction of mistakes, either in law or fact, committed by the inferior tribunal within the limits of its jurisdiction;" citing many cases. It may be conceded that the action of the court in dismissing this appeal was entirely without support in the law, and furnished ample material to justify a reversal of the order if a proper matter for review under the statute; but such may be the fact, and yet no question of excess of jurisdiction be involved. To absolutely thus deprive the appellant of the right to be heard upon the merits of his cause is a great hardship, and often productive of serious pecuniary loss, but such appellant suffers no greater hardship or loss than though he proceeds to trial and the court decides against him upon final judgment when he has a cause full of merit. As was said in Sherer v. Superior Court, 94 Cal.

355, 29 Pac. Rep. 716: "Within the limits thus prescribed, its errors in the exercise of its jurisdiction, however gross or glaring they may be, must be submitted to, as a part of the sacrifice which every individual is compelled to yield to the infirmities of human government." These views are in conflict with Carlson v. Superior Court, 70 Cal. 628, 11 Pac. Rep. 788, and that case must be considered as overruled. The appeal in that case was dismissed upon the ground that it was taken upon questions of law, and should have been taken upon questions of both law and fact. This court said the appeal vested the superior court with jurisdiction to hear and determine the question, and to dismiss the appeal was an act of the court in excess of its jurisdiction. The entire reasoning of the court upon the matter goes to the question that the order of the court in dismissing the appeal was erroneous,—a matter entirely immaterial to the issue involved. The vital question was, did the superior court exceed its jurisdiction in dismissing the appeal? not, was the appeal erroneously dismissed? When an appeal is regularly taken, the court not only has jurisdiction to try the cause upon its merits, but it has entire and complete jurisdiction of the cause for any and all purposes. It has jurisdiction to hear a motion to dismiss the appeal as fully as it has jurisdiction to hear and determine the cause upon its merits, and to erroneously dismiss the appeal is no more jurisdictional than to erroneously decide the merits of the cause. It follows that, if the court erred in dismissing the appeal, it was done in the exercise of jurisdiction, and not in assuming jurisdiction which did not exist. It was a mere error in the exercise of its power, an error of law, which will not be reviewed by an original proceeding. If there are other cases following in the wake of Carlson v. Superior Court, they are valueless for future precedent. Let the writ be dismissed.

We concur: De Haven, J.; McFarland, J.; Harrison, J.; Sharpstein, J.

Paterson, J., (*dissenting*.) A dissenting opinion in an ordinary case probably does more harm than good; it weakens the effect of the decision as a precedent, and tends to destroy the respect which we all hope to secure for our decisions at home and abroad. The decision in this case, however, is itself so destructive of precedents established by our predecessors in well-considered cases, I deem it my duty to spread upon the record the reasons for my dissent, and to show if possible that in matters of jurisdiction the superior court is not clothed with that supreme and arbitrary power conceded to it by the decision herein. Carlson v. Superior Court, 70 Cal. 628, 11 Pac. Rep. 788; Levy v. Superior Court, 66 Cal. 292, 5 Pac. Rep. 353, and other kindred cases, in my opinion, were correctly decided, and should be adhered to. The decisions in those cases went upon the proposition that a court cannot divest itself of jurisdiction by arbitrarily saying it has no right to proceed, any more than it can invest itself with jurisdiction by arbitrarily saying it has a right to proceed. My brothers concede that, if a court proceed in a case where the record shows it has no jurisdiction, its orders are void; but hold that, in this case the court having jurisdiction to hear and determine the motion to dismiss an appeal, "its ruling upon the motion was simply an exercise of that jurisdiction, and, however erroneous such ruling might be, it could only be an error of law." But the dismissal of the appeal in this case was neither more nor less than a refusal on the part of the court to give the appellant a hearing in the case, although the record on its face showed that he was entitled to a hearing on the merits. The court has no more right to refuse to hear the complaint and answer the prayer of a litigant who is regularly before it by proceedings on appeal than it has to refuse to hear and determine the claims of parties who are regularly before it by complaint, summons, and answer. It happens occasionally that the court refuses to settle a bill of exceptions, or to proceed with the trial of a case. It might be said in such cases that the court below had jurisdiction to grant or deny the motion, or to grant or deny the plaintiff's prayer for relief,—that it had to look into the record to determine whether it had jurisdiction or not,—and that its refusal to entertain the matter on its merits, or to hear the case, was mere error; but this court has never denied a writ of mandate when it appeared that the party was entitled to a hearing, and has uniformly held that a court could not refuse to hear a matter upon the merits when it was regularly before it for that purpose. There is no force in the argument that the superior court is liable to commit error on the trial of any case on appeal from the justice's court for which there is no remedy, and that, where a motion to dismiss the appeal is granted, the appellant "suffers no greater hardship or loss than though he proceeds to trial, and the court decides against him upon final judgment." The lameness of the argument consists in the assumption that the court would decide the case against the appellant, and it ignores his right to the judgment of the court upon the merits of the matter which is regularly before it for determination. Judgment is entered against A. in the justice's court, and he perfects an appeal to the superior court. The respondent moves to dismiss the appeal, to which motion A. objects, and asks to have the cause set for trial. The court overrules the objection, and dismisses the appeal. This is held to be mere error, although the record on its face shows that the court had jurisdiction, and should have tried the case. Judgment is entered against B. in the justice's court, and he makes an ineffectual attempt to take an appeal. The respondent moves to dismiss the appeal, to which motion B. objects, and asks to have the case set for trial. The objection of B. is sustained, the motion to dismiss the appeal is denied, and the case proceeds to trial and judgment. In each case the decision of the court was wrong. In the latter case it is conceded that the judgment is void, and should be set aside on *certiorari.* If the ruling of the court in the first case was merely erroneous, why was it not merely erroneous in the second case supposed? The court had jurisdiction to hear and decide the motion in the first case, and for that reason it is said its ruling was mere error, although it affirmatively appeared on the record that the court had jurisdiction to hear the appeal. Is it not equally true that in the second case the court had jurisdiction to hear and determine the objection and the motion before it? If its ruling in the one case was merely erroneous, was it not merely erroneous in the other? The error of the court rests in the assumption that, in determining that it has not jurisdiction, although the record affirmatively shows that it has, the superior court may exercise discretion, while it is admitted in determining that it has jurisdiction, when the record shows affirmatively that it has not, there is no discretion in the court, and its order is void. If it be true that a court has no power to say it has jurisdiction when the record shows it has not, the converse of the proposition must be true, that, if the record shows it has jurisdiction, it has no right to say it has not. The question of discretion or error is entirely foreign to the discussion. If the record shows it has jurisdiction, that is the end of it; the court must proceed. It has no power to say that it will not. If the record shows affirmatively that it has not jurisdiction, it has no power to say that it will proceed. In each case the court is bound by the jurisdictional facts appearing of record; it cannot ignore or dispute them. As said in Levy v. Superior Court, 66 Cal. 292, 5 Pac. Rep. 353, "the case is not like those which are dependent upon the existence of facts *aliunde.*"

Beatty, C. J. I concur in the foregoing opinion of Mr. Justice Paterson.

96 Cal. 140

CITY AND COUNTY OF SAN FRANCISCO v. WESTERN UNION TEL. CO. (No. 13,903.)

(Supreme Court of California. Sept. 2, 1892.)

Telegraph Companies — Acceptance of Franchise from United States — Power of State to Tax.

Rev. St. U. S. tit. 65, provides that any telegraph company, by filing its written acceptance, may construct and operate lines over any portion of the public domain, across any navigable water, and along any of the military or post roads of the United States; that the United States shall have priority in sending telegrams between the departments of government, its officers and agents, at rates to be fixed by the postmaster general; that after five years the United States may purchase such lines for postal and military purposes at an appraised value. *Held,* that a telegraph company, by filing such acceptance, acquired national franchises, which no state could tax. Telegraph Co. v. Attorney General, 8 Sup. Ct. Rep. 961, 125 U. S. 530, distinguished.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by the city and county of San Francisco against the Western Union Telegraph Company to recover unpaid taxes. Judgment for plaintiff. Defendant appeals. Reversed.

R. B. Carpenter, for appellant. *Atty. Gen. Hart* and *W. A. S. Nicholson,* for respondent.

McFarland, J. This action was brought to recover a certain sum of money alleged to be due from defendant to plaintiff for state and county taxes alleged to have been duly assessed and levied "upon personal property of said defendant, to wit, franchise for the fiscal year ending June 30, 1886." Judgment was rendered for plaintiff, and defendant appeals from the judgment. From the findings of the trial court, and the written stipulations of the parties contained in a bill of exceptions, the following are substantially the facts upon which the appeal must be determined: During the times mentioned in the complaint, appellant was, and still is, a corporation "organized and existing under the laws of the state of New York," and engaged in the business of transmitting telegraphic messages. "It is not organized under the laws of the state of California, and has derived no franchise therefrom." For the said fiscal year ending June 30, 1886, the appellant was assessed upon all its lines and property within this state for state and city and county taxes, and paid all of said taxes. The assessment upon which the taxes sued for in this action is based is as follows: "Franchise, $50,000;" and no other taxes or causes of action are here involved. On July 24, 1866, there was approved an act of the congress of the United States entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," which act was put in evidence. It is to be found at pages 221, 222, U. S. St. at Large 1865-1867, also incorporated in title 65 of the Revised Statutes. This act provides "that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the postmaster general of the restrictions and obligations required by this act;" and such written acceptance was so filed by the appellant herein on June 12, 1867. It is not necessary, at this point, to state in detail the provisions of that act, because the United States supreme court, in decisions hereinafter noticed, has declared its nature, purpose, and scope, and the character of the rights and privileges which it conferred upon the appellant herein. It is sufficient here to say generally that the act gives the appellant the right to construct and maintain telegraph lines, not only through the public domain, portions of which are granted to it, and across navigable streams and waters, but also over and along any of the "post roads of the United States which have been or may hereafter be declared such by acts of congress;" that it provides for a priority of telegrams between the departments of the United States government and their officers and agents over all other business, and that they shall be sent at rates fixed by the postmaster general; and that, under the act, the United States may at any time after five years, for postal, military, or other purposes, purchase all the lines and property of the appellant at a value to be appraised in the manner provided in said act. It further appears that on and prior to the first Monday of March, 1885, the defendant, as such corporation, had constructed and was maintaining and operating in the state of California, along the military and post roads of the United States, and over, under, and across the navigable streams or waters of the United States, telegraph lines aggregating 6,531½ miles, and 3,501¼ miles of telegraph poles, and 34 2-5 miles of said wires and 9 miles of said poles are in the city and county of San Francisco; that all of said lines are used by defendant in the transmission of telegrams from points in the state of California to points in the other states of the United States and to foreign countries, and from said other states and countries to points within the state of California, as well as in the transmission of telegrams from point to point within the state of California; that the defendant is likewise engaged in the transmission over said wires of messages for, from, and between the several departments of the government of the United States; that said messages last mentioned are by this defendant given priority over all other business, and are sent at rates annually fixed by the postmaster general of the United States.

Under these facts, it is contended by appellant, among other things, which we do not deem it necessary to discuss, that the appellant is one of the means employed by the United States government for carrying into effect its sovereign powers; that the attempt to tax its franchise, in addition to the taxes which, in common with others, it pays on its property, is an attempt to tax "the operation of an instrument employed by the government of the Union to carry its powers into execution," within the meaning of the decision in McCulloch v. Maryland, infra; and that, therefore, the taxes sought to be recovered in this action were beyond the jurisdiction of the state to levy, and void. If the appellant is to be considered an instrument of the national government, within the meaning of McCulloch v. Maryland, then it is quite clear that, within the meaning of that celebrated case, the attempted tax on the franchise of the appellant was a tax upon its "operations." It is true that the state of Maryland had put its attempt to tax the United States Bank in the shape of a provision that its notes should be upon stamped paper furnished by the state at certain stated prices; but it is impossible to see how that method of taxation was any more a tax upon the "operation" of the bank than a general tax upon its franchise—upon its right to operate at all—would have been. There is in principle no distinction between the two methods of effecting the same result. But there is no need of general argument upon the subject, because the precise question was definitely settled by the supreme court of the United States in the case of California v. Railroad Co., 127 U. S. 1, 8 Sup. Ct. Rep. 1073. In that case the state of California had attempted to tax the "franchise" of the railroad company, and the latter set up that it had franchises from the general government, granted under certain well-known acts of congress, which the state had no jurisdiction to tax. The decision of the court, from which there was no dissent, was delivered by Mr. Justice BRADLEY in a very elaborate opinion, and we have space here only to quote the vital parts of it on the question before us. Having concluded that the railroad company had certain franchises from the general government, the court say: "Assuming that the Central Pacific Railroad Company had received the important franchise referred to by the grant of the United States, the question arises whether they are legitimate subjects of taxation by the state. They were granted to the company for national purposes and to subserve national ends. In seems very clear that the state of California can neither take them away nor destroy nor abridge them nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situated within the state. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. * * * As Chief Justice MARSHALL said in McCulloch v. Maryland, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the constitution, laws, and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to state taxation. The power conferred emanates from, and is a portion of, the government that confers it." And, again, the court, speaking of the taxation of a franchise, say: "It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present case." Under this decision, therefore, it is entirely clear that if the appellant is an instrument of the national government, within the meaning of McCulloch v. Maryland, or has franchises granted by that government for national purposes, then the tax involved in the case at bar cannot be maintained.

The remaining question of importance is this: Are the relations of appellant to the national government, and its franchises derived therefrom, of such character as to bring it within the principles of the cases above cited? We think that the decisions of the supreme court of the United States answer this question in the affirmative. Indeed, the very case of California v. Railroad Co., to which we have just referred, seems to be itself a determination of the point in favor of appellant; for a comparison of the railroad acts which were held in that case to have conferred franchises upon the railroad company, with the act of July 24, 1866, respecting telegraph companies, (hereinbefore mentioned,) shows that the difference between the rights and powers granted in the two instances is a difference of degree only, and not of kind. An interstate railroad is a thing of more magnitude, and has greater financial and commercial value, than an interstate line of wires and poles used for telegraphy. The transportation of troops and munitions of war is, no doubt, a thing of graver importance than the transmission of telegraph messages; but the latter has become, also, an absolute necessity to the proper administration of the national government, either in peace or war. If, therefore, as was held in the decision last mentioned, the rights, privileges, and powers conferred by congress on the railroad company constitute franchises which a state cannot tax, it seems impossible to escape the conclusion that the rights, privileges, and powers thus conferred upon the appellant also constitute such franchises. But the supreme court of the United States has had occasion to declare the character and position of the appellant, with respect to the question here involved, in cases in which the appellant itself was a party to the record. In December, 1866, the legislature of Florida passed an act granting to the Pensacola Telegraph Company "the sole and exclusive right and privilege" of maintaining lines of electric telegraph through certain parts of that state. There was nothing in the state constitution of Florida which prohibited its legislature from granting such exclusive privileges within it own jurisdiction. Afterwards a certain railroad company granted the right to erect a telegraph line along its right of way, to the Western Union Telegraph Company, the appellant in the case at bar. The latter company had commenced the erection of the line when the said Pensacola Company commenced an action in the United States circuit court to enjoin the work, on account of its alleged exclusive right under said act of the legislature of Florida, with which the proposed line of the Western Union Company competed. The action was dismissed in the circuit court, and an appeal was taken by the Pensacola Company to the supreme court of the United States, where the judgment was affirmed. Pensacola Tel. Co. v. Western U. Tel. Co., 96 U. S. 1. The case was elaborately argued by counsel and thoroughly considered by the court, Mr. Justice FIELD delivering a very able and exhaustive dissenting opinion. The opinion of the court was delivered by Chief Justice WAITE, and is too lengthy to be quoted here. It was decided, however, in brief, that the said act of July 24, 1886, "to aid in the construction of telegraph lines," etc., was a legitimate and proper exercise by congress of the power "to regulate commerce with foreign nations and among the several states," and "to establish post offices and post roads;" that the powers given to and accepted by the Western Union Telegraph Company cannot be obstructed by state legislation, and that said act extends not only to such post roads as are on the public domain, but to "any of the military or post roads of the United States which have been, or may hereafter be, declared such by act of congress." The court say, among other things, as follows: "It is not necessary now to inquire whether congress may assume the telegraph as part of the postal system, and exclude all others from its use. The present case is satisfied if we find that congress has power, by appropriate legislation, to prevent the states from placing obstructions in the way of its usefulness." And the power of a state to tax its "franchise" to an unlimited extent would seem to be about as effective a means as could be imagined of "placing obstructions in the way of its usefulness." But Telegraph Co. v. Texas, 105 U. S. 460, is still a more pointed case in favor of appellant's contention. In that case the legislature of Texas had passed a statute providing that every telegraph company doing business in the state should pay a certain tax for every message sent by it; and the Western Union Telegraph Company, appellant in the case at bar, having refused to pay taxes under said statute, basing its defense on said act of congress of July 24, 1866, judgment had been recovered against it in the state court for the amount of such taxes. But on a writ of error the judgment was reversed. Here was a case almost impossible to be distinguished from McCulloch v. Maryland. The court, in its opinion, delivered by Chief Justice WAITE, among other things, say: "In Pensacola Tel. Co. v. Western U. Tel. Co., 96 U. S. 1, this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of congress in respect to their foreign and interstate business A telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself." The opinion then refers to rights held by the said telegraph company under the said act of congress by which it became a "government agent;" and then, referring to the said tax attempted to be levied on its messages by the state of Texas, says: "As such, so far as it operates on private messages sent out of the state, it is a regulation of foreign and interstate commerce, and beyond the power of the state. That is fully established by the cases already cited. As to the government messages, it is a tax on the means employed by the government of the United States to exercise its constitutional powers, and therefore void. It was so decided in McCulloch v. Maryland, 4 Wheat. 316, and has never been doubted since." And thus in that case the Western Union Telegraph Company is put in exactly the same class with the United States Bank in McCulloch v. Maryland. With respect to the last-named case, we stated before that there was in principle no difference between a stamp tax on the notes of the United States Bank and a general tax upon its "franchise." But it is to be observed further on that subject that the statute of

Maryland imposing the stamp tax provided that the bank may relieve itself from the operation of the provision aforesaid by paying annually in advance to the treasurer of the Western Shore, for the use of the state, the sum of $15,000. See act on page 319, 4 Wheat. And so the bank might have avoided the purchase of stamped paper on which to issue its notes by simply paying a lump sum annually, and that would have been the paying of a tax upon its right to carry on its operations,—upon its franchise. And if the court had seen any substantial difference between the two methods of accomplishing the same thing, it would have told the bank that it had no cause to complain of the illegal stamp tax, because that could have been avoided by the payment of the legal franchise tax. Suppose that the statute of Maryland had made no mention of a stamp tax, and had simply required the annual tax of $15,000, does any one suppose that in such event the great opinion of Chief Justice MARSHALL would never have been written, to become the broad and sure foundation for subsequent judicial decision in the realm of constitutional law?

The only decision of the United States supreme court which can be invoked with any plausibility in favor of the validity of the tax here involved is to be found in the case of Telegraph Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. Rep. 961. An analysis of the case, however, shows it to be entirely consistent with the decisions and views hereinbefore cited and expressed. In that case certain taxes levied against appellant herein, under certain statutes of the state of Massachusetts, were upheld; and it is true that in those statutes the words "corporate franchise" are used. But an examination of those statutes will show that the taxes there involved were levied upon the property of the company, and not upon its franchise, and the opinion delivered shows that such was the understanding of the court. When in a statute a certain thing is particularly described, so as to clearly identify it, the character of the thing is not changed by a misnomer. The Massachusetts statutes, with which the court was dealing, may be found in full on pages 531-535, 125 U. S. They contain in detail a long and somewhat complicated plan for the assessment and taxation of corporations. The general scheme is that each corporation shall return annually to the tax commissioner the amount of its capital stock, with its par and market value, and also a list of structures, works, machinery, real estate, etc. Railroad and telegraph companies shall also return the whole length of their lines, and their length outside of the state. The commissioner is to ascertain from the returns, or otherwise, the true market value of the shares of the corporation, and to estimate therefrom the fair cash value of all of said shares constituting its capital stock. He is also to ascertain and determine the value and amount of all real estate, machinery, etc., owned by the corporation. Then from the aggregate value of the shares of capital stock, ascertained as aforesaid, a great many deductions are to be made, and, in case of railroad and telegraph companies having lines running beyond the state, there is to be deducted "such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportioned to the length of that part of their line lying without the commonwealth," and also an amount equal to the value of certain property located within the state, and subject to local taxation; and the corporation is to pay a tax on such part of the value of the capital stock as remains after all the deductions are made. It thus appears that these statutes, of which the foregoing is a mere summary, undertake to provide a just and equitable mode by which the taxable property of a corporation shall be ascertained, according to business principles and usual methods of valuation and appraisement; and that mode is radically and entirely different from the unlimited irresponsible taxation of a "franchise," without regulation or condition, and without any necessary consideration of property values or recognized rules of assessment, such as we find in the case at bar. The tax under the Massachusetts statutes was a tax on property, and so the court clearly holds. Counsel for the telegraph company in that case argued that the tax was upon the franchise, and therefore void; and the court said upon that point as follows: "The argument is very much pressed that it is a tax upon the franchise of the company, which franchise, being derived from the United States by virtue of the statute above recited, cannot be taxed by a state; and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein." The court further say that the rights conferred on the company by the said act of congress do not exempt it from the "ordinary burdens of taxation," and that it is "liable upon its real or personal property as any other person would be;" and, referring to Telegraph Co. v. Texas, supra, it quotes the expression of Chief Justice WAITE that "its property in the state is subject to taxation the same as other property." Again, the court say: "The tax in the present case, though nominally upon the shares of the capital stock of the company, is, in effect, a tax upon that organization on account of property owned and used by it in the state of Massachusetts." We think, therefore, that the decision is clearly to the point that the thing there sought to be taxed, "as described in the laws of Massachusetts," was not "franchise," but property in the ordinary sense, "by whatever name it may be called." Under this view the case is entirely consistent with those of California v. Railroad Co., 127 U. S., 18 Sup. Ct. Rep. 1073, and with the Pensacola Case and the Texas, above cited; otherwise, it is impossible to reconcile it with those cases. Moreover, in the Massachusetts case, the statutes provided that if the telegraph company failed to pay the taxes, it should be enjoined from doing business, and the decree of the lower court had awarded an injunction; but the supreme court reversed that part of the decree, and held that the provision in the statutes for an injunction was, as against appellant, void; thus, in effect, recognizing the rights of the appellant under the said act of congress as they had been declared in the other decisions hereinbefore cited. The case of Massachusetts v. Telegraph Co., 141 U. S. 40, 11 Sup. Ct. Rep. 889, also cited by respondent, is the same, practically, as the case in 125 U. S. 530, 8 Sup. Ct. Rep. 961, which we have just been reviewing. It must be remembered that it has never been held in any of the cases that the property of a corporation holding national franchises was not subject to state taxation. In McCulloch v. Maryland, the court say: "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the state."

From the foregoing decisions and views, we are of opinion that the taxes sought to be recovered in this case were beyond the power of the state to levy, and therefore void. The judgment is reversed, with direction to the superior court to dismiss the action.

We concur: De Haven, J.; Garoutte, J.; Harrison, J.; Paterson, J.; Sharpstein, J.

(96 Cal. xviii)

CITY AND COUNTY OF SAN FRANCISCO v. WESTERN UNION TEL. CO. (No. 13,904.)

(Supreme Court of California. Sept. 2, 1892.)

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by the city and county of San Francisco against the Western Union Telegraph Company to recover unpaid taxes. Judgment for plaintiff. Defendant appeals. Reversed.

R. B. Carpenter, for appellant. *Atty. Gen. Hart* and *W. A. S. Nicholson*, for respondent.

Per Curiam. On the authority of San Francisco v. Telegraph Co., 30 Pac. Rep. 10, (No. 13,903,) this day decided, the judgment is reversed, with direction to the superior court to dismiss the action.

(3 Cal. Unrep. 507)

KELLEY v. OWENS. (No. 13,804.)

(Supreme Court of California. Sept. 2, 1892.)

On rehearing.

Per Curiam. The petition for rehearing is denied, but the following paragraph is eliminated from the opinion: "The testimony of Mr. Stewart should have been excluded; and the court erred in receiving it in the light of the circumstances shown by the record; but whether the appellant was prejudiced thereby to such extent as to justify a reversal upon that ground alone, it is not necessary to decide."

(96 Cal. 160)

HARVEY v. DALE. (No. 15,128.)

(Supreme Court of California. Sept. 7, 1892.)

Promissory Note—Failure of Consideration—Sale of Bonds.

In an action on a note given for the purchase of a bond, the invalidity of such bond, on account of noncompliance with statutory requirements in its issue, does not constitute a failure of consideration.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Harvey against Dale on a promissory note. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. T. Baggett, for appellant. *James A. Waymire*, for respondent.

Harrison, J. Action on a promissory note, to which the defendant pleaded a failure of consideration. Plaintiff recovered judgment, and the defendant has appealed. The cause was tried upon an agreed statement of facts, from which it appears that the note sued on was given for the purchase, by the defendant from the plaintiff, of one of a series of 5000 $1,000 bonds that had been issued by the Blue Lakes Water Company, a corporation duly organized and doing business under the laws of this state. The agreed statement also contains the various steps taken by the corporation in the matter of its issuance of the bonds; and it is contended on the part of the appellant that, by reason of the failure to take certain other steps which he claims are required by the statute, the bonds are invalid, and therefore the consideration for his note has failed. The sufficiency of the acts done by the corporation in the issuance of the bonds is the only question presented in the points of the respective counsel, and upon this question we have been referred merely to section 359 of the Civil Code, designating the steps to be taken by a corporation for the issuance of its bonds, and are asked to determine whether the compliance with the steps designated by that section was sufficient to render the bonds valid. But as this question is not involved in determining the correctness of the judgment appealed from, it would not be proper to enter into its discussion, especially as the corporation and other bondholders who are directly interested in the question are not before the court. In Sutro v. Rhodes, 92 Cal. 117, 28 Pac. Rep. 98, it was held that where one had sold certain county bonds that were invalid by reason of their having been issued without authority, such invalidity did not constitute a failure of consideration, and that the purchaser could not maintain an action to recover from his vendor the money which he had paid for the bonds, referring in support thereof to section 1774 of the Civil Code, and Otis v. Cullum, 92 U. S. 447. Upon the principles of that case, we must hold that the defendant herein cannot resist the payment of the note sued upon. He got from the plaintiff exactly what he intended to buy and did buy, viz., one of the bonds of the corporation. He had the same opportunity as the plaintiff to ascertain the steps that had been taken by the corporation in the issuance of the bonds, and, whether he made such examination or not, he bought subject to the rule of *caveat emptor*, and assumed all the risk of its invalidity when he accepted the bond in exchange for his promissory note. The judgment is affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; DEHAVEN, J., SHARPSTEIN, J.

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96 Cal. 162

In re GREEN. (No. 14,726.)

(Supreme Court of California. Sept. 8, 1892.)

INSOLVENCY—SCHEDULE AND INVENTORY—VERIFICATION.

Insolvent Act 1880, § 12, provides that in involuntary insolvency proceedings the debtor shall file the schedule of debts and inventory of property required by sections 3 and 4. Sections 3 and 4, under the head of "Voluntary Insolvency," provide for a schedule and inventory, and what they shall contain. Section 5, under the same head, requires the schedule and inventory to be verified. *Held* that, there being no requirement to that effect in sections 3 and 4, and section 12, which provides for the schedule and inventory, failing to refer to section 5, which requires their verification, it was unnecessary that the schedule and inventory in involuntary proceedings be verified.

Department 2. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

In the matter of Paul F. Green, an insolvent debtor. Appeal from an order discharging said Green from his debts. Affirmed.

Barham & Bolton, for appellant. *J. C. Sims* and *A. B. Ware*, for respondent.

SHARPSTEIN, J. Appeal from an order discharging respondent from his debts. The record shows that upon a petition of the requisite number of creditors the firm of Baxter & Green, and the members thereof, were adjudged to be insolvent, and that they prepare and file an inventory and schedule of all their property and estate, and of their debts and liabilities. Respondent, a member of said firm, filed an unverified inventory and schedule. After the expiration of more than three months from the adjudication of insolvency, respondent applied to the court for a discharge from his liabilities. Due notice of said application was given to creditors who had proved their debts, and they were notified to appear on a day appointed for that purpose, and show cause why a discharge should not be granted. On the day appointed for that purpose, appellant filed an opposition to the discharge of respondent, alleging as the ground of such opposition that, prior to the commencement of said proceedings in insolvency, respondent procured a writ of attachment to be issued and levied upon all the property of said firm of Baxter & Green, for the purpose of causing the creditors of said firm to proceed against it in involuntary insolvency. To that application respondent filed an answer denying said allegation, and upon that issue a trial was had, which resulted in a verdict and findings in favor of respondent. Appellant then objected to a discharge being granted to respondent, on the ground that respondent had not complied with the order or judgment of the court, requiring him to file an inventory and schedule, in that the inventory and schedule filed by him were not verified. The court overruled the objection, and granted a discharge to respondent from his debts. There was a literal compliance with the order of the court, which required respondent to file an inventory and schedule. The order did not expressly require that such inventory and schedule should be verified. But appellant's counsel insist that the insolvent act of 1880 requires that a debtor adjudged an insolvent upon the petition of his creditors must be required to file in court a verified inventory and schedule. Section 12 of the act provides that "if the respondent shall make default, or if, after a trial, the issues are found in favor of the petitioners, the court shall make an order adjudging that said respondent is, and was at the time of filing the petition, an insolvent debtor, and shall require said debtor, within such time as the court may designate, to file in court the schedule and inventory provided for in sections three and four of this act; and thereupon all proceedings shall be had in said matter in the same manner as if said debtor had voluntarily filed his petition." Sections 3 and 4 read as follows: "Sec. 3. Said schedule must contain a full and true statement of all his debts and liabilities, exhibiting, to the best of his knowledge and belief, to whom said debts and liabilities are due, and place of residence of his creditors, and the sum due to each; the nature of the indebtedness or demand, whether founded on written security, obligation, contract, or otherwise; the true cause and consideration thereof, and the time and place when and where said indebtedness accrued; and a statement of any existing pledge, lien, mortgage, judgment, or other security for the payment of the same. Sec. 4. Said inventory must contain an accurate description of all the estate, both real and personal, of the petitioner, including his homestead, if any, and all property exempt by law from execution, and where the same is situated, and all incumbrances thereon." As will readily be seen, neither of these sections requires a verification of the inventory and schedule to which it refers. But section 5 does require that the petition, schedule, and inventory voluntarily filed by an insolvent debtor must be verified by the affidavit of the petitioner. But section 5 is not referred to in section 12, and the omission to refer to it is, to our mind, quite significant. We think, if the legislature had intended that an involuntary insolvent debtor should verify his inventory and schedule in the same manner as a voluntary insolvent debtor is required to verify his petition, inventory, and schedule, the intention would have been clearly expressed. No such intention is expressed, and we think the implication clearly against it. Order affirmed.

We concur: McFarland, J.; De Haven, J.

96 Cal. 182

McCORMICK v. BELVIN et al. (No. 15,061.)

(Supreme Court of California. Sept. 9, 1892.)

Undertaking on Appeal.

1. Where an appeal is taken from a judgment, from an order refusing to dismiss, and from one denying a motion to vacate a default, and only one undertaking is given, which does not refer separately to either appeal, the undertaking is a nullity, and not merely insufficient, so that Code Civil Proc. § 954, authorizing a new undertaking to be filed when the original is insufficient, does not apply.

2. An order denying a motion to set aside a default is appealable.

In bank. Appeal from superior court, city and county of San Francisco.

Action by J. H. McCormick against W. W. Belvin and others. From a judgment for plaintiff, and from certain orders, defendant appeals. Dismissed.

C. L. Weller, for appellant. *Pillsbury, Blanding & Hayne*, for respondent.

Per Curiam. This is a motion by respondent to dismiss three appeals, upon the ground of want of undertaking on appeal. The appellant, by one notice of appeal, gave notice that he appealed from the judgment entered in the case, from an order denying appellant's motion to dismiss the action, and also from an order denying appellant's motion to set aside the judgment by default. Only one undertaking on appeal was given, in the sum of $300, and it did not refer separately to either of the appeals. "The undertaking is no undertaking at all," and there is no remedy under section 954 of the Code of Civil Procedure. Associates v. Wilkins, 71 Cal. 626, 12 Pac. Rep. 799; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. Rep. 815. One of the orders, at least, was appealable,—the order denying the motion to set aside the default judgment.

The appeals are dismissed.

96 Cal. 165

PEOPLE v. SWIFT et al. (No. 14,793.)

(Supreme Court of California. Sept. 9, 1892.)

Patents—Cancellation—Fraud of Patentee—Bona Fide Purchasers—Appeal.

1. Though the denials in the answer to the allegations of a complaint do not conform to the statute, and are imperfectly made, yet, when the case is tried on the supposition that the denials are sufficient, an objection to them cannot be raised for the first time in an appellate court.

2. A patent will not be canceled on the ground that it was procured by the fraud of the patentee, where the land has passed to a bona fide purchaser from the patentee, for value and without notice of the fraud, though such purchase was made before the patent was issued, and while the patentee had only an equitable title.

3. Where a state seeks to cancel patents issued by it on the ground of fraud practiced in securing the patent, a suspicion of fraud, however strong, is not sufficient, but the proof must be clear and convincing.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by the state of California against H. W. Swift and others to cancel certain patents issued for redwood timber land in Humboldt county. On the trial, plaintiff was nonsuited, and, from an order denying the motion for a new trial, appeals. Affirmed.

Atty. Gen. Hart and *John W. Turner*, for appellant. *Horace L. Smith*, for respondents.

Garoutte, J. This action was brought by the state to cancel certain patents issued for redwood timber land, situated in Humboldt county. After the certificates of purchase were issued to the several entrymen, each respectively conveyed the land included in his certificate to David Evans, who subsequently conveyed to one J. D. Walker, and upon June 16, 1885, Walker conveyed to the defendants H. W. Swift, T. W. Harvey, and Robert J. Walker, as trustees for other persons. It is sought by plaintiff to cancel these patents, upon the ground that they were procured by fraud and conspiracy practiced by the various parties to these transfers, in connection with other persons, for the benefit of and with the full knowledge and active consent of the defendant the California Redwood Company, a corporation. This corporation answered the complaint, denying the allegations thereof, and disclaiming any interest in the land involved in the litigation, and thereupon the action was dismissed as to such defendant. The defendants Swift, Harvey, and Walker denied the allegations of the complaint as to any fraud or conspiracy, admitted the land was conveyed to them as trustees, and set out that they held it in trust for the Humboldt Redwood Company, Limited, and that such company was a *bona fide* purchaser for a valuable consideration, and without notice of any fraud practiced in the procurement of the title from the state. The plaintiff was nonsuited, and now appeals from the order denying the motion for a new trial. Many of the denials of the answer are as follows: "And further answering, this defendant says 'that he has no knowledge or information sufficient to enable him to form a belief as to the truth of or to answer the allegation in said complaint contained, that * * *; and therefore he denies the said allegation, and the whole thereof.'" It is now insisted by appellant that these denials are not sufficient to constitute an issue, and that all the allegations of the complaint, where such character of denial exists in the answer, must be taken as true. The form of the denials is neither in line with the statute, nor valuable for future precedent, yet no objection was made to its sufficiency in the trial court, and the case undoubtedly went to judgment upon the theory that these denials were sufficient to create an issue. While they are imperfectly made, we do not consider them fatally defective, in view of the fact that appellant treated them as creating an issue, by supporting the allegations of the complaint in such regard with evidence, and from the further fact that the trial court undoubtedly so considered the matter in passing upon the motion for a nonsuit. To now sustain appellant's contention as to the insufficiency of the denials would not only be an injustice to respondents, but an injustice to the trial court. As was said in White v. Railroad Co., 50 Cal. 419: "The case seems to have been tried upon the supposition that the answer presented a sufficient denial to the allegations of the complaint, and to raise the objection for the first time in this court is too late."

If the defendants are *bona fide* purchasers for value, without notice, their title cannot be attacked by the state, notwithstanding fraud was practiced by their grantors in securing the patents. The recent case of Coal, etc., Co. v. U. S., 123 U. S. 307, 8 Sup. Ct. Rep. 131, is in many essential features similar to the case at bar; and there the court, speaking to this point through Mr. Justice MATTHEWS, said: "It is fully established by the evidence that there were no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a *bona fide* purchaser for value without notice is perfect." It is insisted that defendants were not innocent purchasers, and for that reason are not entitled to the benefits of the rule quoted. Before passing to an examination of the record upon this point, we would say the evidence necessary to be produced in a court of equity to justify the setting aside of a patent to state or United States lands, must be clear, convincing, and unequivocal. As was said in the Maxwell Land Grant Case, 121 U. S. 331, 7 Sup. Ct. Rep. 1015: "It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the president of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful." The foregoing rule of evidence not only applies to the matter of fraud practiced upon the government by the entrymen and others in the actual procurement of the patents, but applies with equal force and effect to the good faith and innocence of the subsequent grantee.

Upon a careful examination of the record, we are of the opinion that the evidence entirely fails to establish the fact that defendants actually connived at or had notice of the fraud and perjury practiced in the procurement of these patents; for that some of them at least were procured through fraud and perjury amply sufficient to justify their cancellation by the state, if held by the original parties, or those claiming under them with notice, the evidence fully indicates. The actual purchasers of these lands were principally residents of Scotland, and it is not claimed that they were personally conversant with any of the details of the transaction; but it is insisted that their agent, one J. D. Walker, living in San Francisco, made the agreement of purchase with notice of the frauds to be practiced in the procurement of the title. We find but one fact in the case that to any degree casts suspicion upon the good faith and innocence of Walker in entering into this agreement of purchase, and that is the fact that he knew at the date of the agreement that the lands were the public lands of the state. But to create a suspicion, however strong that suspicion may be, is not sufficient under the rules of evidence by which we are guided. These parties should not lose their lands by a judgment based upon evidence from which suspicions, inferences, and conjectures of fraud only can be deduced. The stability of titles demands that a patent should only be annulled by a court of equity upon full and complete proof,—upon testimony which the courts say must be "clear, unequivocal, and convincing." As against the suspicion of the fraud created by Walker's knowledge that the title to these lands was vested in the state, we have his positive denials in detail of any participation in or knowledge of any fraud of any kind or character practiced in the procurement of these patents. His testimony, if true, sustains the judgment, and the character of the judgment clearly indicates that such testimony favorably impressed the trial court.

It is insisted that, defendants having purchased the land before the patent issued, they simply purchased an equity, and that the rule of *bona fide* purchasers for value without notice does not apply to equitable titles. If defendants' title had not ripened into a perfect legal title by virtue of the issuance of the patents prior to the commencement of this action, there would be merit in the contention, under the authority of Taylor v. Weston, 77 Cal. 534, 20 Pac. Rep. 62. But in that case, after a careful review of the authorities, the opinion of the court concludes by saying: "It is hardly necessary to add that in what we have said we have no reference to cases where the legal title has passed to the person through whom the *bona fide* purchaser claims." That is the *status* of this case exactly, and there can be no question but that these *bona fide* purchasers, being possessed of perfect legal title at the time this attack was made, although having purchased prior to the issuance of the patent, were in no worse position than though the patent had issued prior to the date of their purchase. Let the order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

(96 Cal. 258)

HASKIN v. JAMES. (No. 14,812.)

(Supreme Court of California. Sept. 26, 1892.)

FRAUDULENT CONVEYANCES — CONSIDERATION — RIGHTS OF GRANTEE—REVIEW ON APPEAL.

1. Where the transferee of valuable property of an insolvent firm did not know, or have reasonable cause to believe, that the transfer was made to prevent the property from coming into the hands of their assignee in insolvency, or to defeat the object of the insolvent act, and paid full consideration in good faith, he is not liable to the assignee in insolvency appointed within a month after such transfer.

2. The finding of a court that had the witnesses before it, on a point on which the evidence was conflicting, will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Action by Charles A. Haskin, assignee, etc., against D. W. James. Judgment for defendant. Plaintiff appeals. Affirmed.

Wilcoxson & Bouldin, for appellant.
Graves & Graves, for respondent.

FOOTE, C. The plaintiff, assignee of the partnership of Ward & James, insolvent debtors, brings this action against the defendant, D. W. James, to recover the value of certain property of the partnership, which it is alleged had been transferred to the defendant within one month prior to the creditors' petition in insolvency, by means of which transfer a preference had been made, in violation of section 55 of the insolvent act of 1880. The court below found against the contention of the plaintiff, and rendered judgment accordingly, from which, and from an order denying a new trial, the assignee appeals.

The findings are assailed as being contradictory, and as being unsupported by the evidence. It is claimed that in one part of the findings the court finds the defendant a creditor of the insolvents, and in another part that he is not a creditor, as meant in the insolvent act, and that, therefore, the judgment should be reversed. We do not deem it necessary to determine that question, because, under our view of the matter, it becomes of no consequence whether the defendant, at the time the transfer was made, was or was not a creditor of the insolvent debtors. The court finds, among other things, "that said defendant James did not believe, and did not have reasonable cause to believe, at or before the time he took said assignment from said Ward & James, that said Ward & James were insolvent, or that said assignment was made by them with a view to prevent the property conveyed from coming into the hands of their assignee in insolvency, or to prevent the same from being distributed ratably among their creditors, or to defeat the object of the insolvent act, or to hinder, impede, or delay the operation of the insolvent act." The transaction seems to have been one where it appears that this firm had improperly failed to account for certain money due Wells, Fargo & Co., and where they were threatened to be proceeded against criminally, and that they sought to get the defendant, who was the father of one of the partners, to become security for the payment of this money; and to secure him for that amount, and not for any previous liability which he was under for them, they made this transfer. The transfer was made, therefore, not in consideration of past indebtedness to the defendant, but for the purpose of securing him in his future payments of their debts. The evidence that the defendant did not know of the insolvency of the firm, or have reason to believe they were insolvent, is conflicting, but we cannot say that the court below, with the witnesses present and before it, and with an opportunity to observe their manner of testifying, was manifestly wrong in giving credence to one side rather than the other. For this reason we do not think the finding on the point above mentioned should be disturbed, and under it the defendant cannot be said to have accepted the preference in violation of the insolvent act. Bernheim v. Christal, 76 Cal. 567, 18 Pac. Rep. 683. Again, the evidence and the finding show that the property transferred was worth $900, and the amount the defendant agreed to pay and did pay afterwards for the insolvents was $1,272.47. As the findings show upon sufficient evidence that the defendant did not know or have any reason to believe a fraud was intended on the insolvent act on the part of the insolvent debtors, and it appears that he paid full consideration for the goods in good faith, he is not liable in this action. Albertoli v. Branham, 80 Cal. 631, 22 Pac. Rep. 404. For these reasons we think that the judgment and order should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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96 Cal. 206

DORN v. BAKER et al. (No. 14,809.)

(Supreme Court of California. Sept. 17, 1892.)

TAX TITLE—SALE OF EQUITABLE INTEREST—EJECTMENT—PLEADING—AMENDMENT.

1. The purchaser at a tax sale of land held under a certificate of purchase from the state acquires only an equitable title, and the certificate holder, on subsequently completing his purchase and procuring a patent, may recover the land in ejectment against the tax purchaser, where no equitable defense was pleaded.

2. There is no error in refusing to permit an amended answer to be filed, where it states no defense that could not be made under the original answer.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Ejectment by N. A. Dorn against J. C. Baker and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Venable & Goodchild and *Graves & Graves*, for appellants. *F. A. Dorn*, for respondent.

BELCHER, C. This is an action of ejectment to recover possession of the east half of a certain thirty-sixth section of land in San Luis Obispo county, and the complaint is in the ordinary form. The answer of defendants simply denies the averments of the complaint, and alleges that the cause of action is barred by the statute of limitations. At the trial, the plaintiff introduced in evidence a patent from the state of California, dated March 21, 1891, granting to him the demanded premises. The defendants then admitted that they were, and had been since January 1, 1891, in possession of said land. And the plaintiff admitted that prior to the year 1880, one Alois Schneider applied to the state of California to purchase the said land, and paid to the state 20 per cent. of the purchase price and interest, and received a school land certificate of purchase therefor; that Schneider died in the year 1887, and thereafter, in the year 1890, plaintiff succeeded to his rights in and to the said land, under and through a deed executed by the administrator of his estate, after due and regular proceedings in the matter of his estate, and pursuant to an order of the court duly made, confirming the sale to plaintiff, and directing the execution of the deed. And plaintiff testified that at the time he purchased the land there was due the state, on the certificate of purchase therefor, about $600, which he paid to the state, and then, as the assignee of the certificate, received the patent introduced by him in evidence, and that he had no title to the land other than the one thus acquired. The defendants then offered in evidence a tax collector's deed of the land, which was executed to defendant Baker on March 12, and recorded on April 6, 1886, and which recited, among other things, that the land was assessed to Alois Schneider for the fiscal year ending June 30, 1885, and, the state and county taxes due thereon not being paid, was sold to Baker on March 6, 1885, for the sum of $9.13, the full amount of the taxes, costs, and charges. The plaintiff objected to the deed being received in evidence, upon the ground that it was immaterial, and was not pleaded. The court overruled the objection, and thereupon the case was submitted. On the next day, and before the case was decided, the defendants presented to the court and asked leave to file an amended answer, in which, in addition to the denials and averments of their original answer, they set out a copy of the said tax deed, and alleged that defendant Baker was the owner of said property, and in possession thereof, and had been such owner and in possession since the 6th day of March, 1885. The plaintiff objected to the filing of the amended answer upon the grounds "that said amendments were offered too late, and not at the proper time, and that they should have been offered at the time of the trial; that the amendments as offered do not constitute a defense; that no notice has been given to the plaintiff or his attorney of the proposed amendments, and the same, or a copy thereof, had not been served on the plaintiff or his attorney." The court sustained the objection, and the defendants excepted to the ruling. Thereafter the court found the facts and rendered judgment in favor of the plaintiff, from which, and from an order denying a new trial, defendants have appealed.

In support of the appeal it is now claimed that the evidence did not justify the finding that the plaintiff was the owner and entitled to the possession of the land, or the finding that the entry of defendants was without right or title; and it is urged that under the pleadings defendants had a right to introduce any evidence which might show, or tend to show, that plaintiff had no right of entry when the action was commenced; and that the evidence introduced did show that Baker, by his tax deed, acquired all the interest of Schneider in the land and in the certificate of purchase, which, by section 3514 of the Political Code, was made *prima facie* evidence of title; and hence that, under the rule declared in Clark v. Baker, 14 Cal. 612, and other cases, and in section 1106 of the Civil Code, the patent issued to plaintiff inured to Baker's benefit, and fed his title. We do not think the rule invoked applicable to the facts of this case. At most, the tax deed conveyed to Baker only such interest in the land as Schneider then had. That interest was an equitable title, which could only be perfected by paying up the balance of the purchase money, with the interest due thereon, and other charges, and obtaining the legal title from the state. Neither Schneider nor Baker ever made or offered to make these payments, but the plaintiff made them for and on his own behalf. When, therefore, he obtained the patent, the legal title vested in him, and the most that can be claimed is that Baker has a right, which a court of equity would enforce, to have that title transferred to him upon his doing equity and paying back to plaintiff all the money he has paid, and interest thereon. But in an action of ejectment the legal title will always prevail against an equitable one, if no equitable defense is pleaded. Hartley v. Brown, 51 Cal. 465; Kentfield v. Hayes, 57 Cal. 409. Here no equitable defense was pleaded, either in the original or amended answer, and the court, therefore, rightly gave judgment for the plaintiff. There was no error in refusing to permit the amended answer to be filed. The application was addressed to the discretion of the court, and the paper offered stated no defense that could not be made under the original answer. The statute of limitations did not begin to run until the patent was issued, and there can be no pretense, therefore, that the cause of action was barred. Manly v. Howlett, 55 Cal. 94. We advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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96 Cal. 210

BURR v. BOARD OF SUP'RS OF SACRAMENTO COUNTY. (No. 14,759.)

(Supreme Court of California. Sept. 20, 1892.)

County Board — Allowance of Claims — Writ of Review — Interest of Taxpayer — Remedy at Law.

1. A petition for a writ of review by a private citizen, asking the annulment of an order of a county board illegally allowing a claim against the county, which had not been duly verified, will not be granted, where the money has been obtained on the said order, because the annulment would not secure a return of the money, nor have any other beneficial effect, nor would the judgment therein be competent as evidence in a suit by the county against the recipient of the money, the county auditor, or treasurer, neither being a party to the said proceeding.

2. The county government act, (section 8,) making it the duty of a county attorney, whenever any money shall have actually been paid under an order of the supervisors, made without lawful authority, to institute suit for the said money in the name of the county, affords an adequate remedy at law in such cases; but the interest which a mere citizen or taxpayer has in the matter does not entitle him to bring suit in his own name, until after the matter has been laid before the attorney, and the latter has refused to act.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; W. C. Van Fleet, Judge.

Petition by E. A. Burr for the annulling of an order of the board of supervisors of Sacramento county. There was a demurrer to the petition, which was sustained, and judgment rendered for the board. Petitioner appeals. Affirmed.

Johnson, Johnson & Johnson, for appellant. *A. J. & Elwood Bruner*, for respondent.

Vanclief, C. Petition to the superior court for a writ of review for the purpose of annulling an order of the respondent board, allowing a claim of James McClatchy & Co. against the county for advertising. The court sustained a general demurrer to the petition, and thereupon, the petitioner declining to amend, rendered judgment for respondent. Whether or not the court erred in sustaining the demurrer is the only question presented for decision. The petition shows that the petitioner is a resident, citizen, and taxpayer of Sacramento county; that on or about the 11th day of April, 1891, the respondent heard and considered the claim of McClatchy & Co. for $1,567, for advertising, and allowed it to the extent of $1,317; that immediately thereafter, on the same day, McClatchy & Co. procured a warrant therefor from the county auditor, and obtained the money on the warrant from the county treasurer; and "that the said claim or bill of the said firm, so heard, considered, and allowed by respondent, was not duly or otherwise verified as to its correctness, and no claim therefor, duly or otherwise verified, was ever presented to or filed with the clerk of said board." It is also stated that because the claim was not verified the board had no jurisdiction to consider or allow it; and "that petitioner has no plain, speedy, or adequate remedy at law."

1. Conceding that the action of the board of supervisors was unauthorized and in excess of its jurisdiction, and that the money was wrongfully and unlawfully obtained from the county treasury, I think the relief sought, and all relief that could be given in this proceeding, viz., the annulment of the order of the board allowing the claim, would be of no material or beneficial consequence to the petitioner or to the county. It would not restore to the county treasury the money obtained by McClatchy & Co.; nor would the judgment be competent evidence in a suit by the county against McClatchy & Co., the county auditor, or the treasurer, as neither of them is a party to this proceeding; and, if an action by the county against the individual members of the board can be maintained on the facts stated in the petition, the alleged fact that the claim of McClatchy & Co. was not verified, and all other facts necessary to prove the nullity of the order of the board, may be proved in such action by any evidence which would be competent to prove them in this proceeding. "The law neither does nor requires idle acts." Civil Code, § 3532. A court will not exercise a power for no material or useful purpose, (Huntington v. Nicoll, 3 Johns. 598,) and will refuse a writ of *mandamus* if it appears that it can have no beneficial effect, (People v. Supervisors, 12 Barb. 222.)

2. A remedy for the wrong complained of is provided by section 8 of the county government act, as follows: "Sec. 8. Hereafter, whenever any board of supervisors shall without authority of law order any money paid as a salary, fees, or for any other purposes, and such money shall have been actually paid, * * * the district attorney of such county is hereby empowered, and it is hereby made his duty, to institute suit in the name of the county against such person or persons to recover the money so paid and twenty per cent. damages for the use thereof, and no order of the board of supervisors therefor shall be necessary to maintain such suit." This seems to be a plain, speedy, and adequate remedy at law, available to the petitioner or to any other taxpayer of the county, by complaint to the district attorney; and, to say the least, the interest which a mere taxpayer has in the matter does not entitle him to bring suit in his own name until after the district attorney has refused to perform the duty enjoined upon him by the eighth section of the county government act. The petition does not show that any information of the alleged wrong has been laid before the district attorney, nor that he has failed or refused to perform his duty. I think the judgment should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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96 Cal. 228

HULSMAN v. TODD et al. (No. 14,568.)

(Supreme Court of California. Sept. 20, 1892.)

WATER RIGHTS—QUIETING TITLE—PLEADING—FINDINGS—JOINT DEFENDANTS.

1. A complaint in an action to quiet title to the waters of a certain creek, and enjoin defendants' diversion of the same, alleging defendants' claim of interest in the said waters merely on information and belief, although perhaps imperfect in its assertion of their said claim, is not open to a general demurrer, where it alleges also facts showing a wrongful diversion by defendants, and a threatened continuance.

2. Findings that at the commencement of suit defendants claimed an interest in the waters adverse to plaintiff, and without right; that plaintiff had irrigated his land with said waters for 30 years, taking 230 inches of water, all of which was necessary for the purpose; and that he owned all waters flowing in the creek above his land, to the extent aforesaid,—were sufficient upon the issue raised by the pleadings as to whether defendants had any right, title, or interest in the waters, or any portion thereof, and also upon the plea of limitation, making it clear, at least, that if more specific findings had been made they would necessarily have been adverse to defendants.

3. Defendants made common answer, denying that plaintiff had any right to certain of the water, which belonged to defendants, and which one of their number had diverted, and disclaiming any right, except to the water owned by the said defendant. The court found that defendants claimed an interest in the water adverse to plaintiff, and that the said defendant, in pursuance thereof, and for the several benefit of himself and his codefendants, entered on the water, and diverted a portion belonging to plaintiff. *Held*, that a joint judgment for damages was proper against each defendant making the said answer, even though the ditch might not then have been extended to his land. Miller v. Ditch Co., 25 Pac. Rep. 550, 87 Cal. 430; Blaisdell v. Stephens, 14 Nev. 17; and Foreman v. Boyle, 26 Pac. Rep. 94, 88 Cal. 290,—distinguished.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county; W. F. MASTEN, Judge.

Suit by John F. Hulsman against Joseph Todd and others to quiet title, and for other relief. Judgment for plaintiff. Defendants appeal. Affirmed.

Spencer & Raker, for appellants. *Goodwin & Goodwin*, for respondent.

BELCHER, C. It is alleged in the complaint in this case that for more than 30 years the plaintiff and his grantors have been the owners and in possession of a certain tract of land in Lassen county, which during all that time has been held and used by them as a farm; that from time immemorial a small stream of water, known as "Lassen Creek," has flowed to, upon, and across the said tract; that in the spring the stream carries about 225 inches of water, measured under a 4-inch pressure, but the amount thereafter diminishes until the flow does not exceed 25 inches; that plaintiff is the owner of three ditches conveying water from said stream to and upon his lands to irrigate the same, and that he and his grantors have owned, possessed, and used said ditches for that purpose for 30 years last past; that the three ditches have an aggregate capacity to carry 230 inches of water, measured under a 4-inch pressure, and that plaintiff now owns the said water, and the whole thereof, and has the right to have the same flow undisturbed to, upon, and across his land, and to and through his ditches; that plaintiff is informed and believes that defendants, and each of them, claim some interest in the waters of said stream adverse to him, and that such claim is without right; that at the time of the commencement of the action there was not to exceed 75 inches of water flowing in the said stream; that defendants have entered upon the stream above plaintiff's land and ditches, and have diverted a large portion of the waters thereof, and are conveying the same entirely away from plaintiff's land, and wholly depriving him of the use thereof; that plaintiff has growing crops of grass and grain and other products upon his land, which require all the water flowing in the said stream for their growth and maturity; that to deprive plaintiff of the use of the water will result in his irreparable injury; that defendants threaten to continue such diversion, and plaintiff has already suffered damage in the sum of $100. And the prayer is that plaintiff have judgment quieting his title to the waters of Lassen creek to the extent of 230 inches as against defendants, and perpetually enjoining them from diverting any portion thereof away from his land and ditches, and for damages in the sum of $100. The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and their demurrer was overruled. They then filed a joint answer, by which they denied all the averments of the complaint, except those as to Lassen creek, the amount of water flowing in it, and their adverse claim to a portion thereof; and alleged that defendant Joseph Todd had a right to 50 inches of water of the stream, measured under a 4-inch pressure, which was prior and superior to the right thereto of the plaintiff; and that the other defendants never obstructed the flow of the waters of the creek, or claimed any interest in or right to the same, except the 50 inches owned and claimed by Joseph Todd, and subject to his superior right. They also pleaded the statute of limitations in bar of the action. After trial the court made its findings, and rendered judgment in favor of the plaintiff, according to the prayer of his complaint. From that judgment the defendants appealed, and the case is brought here for review on the judgment roll alone.

The first point made for a reversal of the judgment is that the court erred in overruling the demurrer. We see no error in the ruling. The law is well settled that a general demurrer to a whole complaint cannot be sustained if the complaint states facts, though imperfectly, showing that the plaintiff is entitled to relief, either legal or equitable. White v. Lyons, 42 Cal. 279; Cassidy v. Cassidy, 63 Cal. 352; McPherson v. Weston, 64 Cal. 275, 30 Pac. Rep. 842; Fleming v. Albeck, 67 Cal. 226, 7 Pac. Rep. 659. Here the averment objected to as insufficient is "that the plaintiff is informed and believes that the defendants, and each of them, claim some interest in and to the waters of said stream, adverse to plaintiff's title thereto;" and it is argued that this is not an averment that defendants claim any interest in the waters, but only that plaintiff is informed and believes that they do; and hence that the complaint does not state a cause of action to quiet title. Conceding this to be so, still the complaint states facts showing a wrongful diversion of water by the defendants, to the detriment of plaintiff, and a threatened continuance of such diversion. Under this showing, we think the plaintiff was clearly entitled to some relief, and his complaint was therefore not demurrable on the ground that it did not state facts sufficient to constitute a cause of action.

The next point is that the court failed to find upon the issue raised by the pleadings, as to whether or not the defendants had "any right or title to, or interest in, the waters of said stream, or any portion thereof;" and also failed to find upon the statute of limitations, pleaded by defendants; and it is claimed that for want of findings upon these issues the judgment should be reversed. The court found "that in the early spring of 1889 the defendants claimed an interest in the waters of said stream adverse to the plaintiff, and did so claim at the time this action was commenced; that the said claim was without right, and in subordination to plaintiff's right and title to said water." It further found "that since the year 1860 the plaintiff and his grantors have occupied and improved the lands described in the complaint; * * * that at the commencement of this action plaintiff owned, and since 1861 he and his grantors have owned, the three ditches described in the complaint; * * * that by means of said ditches the plaintiff and his grantors have each year during all of said time * * * diverted from said stream and appropriated two hundred and thirty inches of water, measured under a four-inch pressure, * * * and that said amount of water is necessary during all of the spring, summer, and fall months of each year for the irrigation and other domestic wants of plaintiff on said land; and at the time this action was commenced the plaintiff owned all the water flowing in said stream above his said lands, to the extent aforesaid." These findings seem sufficient to meet and dispose of the issues referred to, and they at least make it clear that, if more specific findings had been made, they must necessarily have been adverse to appellants. The judgment cannot, therefore, be reversed for the failures complained of. People v. Center, 66 Cal. 564, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; Gillespie v. Lake, 85 Cal. 407, 24 Pac. Rep. 891; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. Rep. 504.

The third and last point which need be noticed is that a joint judgment for damages and costs was entered against all of the defendants. It is claimed that no judgment for damages or costs was authorized as against the defendant Hosselkus, and that the judgment entered, at least so far as it affects him, should be reversed. We do not think this claim can be sustained. It appears that Hosselkus joined in a common answer with the other defendants, denying, among other things, that plaintiff had any right to "fifty inches of the waters of said creek belonging to the defendants," and alleging that defendant Joseph Todd and his grantors rightly entered upon the stream, and diverted 50 inches of the waters thereof, and had thereby acquired a right thereto which was superior to any rights of the plaintiff; and that he (Hosselkus) claimed no right to the waters of the stream, except such as he may have to the said 50 inches owned by Joseph Todd. And the court found that the defendants claimed an interest in the waters of the stream adverse to plaintiff, and "that in pursuance of said claim, and for the several benefit of himself and his codefendants, the defendant Joseph Todd entered upon said stream above the land of plaintiff, and above each and all of his ditches, as aforesaid, and in the spring of 1889 diverted a portion of the waters belonging to plaintiff." The diversion was therefore for the benefit of Hosselkus, and presumably was made partly at his instance and by his procurement. Under these circumstances, he became jointly liable with the other defendants for the damages resulting, and it was immaterial that the ditch had not yet been extended to his land. The cases of Miller v. Ditch Co., 87 Cal. 430, 25 Pac. Rep. 550; Blaisdell v. Stephens, 14 Nev. 17; and Foreman v. Boyle, 88 Cal. 290, 26 Pac. Rep. 94,—are not in point. In those cases it was held that an action for damages cannot be maintained against several defendants jointly when each acts independently of the others, and there is no concert or unity of design between them. The rule thus stated is undoubtedly correct, but it is not applicable to this case. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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96 Cal. 214

RAMELLI v. IRISH. (No. 14,728.)

(Supreme Court of California. Sept. 20, 1892.)

APPROPRIATION OF WATER—CHANGING USE—PUBLIC LANDS.

1. A right acquired by appropriation of water flowing through public land will be protected as against a subsequent purchaser of such land.

2. A person entitled to the use of water may change the place of diversion, the place where it is used, or the use to which it is applied, if others are not injured by such change.

Commissioners' decision. Department 1. Appeal from superior court, El Dorado county; N. D. ARNOT, Judge.

Action by Giovanni Ramelli against Joseph Irish for damages alleged to have resulted from the diversion by the defendant of a stream of water. From a judgment entered upon an order granting a motion for nonsuit, plaintiff appeals. Reversed.

Blanchard & Swisler, for appellant. *Irwin & Irwin*, for respondent.

BELCHER, C. The controversy in this case is as to the respective rights of the parties thereto to divert and use for purposes of irrigation the natural waters of a small stream in El Dorado county, known as "Slate Creek." Each party alleges that his right to the said waters is prior and superior to that of the other. At the trial, when the plaintiff rested his case, the defendant moved for a nonsuit, upon the grounds "that plaintiff has failed to show that at the time the water was diverted from the bed of the stream by the defendant the quantity of water at head of plaintiff's ditch was thereby diminished; that the evidence given shows that the defendant was lawfully entitled, as riparian proprietor, to the water diverted by him, and that none of the waters have been diverted away from the stream; that the evidence given does not show that the plaintiff was entitled to any of the waters diverted by the defendant." The court granted the motion, and the plaintiff thereupon appealed from the judgment.

The facts proved were, in substance, as follows: Slate creek runs through land owned by defendant, and to which he acquired title from the government by a homestead patent in April, 1885. It carries at the beginning of the irrigating season 20 or more inches of natural water, measured under a 4-inch pressure; but the quantity diminishes as the season advances, and at the end thereof there are not more than 4 or 5 inches. As early as 1857, a ditch, now called the "Schlein Ditch," was constructed to take water from Slate creek, and carry it away, to be used in mining. It started at a point a little above the lower line of the land now owned by defendant, and took not only the natural water of the creek, but other water received from flumes passing a short distance above its head. In 1858 one Craig purchased the ditch, and thereafter held and owned it until 1873. During the time he so held the ditch he sold water conducted through it to miners, and used some of the water to irrigate his land. In 1873 he conveyed his land to one Theodore Schlein, and intended to convey the ditch, but did not mention it in his deed. He testified: "I still owned it [the ditch] until I sold it to Mr. Schlein. I sold my ranch, and that with the ranch. I did not give a deed of the ditch. I forgot to put it in the deed. This ditch ran to the land I sold to Mr. Schlein. I used this ditch for irrigating on a portion of this land. * * * This Schlein ditch was used in connection with my ranch, and I sold water through it. This ditch took the natural waters of Slate creek from the time it was cut,—some time in 1856 or '57. * * * Schlein took possession of this Schlein ditch at the time I sold the ranch. The deed is dated December 30, 1873. Mr. Schlein took possession of the ranch and ditch at the same time." In March, 1875, Schlein sold the ditch to the plaintiff Ramelli, and he testified: "I entered into possession of the Schlein ditch in November or December, 1873, and continued in possession until I sold it to Mr. Ramelli. After I sold it to him, he went into possession of it, and used it. I went into possession of it through Mr. Craig's conveyance. At the time I purchased this ranch of Mr. Craig the ditch extended onto that land,—onto that ranch. * * * At the time I bought the ranch of Mr. Craig it was intended to include the ditch also, and I used this ditch in connection with the ranch, for irrigating purposes on the ranch, while I owned the ditch and had possession of the ditch." In July, 1876, the plaintiff purchased a piece of land, and 10 or 12 years before the trial, which was in June, 1891, constructed a ditch called the "Ramelli Ditch," which commenced at a point in Slate creek about a hundred feet below the head of the Schlein ditch, and extended thence to his land, about a mile distant. From the time of the construction of this new ditch plaintiff diverted the waters of the creek through it, and used them for mining on his land, and for irrigating crops on a portion thereof, until July, 1888, when the defendant, above the point of plaintiff's diversion, wholly obstructed the flow, and thereafter refused to let any water pass down to plaintiff's ditch. At that time plaintiff had growing on his land and was irrigating about an acre and a half of potatoes, some clover, fruit trees, and blackberries, all of which, as he says, for want of the water turned away, dried up and were destroyed, to his damage in the sum of $300. The prayer of the complaint was for an injunction and damages.

We think the court erred in granting the nonsuit. It is settled law that the right to the use of water flowing in a stream may be acquired by appropriation; and when an appropriation has been made upon public land of the United States for some useful or beneficial purpose, the rights so acquired will be recognized and protected as against another person who subsequently obtains title to the land from the government. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, and 22 Pac. Rep. 198. It is also settled law that the person entitled to the use of water may change the place of diversion, or the place where it is used, or the use to which it was first applied, if others are not injured by such change. Civil Code, § 1412; Kidd v. Laird, 15 Cal. 162; Davis v. Gale, 32 Cal. 27. Here it appears that the waters of Slate creek were appropriated for a useful purpose as early as 1857. And the evidence tended to show that the plaintiff had at least obtained a complete equitable title to the ditch then constructed, and the water right thereby acquired, and that the same had not been abandoned or lost. The plaintiff also constructed his new ditch some time between 1879 and 1881, and thereby again diverted and appropriated the waters of the creek. And after this appropriation he continued to use the waters for useful purposes until 1888, without any objection, so far as appears, on the part of the defendant. The defendant's patent may relate back to a point of time five years before its date, and still his rights as a riparian proprietor to claim and use the water on his land would be subordinate to those of the plaintiff, if the latter constructed his "Ramelli ditch" before that time, or had succeeded to and still retained the rights of the first appropriators. Under these circumstances, we think the case should have been fully tried, and the rights of the parties determined in view of all the evidence. We advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: Vanclief, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

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96 Cal. 218

SHEPLAR v. GREEN et al. (No. 14,826.)

(Supreme Court of California. Sept. 20, 1892.)

Specific Performance—When Lies—Tender of Purchase Money.

1. Where the purchaser of land by contract pays part of the purchase money, takes possession, and makes improvements, the vendor, by bringing action against him to quiet title, without first offering to convey, repudiates the contract, and the purchaser may file a cross complaint for specific performance without a tender of the balance of purchase money.

2. Where the purchaser withdraws money deposited by him to cover balance due on the purchase, the withdrawal, though a violation of the contract, will not release the vendor from offering to convey and demanding the exact sum due before bringing suit, nor will it prevent the purchaser from obtaining specific performance.

Commissioners' decision. Department 1. Appeal from superior court, El Dorado county; N. D. Arnot, Judge.

Action by Samuel H. Sheplar against W. C. Green and others to quiet title. From a judgment in favor of Green and Robinson, plaintiff appealed. Affirmed.

George E. Williams, for appellant.

The question of tender being necessary before filing the cross complaint has been settled by several decisions in this state, and I will only refer to two of the cases: Goodale v. West, 5 Cal. 339; Englander v. Rogers, 41 Cal. 422.

Blanchard & Swisler, for respondents.

Haynes, C. Appeal from a judgment in favor of respondents Green and Robinson upon the judgment roll. The action was brought against respondents and one J. W. Rupley to quiet title to 80 acres of mineral land. Each defendant answered separately, and each filed a cross complaint for specific performance; Rupley to a part thereof containing about 20 acres, under a contract made and recorded in 1871; and the other defendants under a contract of purchase made by defendant Green with the plaintiff July 3, 1890, for the whole of said 80 acres. Robinson's claim was under this contract, in which he was interested with Green. Judgment went in favor of Rupley for the part claimed by him, and described as lying "below the toll road," being 20 acres; and in favor of defendants Green and Robinson upon their cross complaint, awarding specific performance of the Green contract for the remaining 60 acres. There was no appeal from the judgment in favor of Rupley.

The contract price of the land was $2,500, of which Green paid plaintiff $1,000, and deposited the remaining $1,500 in the hands of one Mahoney; the deposit, by the terms of the contract, to remain in his hands "until approval of title" by an attorney named in the contract, whose decision as to title should be final. Five days were allowed for examination of title after receipt of the abstract, and the balance of the purchase money "to be paid on delivery of deed." The contract further provided that the purchaser was to get full 80 acres of "bed rock," but if there should be less the price was to be correspondingly reduced. At the date of the contract the quantity of land embraced in the Rupley contract was not known. Plaintiff took no steps to ascertain the quantity, nor did he furnish an abstract, as to which matters the contract was silent. In the latter part of July, 1890, defendant Robinson had the Rupley tract surveyed, and also procured an abstract of title, on which the Rupley contract appeared. Soon thereafter, and before August 8th, the attorney informed plaintiff that there were 20 acres in the Rupley lot, and that he had good title to the remaining 60 acres. Immediately after entering into the contract defendants went into possession of the land, and made valuable improvements thereon, and also upon adjoining land, with a view to the development of the land in question. On August 8th defendants withdrew the deposit of $1,500. Plaintiff never tendered a deed, nor offered to convey; nor did defendants tender the remainder of the purchase money, or demand a conveyance. The court further found that defendants were at all times able, ready, and willing to complete the purchase, and that upon the trial they tendered to plaintiff $875, which plaintiff declined, and which defendants afterwards, and before the close of the trial, deposited with the clerk for the plaintiff, and which sum the court found was the balance due on the contract. On these facts appellant raises two questions: "(1) Was a tender of the balance of the purchase money by the defendants necessary before filing their cross complaint? (2) Was the withdrawal of the money by Green from the depositary a violation of the contract?"

1. The covenants of the parties were mutual and dependent. Plaintiff never having offered to convey, the defendants were not in default when plaintiff commenced his action to quiet title, which, in itself, was a repudiation of the contract. A tender of the remainder of the purchase money, under such circumstances, would have been a vain thing, which the law does not require. Counsel contends that the settled law in this state requires a plaintiff to tender performance before bringing suit, and that when a defendant files a cross complaint he becomes an actor or plaintiff, and must therefore tender performance on his part. The rule is not universal as to either party. In Dowd v. Clarke, 54 Cal. at page 50, the vendee sought specific performance. The court said: "He [the defendant] ignored altogether the right of the plaintiff to purchase, and on well-settled principles this was a waiver of the necessity of a tender before bringing suit." See, also, Barsolou v. Newton, 63 Cal. at page 226, and Pom. Spec. Perf. § 361. These authorities do not in the least conflict with the cases cited by appellant's counsel, none of which presented facts bringing them within the exception above stated.

2. The withdrawal of the deposit on the 8th of August, 1890, if a violation of the contract, was not such as to release the plaintiff from performing, or offering to perform, on his part; nor such as to prevent the defendants from obtaining specific performance against the plaintiff under the facts found by the court. The plaintiff had received more than half of the purchase money, and put defendants in possession, and permitted them to make valuable improvements on the land, yet had taken no steps to complete the contract. He was informed, prior to the withdrawal of the money, of the quantity of land claimed by Rupley, and which would largely diminish the amount required to complete the purchase, so that but little over one half the sum deposited was required for that purpose. It may be questioned, under these circumstances, viewed in the light of the wording of the contract, whether the withdrawal was a violation of its terms; but, conceding that it was, the plaintiff was not injured. It is true, he called upon the attorney who became the depositary, by consent of the parties, for the money, four days before the commencement of the action, but if that could be considered a demand, it was for the whole sum deposited, and not for the less sum actually due; nor was it accompanied by a tender of a deed or offer to convey. He was therefore not entitled to the money from the depositary, if it had then been in his hands; and the circumstances did not indicate that he had any intention of performing the contract on his part. Any lack of exact compliance with the terms of the contract on the part of defendants was sufficiently compensated by allowing costs to the plaintiff, while a refusal to grant defendants their prayer for specific performance against the plaintiff would have caused them irreparable loss. I advise that the judgment be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

96 Cal. 235

ABRAM v. STUART et al. (No. 14,807.)

(Supreme Court of California. Sept. 23, 1892.)

COSTS—DISCRETION OF COURT.

Under Code Civil Proc. § 1025, which provides that in certain cases "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court," in a suit for an injunction against several defendants, though plaintiff has judgment against one of the defendants, where the issues are found in favor of the others, it is not an abuse of discretion to allow such defendants costs against plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. E. PREWITT, Judge.

Action for an injunction by John Abram against William Stuart and others. Plaintiff had judgment against one of the defendants only, and from the order allowing costs to the successful defendants, plaintiff appeals. Affirmed.

F. P. Tuttle, for appellant. *J. M. Fulweiler*, *B. P. Tabor*, and *Jo. Hamilton*, for respondents.

BELCHER, C. On the 14th of July, 1890, the defendant Kaslowsky, to secure payment of the sum of $504.21, executed to the plaintiff a mortgage upon a certain mining claim and water ditch. which he had owned for many years, known as the "Stony Bar Claim" and "Stony Bar Ditch." On the 23d of May, 1890, Kaslowsky and one Graydon located another mining claim known as the "Red Hill Claim," which seems to have adjoined the Stony Bar claim, and across which the Stony Bar ditch extended. In June, 1890, Graydon and the defendants Stuart and Kaslowsky began to work the Red Hill claim by the hydraulic process, dumping the *debris* and tailings upon the Stony Bar claim, and during that month they washed away 79 feet of the Stony Bar ditch. Work was then suspended until December, 1890, when the defendants, some of whom had purchased Graydon's interest, began again to mine and wash away the Red Hill claim, dumping the tailings as before, and they continued such work up to the time this action was commenced, on January 9, 1891. After resuming work on the mine, as aforesaid, defendants washed away 87 feet more of the Stony Bar ditch. In his complaint the plaintiff alleged that Kaslowsky executed to him the mortgage as before stated, and that on or about December 1, 1890, the defendants "entered upon said property, and ever since said date have been, and now are, engaged in mining on a portion of the same by forcing water through pipes and a nozzle under pressure, and thereby disintegrating, washing away, and removing the earth, rock, and gravel, and causing the same to pass through cuts and sluices, where gold is retained;" "that by reason of said working the value of said mining property is being constantly diminished, and the security of plaintiff thereby impaired;" also that by reason of said working defendants have washed away a portion of said Stony Bar ditch, and destroyed the *situs* of the same, and they threaten to continue their working, and totally destroy said ditch, and that by the destruction of the ditch the security of plaintiff will be rendered valueless; that the work carried on as aforesaid by defendants has caused and is causing the earth, rock, and gravel to be deposited on a portion of the claim; and that the said mining claim is of the value of $250, and the said ditch is of the value of $250. Wherefore plaintiff prays that a temporary injunction be issued, restraining the defendants from committing the acts complained of, and that on the final hearing the injunction be made perpetual. The defendant Kaslowsky failed to answer, and his default was entered. The other defendants answered, and the principal issues raised were as to whether or not the plaintiff's mortgage covered the Red Hill claim, and as to whether or not the Stony Bar claim and ditch were of any value as a mortgage security. After trial, the court found, among other things, that no part of the Red Hill claim was covered by the said mortgage; that at the date of the execution of the mortgage "the Stony Bar mining claim, described in said mortgage, was wholly valueless as a security, and entirely worked out, and that no depreciation in the value thereof has been, or will in the future be, caused by the working of the said Red Hill placer mining claim by the defendants, or by the dumping of the tailings from such working upon the said Stony Bar mining claim; and that such deposit of *debris* and tailings by the defendants will in no wise impair the value of the security held by plaintiff by reason of said mortgage;" that the Stony Bar ditch was valuable, "and the destruction of the same would render it valueless, and impair the security of the mortgage of plaintiff:" and, as conclusions of law, that plaintiff was entitled to an injunction restraining the further destruction of the said ditch; that plaintiff was entitled to a judgment against defendant Kaslowsky for his costs of suit; and that the other defendants were entitled to a judgment against the plaintiff for their costs of suit. Judgment was accordingly so entered, and from that part of it which awards costs to the defendants, plaintiff appeals.

The contention in support of the appeal is that it appears from the facts found that "the trial court erred and committed an abuse of discretion in adjudging that appellant should pay the costs incurred in the action by the defendants named;" and it is said: "While it is true, as a general principle, that the matter of costs in equity proceedings is a matter of discretion, yet it is equally true that it must be a discretion tempered by reason and judgment." In the opinion of the trial court, which the appellant has brought up in the transcript, it is said: "The principal question as to which evidence was offered relates to the value of the Stony Bar claim, the defendants alleging that it is worked out, and wholly valueless, and the plaintiff contending that it possesses a value ranging from $200 to $1,000. In the view which I take of the matter this becomes a very important inquiry. Upon this point the evidence is overwhelmingly in favor of the defendants." And further on: "As we have already seen, the court must hold that the part of the Stony Bar claim in question must be held to have no value; that is, it is not worth one cent." And again: "As almost the whole evidence was directed mainly to the question of the value of the Stony Bar claim and the ownership of the Red Hill claim, I deem it just that the defendants (other than Kaslowsky) recover their costs from the plaintiff." It thus appears that the ground upon which the decision as to costs was based was that the issues for the determination of which the costs were chiefly incurred were decided against the appellant. Under such circumstances, can it be said that the action of the court was an abuse of its discretion? We think not.

The Code provides that in actions like this "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." Section 1025, Code Civil Proc. And in Gray v. Dougherty, 25 Cal. 282, it is said, quoting from a decision of the court of appeals in New York: "Costs in equity are always in the discretion of the court, and, whether they are granted or withheld, they are but as incidents to and no part of the relief sought. A party getting the relief asked may be compelled to pay costs." We advise, therefore, that the judgment appealed from be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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96 Cal. 233

Ex parte BATCHELDER. (No. 20,956.)

(Supreme Court of California. Sept. 22, 1892.)

POOR DEBTORS—EFFECT OF DISCHARGE—ALIMONY

Where defendant in a divorce suit is imprisoned for refusing to pay alimony, and is afterwards discharged on taking oath that he has no property, (Code Civil Proc. § 1148,) a subsequent imprisonment till he should pay the alimony accruing before as well as after such discharge is invalid under Code Civil Proc. § 1151, providing that a person, "after being so discharged, is forever exempted from arrest or imprisonment for the same debt."

In bank.

Petition by George A. Batchelder for *habeas corpus*. Petitioner discharged.

Jones & O'Donnell, for petitioner.

BEATTY, C. J. In June, 1889, the superior court of San Francisco, in an action for divorce in which Mary M. Batchelder was plaintiff and the prisoner was defendant, made its decree granting the divorce, and ordering the payment by the defendant to the plaintiff of $30 per month permanent alimony. Prior to the decree, there had been orders requiring the payment by defendant of counsel fees and alimony *pendente lite*. In January, 1890, the defendant was imprisoned by order of the superior court for refusal to comply with the orders and decree of the court for the payment of said counsel fees, temporary and permanent alimony, theretofore accrued. In March, 1890, he was duly discharged from said imprisonment by the superior court upon his taking the oath prescribed by section 1148[1] of the Code of Civil Procedure. Subsequently he was again committed by an order requiring his imprisonment until he should comply with the order of the superior court directing him to pay to plaintiff "said alimony and counsel fees;" that is to say, as we construe the order, until he pays all the alimony and counsel fees accrued prior to his last discharge, as well as the monthly alimony accruing since that time. To test the validity of said last-mentioned order this writ has been sued out. The order is certainly invalid, so far as it requires payment of counsel fees and alimony, whether permanent or temporary, due prior to the discharge of the prisoner on March 29, 1890. Code Civil Proc. § 1151.[1] The order, as it stands, cannot be enforced. Let the prisoner be discharged.

We concur: DE HAVEN, J.; MCFARLAND, J.; SHARPSTEIN, J.

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96 Cal. 171

PEOPLE v. O'BRIEN. (No. 20,918.)

(Supreme Court of California. Sept. 9, 1892.)

ALTERING PUBLIC RECORD—INDICTMENT—INTENT—EVIDENCE—IMPEACHING WITNESS—EVIDENCE OF ACCOMPLICE—INSTRUCTIONS.

1. Pen. Code, § 113, provides for the punishment of every officer having the custody of any public record, who is guilty of willfully altering such record. Section 114 provides for the punishment of every person, not an officer, such as is referred to in the preceding section, who is guilty of any act specified in that section. *Held*, that an indictment under the latter section for altering a record need not state that the record was in the custody of an officer, nor need it contain a copy of the writing alleged to have been altered, nor a statement of the substance thereof.

2. Under Pen. Code, §§ 113, 114, taken in connection with section 7, providing that the word "willfully," when applies to the intent with which an act is committed, implies merely a purpose to commit the act, and does not require any intent to violate law or acquire any advantage, it is no defense to an indictment for altering the record of a deed that the alteration was made with no fraudulent intent, and merely to rectify an unauthorized alteration made by defendant in the deed before it was recorded.

3. It is no defense to an indictment for altering the record of a deed that the deed was void by reason of an unauthorized change in the name of the grantee, made before the deed was recorded, which invalidity did not appear on its face.

4. Under Code Civil Proc. § 2051, providing that a witness cannot be impeached by evidence of particular wrongful acts, it was error to compel one of defendant's witnesses to state whether he and defendant had participated in the alteration of a record other than that charged in the indictment.

5. In such a case, it was error to compel defendant to state on cross-examination whether he had participated in such other alteration of a record.

6. Under Const. art. 6, § 19, providing that judges shall not charge juries with respect to

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[1] Code Civil Proc. §§ 1148, 1151, provide that a person imprisoned on civil process, who has been discharged after examination before the judge and taking oath that he has no property other than such as is exempt, and has not concealed or conveyed any property with intent to defraud creditors, "is forever exempted from arrest or imprisonment for the same debt."

matters of fact, it is error to instruct the jury that the testimony of an accomplice, who was called as a witness by defendant, ought to be viewed with distrust.

Department 1. Appeal from superior court, Modoc county; C. L. Claffin, Judge.

Denis O'Brien was convicted of altering a public record, and appeals. Reversed.

J. W. Harrington, J. J. May, D. W. Jenks, and *A. L. Hart*, for appellant. *E. E. Copeland, Spencer & Raker, C. A. Raker, Atty. Gen. Hart*, and *Charles H. Jackson*, for the People.

Paterson, J. In May, 1886, J. H. Derevan conveyed to the defendant a tract of land in Modoc county. The defendant erased his own name, "Denis," from the deed, and inserted therein "Mary," his wife's name, thus making the deed purport to convey the property to Mary O'Brien, instead of to himself. In this form the deed was, at the request of the defendant, recorded in the office of the county recorder. Thereafter the defendant called upon T. B. Reese, the county recorder, before whom the deed had been acknowledged by Derevan, informed him of the change which he (the defendant) had made, and requested him to change the deed and the record so that both would speak the truth with respect to the transaction. Reese refused to make the changes unless Derevan and Mrs. O'Brien consented thereto. Their consent having been obtained, Reese erased the name "Mary" in the deed, and also in the record, and inserted in lieu thereof the name "Denis," in each place. The defendant was convicted of the crime of altering a public record, and was sentenced to serve a term of two years in the state prison. From the judgment, and from an order denying his motion for a new trial, he has appealed.

1. Appellant claims that the demurrer to the indictment should have been sustained. It is insisted that the indictment is insufficient because it is wanting in the following respects: (1) It is not alleged that the record was in the custody of any officer; (2) it does not contain a copy of the writing alleged to have been altered, nor any sufficient description of the same. It is conceded that the case is prosecuted under sections 113 and 114 of the Penal Code, and not under sections 470 and 471, which relate to the forgery of instruments and false entries in public records. Section 113 provides that "every officer having the custody of any record * * * filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering * * * the whole or any part of such record, * * * is punishable," etc. Section 114 provides that "every person, not an officer, such as is referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable," etc. The language of the indictment is: "The said Denis O'Brien, * * * not being an officer, such as referred to in section 113 of the Penal Code, * * * did then and there willfully alter and procure to be altered a certain deed record of real estate in book seven, pages 305-6, of Deeds, public records of Modoc county, state of California, whereby said record was changed and made to read and to appear to read that one J. H. Derevan sold and conveyed certain real property to the defendant, Denis O'Brien, when as a matter of fact, and as the record stood before the altering and defacing the same, the said deed conveyed said real property to Mary O'Brien, the wife of the defendant," etc. It is sufficient to say in answer to the first point urged that section 114 makes it unlawful for a person not an officer to do any of the acts specified in section 113, without regard to the question whether they are in the custody of the officer or not. The words "having the custody of any record" are used to designate the officer who is punishable for the acts prohibited. The offense which an officer having the custody of the record commits when he does any of the acts prohibited by section 113 is regarded by the law as a more aggravated offense than that which is committed by one who has not been intrusted with the safe-keeping of the record. We think that the indictment alleges the facts constituting the offense charged with sufficient certainty. There are cases holding that it is necessary to set out a copy of the instrument, or the substance thereof, but they are not applicable under our system of pleading. Our Code, in matters of civil and criminal procedure, is no friend of old precedents, which were introduced into the law in an age of legal and scholastic refinements, and which Lord Ellenborough justly condemns as a blemish and inconvenience in the law, and the administration thereof. Substance, rather than form, conciseness and clearness, are the canons of code pleading. If "the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended," the indictment is sufficient. "Is the act or omission charged as the offense stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case?" That is the fundamental test. Pen. Code, § 959.

2. It is urged with much earnestness that no offense could have been committed by the defendant, because there was no intention on his part to do an unlawful act, his object being simply to rectify a wrong already done. It is admitted that the defendant was not excusable for procuring the deed to be recorded in its altered form, but it is insisted that his subsequent attempt to rectify the error cannot be deemed a crime. The attorney general admits that the evidence fails to show any fraudulent intent on the part of the defendant; and the question presented is whether it is necessary, in making out the offense, for the prosecution to show that the act was done for some sinister purpose.

It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. Of course, it is based on a fiction, because no man can know all the law, but it is a maxim which the law itself does not permit any one to gainsay. It is expected that the jury and the court, where it is shown that in fact the defendant was ignorant of the law, and innocent of any intention to violate the same, will give the defendant the benefit of the fact, and impose only a light penalty. 1 Bish. Crim. Law, § 2961; Whart. Neg. § 411. The rule rests on public necessity. The welfare of society and the safety of the state depend upon its enforcement. If a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. No system of criminal justice could be sustained which such an element in it to obstruct the course of its administration. The plea would be universally made, and would lead to interminable questions, incapable of solution. Was the defendant in fact ignorant of the law? Was his ignorance of the law excusable? The denser the ignorance the greater would be the exemption from liability. The absurdity of such a condition of the law is shown in the consummate satire of Pascal, where, speaking upon this subject, he says, in substance, that although the less a man thinks of the moral law the more culpable he is, yet under municipal law "the more he relieves himself from a knowledge of his duty the more approvedly is his duty performed." It is a familiar rule that, to constitute crime, there must be a union of act and intent; but our Code provides that "the word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." Pen. Code, § 7. In Halsted v. State, 41 N. J. Law, 552, this subject was carefully considered and elaborately discussed. After reviewing the authorities, the court reached the conclusion stated in the syllabus, viz., that "when an act, in general terms, is made indictable, a criminal intent need not be shown, unless from the language or effects of the law a purpose to require the existence of such intent can be discovered. The question appertains to the department of statutory construction; and, to introduce into the act the requisite of a guilty mind, it must appear that such was the intent of the lawmaker." In State v. McBrayer, 98 N. C. 623, 2 S. E. Rep. 755, the court said: "It is a mistaken notion that positive, willful intent to violate the criminal law is an essential ingredient in every criminal offense, and that, where there is an absence of such intent, there is no offense. This is especially so as to statutory offenses. When the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the language is plain and positive, and the offense is not made to depend upon the positive, willful intent and purpose, nothing is left to interpretation." To the same effect are the following cases: Com. v. Weiss, 139 Pa. St. 251, 21 Atl. Rep. 10; State v. Gould, 40 Iowa, 374; Fiedler v. Darrin, 50 N. Y. 443. A case directly in point is Rex v. Ogden, 6 Car. & P. 631. In that case the prisoner was indicted for unlawfully transposing from one piece of wrought plate to another the lion passant, contrary to the statute. It was conceded that the act was done without any fraudulent intention. The same argument urged here was made in that case, but the court said: "There are no words in the act of parliament referring to any fraudulent intention. The words of it are, 'shall transpose or remove, or cause to procure to be transposed or removed, from one piece of wrought plate to another.'" The court considered the case a harsh one, and, upon recommendations made, the prisoner received his majesty's pardon. It has been held that one who marries a second time under an honest but erroneous belief that a decree of divorce which had been granted was valid is afforded no protection by the invalid decree, and that evidence of his good faith will be excluded. 2 Whart. Crim. Ev. (8th Ed.) § 1695*a*. The same principle is applied to many cases, such as selling intoxicating liquors to minors, abducting girls under a certain age, usurping an office under the belief that the usurper was truly elected, illegal voting under the belief that the voter is a qualified elector, publishing a libel in ignorance of its contents, storing gunpowder, and the like. 1 Whart. Crim. Law, § 88; 2 Whart. Crim. Law, § 1584; Hill *v.* State, 62 Ala. 170. The only authority we have found holding contrary to the rule stated is the case of State v. Gardner, 5 Nev. 378, where it was held that a deputy sheriff, who had settled a suit against persons for doing business without a license upon their payment of the costs and the amount of license, and had given them a paper written by his attorney, and signed by himself, purporting to be a license, although it appeared he had no proper forms or blanks at the time, was guilty of no criminal offense under the statute making the issuance of such a license a felony; there being no fraudulent intention on his part, further than indicated by his mere naked act. That case, however, can be reconciled, perhaps, with other cases referred to, upon the principle stated in Com. v. Weiss, supra, viz.: "Whether a criminal intent or a guilty knowledge is a necessary ingredient of a statutory offense, therefore, is a matter of construction." The majority of the court in the Nevada case held that the legislature, by the act under consideration, did not intend to create an offense under the statute, unless some fraudulent intention on the part of the officer existed at the time he performed the act. Commenting upon this case, the court of appeals of New York say: "The case cited from 5 Nev. 378, tends to support the views of the plaintiff in error, but it is evident that a majority of the court struggled to relieve the defendant from a harsh punishment for a comparatively innocent act." Gardner v. People, 62 N. Y. 305. Sections

7, 112, and 113 of the Penal Code, when read together, clearly establish the proposition that it was not necessary, in making out the offense, to prove any fraudulent intention on the part of the defendant. No hardship will result from the administration of the law as thus construed. The legislature has wisely given the court a wide latitude in fixing the penalty, evidently with the idea of meeting just such cases as this. The penalty fixed is "imprisonment in the state prison not exceeding five years, or in a county jail not exing one year, or by a fine not exceeding one hundred dollars, or by both." Thus are provided appropriate penalties for all degrees of offenses committed under this act.

3. Another contention of the appellant is that, when the deed was offered for record, it was not an instrument entitled to be recorded, and, not being an instrument authorized by law to be recorded, a copy of it written in the recorder's book could not be the subject of a felony. In support of this contention, he relies upon People v. Harrold, 84 Cal. 567, 24 Pac. Rep. 106. The instrument referred to in that case was one which the law did not authorize to be recorded in the office of the county recorder. A record of it could under no circumstances give notice to the public of its contents. The deed under consideration was valid on its face, as recorded, the record was notice to all the world of its contents, and it is immaterial that the instrument was void for objections which did not appear upon its face. U. S. v. Turner, 7 Pet. 136.

4. It is claimed that the court erred in reading section 113 of the Penal Code to the jury, without also reading section 114; that defendant, not being an officer, could not be convicted under section 113. But the court had to read section 113 to the jury to inform them as to the acts prohibited, and it was unnecessary to read section 114 after giving instruction No. 1, which embodied all the information the jury would have received from a reading of the last-named section.

5. During the cross-examination of the defendant, he was required, against his protest, to admit before the jury that he had participated with Reese in the alteration of a record other than that charged in the indictment in this case. Reese, also, in his examination, although protesting that such testimony would tend to criminate him, was compelled to answer similar questions. In the case of Reese the evidence was not admissible to impeach him, nor to show that the defendant had committed other offenses of the same kind about the same time. A witness cannot be impeached by evidence of particular wrongful acts. People v. Hamblin, 68 Cal. 101, 8 Pac. Rep. 687; Code Civil Proc. § 2051. And while it is true that in certain cases, like forgery and embezzlement, it is permissible to introduce evidence concerning other acts of the same nature, for the purpose of establishing a guilty intention, no such rule applies in cases of this kind, where the very ground upon which the prosecution relies for a conviction is that a performance of the acts mentioned in the statute constitutes a crime, regardless of any fraudulent intention. The ruling of the court in the cross-examination of the defendant upon this subject was erroneous, for the additional reason that the questions propounded to him were not proper cross-examination as to anything related in his examination in chief. So far as the defendant is concerned, the court is not allowed that discretion as to the extent and scope of the cross-examination which it is permitted to exercise in the examination of the other witnesses. People v. Rozelle, 78 Cal. 92, 20 Pac. Rep. 36. The court instructed the jury that "the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution." The Code authorizes this instruction to be given to the jury on all proper occasions. Code Civil Proc. § 2061. But we do not think that this was a proper case for such an instruction, although it may be proper to give it in a case where the witness has been called by the people. Section 1111, Pen. Code. It, in effect, told the jury not to believe the testimony of one of the defendant's witnesses,—at least, to discredit it. That is the meaning of the word "distrust." This the court had no right to do. Our constitution provides that "judges shall not charge juries with respect to matters of fact" Article 6, § 19, Const. To tell the jury what weight to give r not to give to any particular evidence is to express an opinion upon a matter of fact. We took occasion to refer to the latter clause of this provision of section 2061, Code Civil Proc., in Kauffman v. Maier, 94 Cal. 283, 29 Pac. Rep. 481, and disapproved of the instruction which embodied it, on the ground that it is unconstitutional.

6. The court also gave an instruction which has been several times approved here,—with some hesitancy and criticism, however,—directing the attention of the jury to the fact that the defendant had offered himself as a witness on his own behalf, and saying to them that in considering the weight and effect to be given to his evidence, in addition to noticing his manner and the probability of his statements, they could consider his relation to the case, and the circumstances under which he gave his testimony, the consequences to him resulting from the verdict in the case, and all the inducements and temptations which would ordinarily influence a person in his situation. This instruction received its first sanction from courts acting under constitutions which had no such inhibition as that found in section 19, art. 6, supra, and never ought to have been approved here; but, as the provision of the constitution referred to is the same as that of the constitution of 1879, under which there were decisions holding it was not error to so charge the jury, the construction which was placed upon it by those decisions has become a part of the provision itself, and we are not at liberty to depart from it. As a slight change in the phraseology of the instruction, however, is liable to be construed as going beyond the limits of

what has been approved, it would be a safer course, and one which would work no injustice to the people, if it were entirely omitted from the instructions asked and given on behalf of the prosecution. Judgment and order reversed, and cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

(3 Cal. Unrep. 558)

BEAN v. PROSEUS. (No. 14,884.)

(Supreme Court of California. Sept. 12, 1892.)

NEGOTIABLE INSTRUMENTS—CONSIDERATION.

In an action on a note for $625, the evidence was undisputed that, in consideration for the note, plaintiff transferred to defendant a one-half interest in a note for $2,500, on which the maker thereof agreed to pay $1,250 as a compromise. *Held*, that the fact that afterwards, in an action thereon, the latter note was declared to have been made without consideration, does not affect the consideration for the note in suit, and plaintiff should recover.

Department 1. Appeal from superior court, Sierra county; JOHN CALDWELL, Judge.

Action on a promissory note by Philander C. Bean against one Proseus. Defendant had judgment, and plaintiff appeals. Reversed.

Frank R. Wehe, for appellant. *John Gale* and *S. B. Davidson*, for respondents.

PATERSON, J. In January, 1885, the appellant held a note against his brother, Joel Bean, for the sum of $2,500. The circumstances under which the note was given are fully set forth in Bell v. Bean, 75 Cal. 86, 16 Pac. Rep. 521, where it was held that the note was without consideration. The defendant was to receive one half of the amount collected, as payment for professional services rendered the plaintiff. On April 21, 1885, the defendant transferred the note to Bell & Co. as security for the payment of the sum of $500, which he owed them. Joel Bean several times offered to pay $1,250; but the defendant, acting for himself and plaintiff, refused to accept less than $2,500. The appellant, being unwilling to engage in litigation with his brother, sold his interest in the note to the defendant, and received from the latter, as payment therefor, a promissory note for $625. Defendant refused to pay the note, claiming that it was given without any consideration, whereupon this action was brought to recover the amount of the principal and interest due on the note. The court found that the note was executed and delivered by defendant without consideration, and judgment was entered against the plaintiff for costs of the suit. From this judgment, and from the order denying his motion for a new trial, plaintiff has appealed.

The respondent claims that the finding of the court is sustained by the admitted fact that there was no consideration for the $2,500 note. There being no consideration for that note, the $625 note given in payment of plaintiff's interest therein is necessarily without consideration. This contention cannot be sustained. The learned judge of the court below overlooked the fact, which is undisputed, that, at the time this note was given by the defendant to the plaintiff, Joel Bean was willing to pay in satisfaction of the claim made against him the sum of $1,250. The $2,500 note, therefore, had an actual cash value of $1,250 when appellant transferred his interest therein to defendant. How can it be said, therefore, that plaintiff parted with nothing of value? It was not his fault that defendant afterwards failed to recover on the note. The latter preferred to litigate. He took the chance of getting more than the amount offered in compromise, and lost. Plaintiff parted with his right to compromise, relying upon defendant's promise to pay him the $625, and is entitled to recover. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: GAROUTTE, J.; McFARLAND, J.

(96 Cal. 183)

McBEAN v. CITY OF SAN BERNARDINO.
(No. 14,681.)

(Supreme Court of California. Sept. 13, 1892.)

CONSTRUCTION OF SEWERS—LIABILITY OF CITY—SUBSEQUENT PROMISE TO PAY.

1. St. 1885, p. 147, requires a contract to construct a sewer to contain a clause that the city shall not be liable thereon, "except where it is otherwise provided in this act," and declares that the city shall be liable only when it expressly agrees to pay for the work out of its funds, or when the cost of the sewer exceeds one half of the valuation of the assessable property, in which case the excess shall be paid by the city. *Held*, in an action to recover part of the cost of a sewer not assessed on the abutting property, where the contract contained the clause provided for, but did not contain an agreement by defendant city to pay, that the complaint must allege that the cost exceeded half the valuation of the assessable property; and an averment that the sum sued for was "chargeable to said city, to be paid out of the municipal treasury," is insufficient to charge the city, being a mere conclusion of law.

2. After the work had been completed and accepted by the superintendent of streets, the board of trustees of the city passed a resolution approving the payment by the city of the portion of the price of construction sued for. *Held*, that the resolution was without consideration, and created no obligation on the city.

Department 2. Appeal from superior court, San Bernardino county; J. W. McKINLEY, Judge.

Plaintiff, McBean, as assignor, sued the defendant, the city of San Bernardino, for the sum of $4,221.19, claimed to be due from it on account of the construction of a sewer. A demurrer to the complaint was sustained, and judgment given for defendant. Plaintiff appeals. Affirmed.

Ezra Crossman and *C. W. C. Rowell*, for appellant. *Paris & Fox*, *Chas. R. Gray*, and *John Brown, Jr.*, for respondent.

DE HAVEN, J. This action was brought for the purpose of recovering from the defendant city the sum of $4,221.19, claimed to be due from it on account of the construction of a sewer, and its promise to pay for the same. A demurrer to the complaint was sustained, and judgment thereupon given for defendant. The question is thus presented by this appeal whether, upon the facts alleged in the complaint, the plaintiff is entitled to the relief which he demands. It appears from the complaint that the sewer referred to was constructed along the center line of First street, in the city of San Bernardino, between C and I streets, and between these terminal points the southern boundary of the city is the center line of First street, so that one half of the sewer as constructed is outside of the city. It was constructed by the assignor of plaintiff, under a contract awarded to him by the board of trustees of defendant, and executed by its superintendent of streets under the provisions of the "Act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, (St. 1885, p. 147.) The contract contained the clause which is required to be inserted in such contracts by section 6 of that act, to the effect "that in no case, except where it is otherwise provided in this act, will the city, or any officer thereof, be liable for any portion of the expense, nor for any delinquency of persons or property assessed." The complaint further alleges that the work called for in the contract was fully performed, and was approved and accepted by the superintendent of streets, "who thereupon, on the 12th day of April, 1889, assessed and apportioned the total amount of expense of said work necessary to be assessed to cover the sum due for said work, including the incidental expenses thereof, as hereinafter set forth, to wit, the sum of seven thousand and fifty-seven dollars and thirty-two cents upon all the lots of land fronting on said north side of First street from the center line of C to the center line of I street, each lot or part of each lot being separately assessed in proportion to its frontage on said First street." It is then alleged, in apparent contradiction to this, that said lots upon the north side of Front street were by the assessment mentioned assessed to pay the sum of $2,836.19, and that the balance of the cost of constructing said sewer, to wit, $4,221.19, was "chargeable to said city, to be paid out of the municipal treasury of said city." In the view we take of the case, it is not necessary to determine whether such lots were assessed for the whole or only a part of the contract price for the construction of the sewer. It further appears from the complaint that the assignor of the plaintiff on April 23, 1889, demanded from the defendant city payment of the said sum of $4,221.19, "and the said city, by resolution of its board of trustees, duly made and passed, agreed and promised to pay said four thousand two hundred and twenty-one dollars and nineteen cents out of the municipal treasury, in language as follows: * * * The motion of Mr. Keniston, seconded by Mr. Lesher, for an order that the city pay one half of the costs of constructing the First street receiving sewer, on the south line of the city, and also pay the excess of the cost of building said sewer over the cost of a lateral sewer, is approved by the board, and ordered referred to the finance committee."

1. The facts alleged in the complaint do not show any liability of the defendant upon the original contract for the construction of the sewer. It was expressly provided in that contract that, except as otherwise provided in the act of March 18, 1885, (St. 1885, p. 147,) the city should not be liable for any portion of the expense incurred in the performance of the contract. Under the provisions of that act, a city is only liable for work done in the construction of sewers when it has expressly contracted to pay for such work out of its funds, or when, in order to raise the necessary amount to pay for such construction, the assessment upon any lot properly assessable for that purpose would exceed one half the valuation of such lot "in its last preceding assessment for municipal taxation," in which case such excess shall be paid by the city. The defendant did not bind itself to pay for any part of this work in the original contract, and it is not alleged that, in order to collect sufficient to pay for the cost of constructing the sewer, it would have been necessary to assess any lot properly chargeable with such cost for an amount exceeding one half its last assessed valuation for municipal purposes. The complaint, therefore, fails to show that the defendant is liable upon the contract for any part of the cost of constructing the sewer, and the allegation that the sum of $4,221.19 was "chargeable to the city, and payable out of its municipal treasury," in view of the other facts alleged, is to be regarded simply as the statement of a conclusion of law, the truth of which was not admitted by the demurrer.

2. The only remaining question for consideration is as to the effect of the above-quoted resolution of defendant's board of trustees. It is claimed by appellant that, whatever view may be taken of defendant's liability upon the original contract, as it actually received the benefit of the work done under such contract, this resolution is sufficient to render the city liable to pay therefor, to the extent therein named. This resolution was passed after the contract was fully performed, and it is clear that before its adoption the city was in no wise liable to pay for any part of the work, the contract expressly providing that it would not be called upon to pay for such work except as provided in the statute under which the contract was made, and the complaint not alleging such facts as would make the city responsible under this statute. This being so, the question is directly presented, whether this naked declaration or resolution of the board of trustees had the effect to create a binding obligation where none existed before. We are of the opinion that it did not. The resolution is without any consideration to support it, and, if it had been executed, the payment of the money named in it would have been in the nature of a gift,—a purely voluntary payment by the city. It cannot be said that the defendant was under any moral obligation to pay for this work. Cities are creatures of law, and their powers are defined by law, and persons dealing with them are chargeable with notice, not only of the ex-

tent of their powers, but also of the mode in which their powers may be exercised. It is very evident that the act of March 18, 1885, (St. 1885, p. 147,) in expressly naming the cases in which cities shall be liable for the construction of sewers, and in directing that every contract for such work shall expressly provide that the city shall not be liable except as provided in that act, intended to place a limitation upon the power of the city to contract an indebtedness for such purposes, to be paid for out of the municipal treasury. The intention of the statute is that improvements of this character shall be paid for by assessments upon adjacent property, unless the city, at the time of undertaking the work, shall determine to "assess the cost and expense thereof upon the property to be affected or benefited thereby in such manner and within such assessment district as it shall prescribe," or shall determine to pay for the same out of its street contingent fund, or by the issuance of bonds. Sections 27, 29, Act March 18, 1885, (St. 1885, p. 147.) The contract under which the assignor of plaintiff constructed this sewer, referred to in the complaint, contemplated no liability on the part of the city, but that the work should be paid for by an assessment upon adjacent property; and it cannot be said that the city was under any moral obligation to pay for that for which, not only the law, but the contract of plaintiff's assignor, following the law, expressly provided that it should not be responsible for. It follows from these views that the resolution set out in the complaint is without consideration, and insufficient to create any liability against the defendant.

Judgment affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

96 Cal. 197

McCORD v. CALIFORNIA NAT. BANK OF SAN DIEGO. (No. 14,693.)

(Supreme Court of California. Sept. 15, 1892.)

BANKS—PAYMENT OF CHECK—MONEY FOR UNLAWFUL USE.

A bank cannot refuse to cash a check, though it knows that the check was drawn in payment of a bet made in violation of law on the result of an election; and the fact that a check was so cashed is not ground on which the drawer can recover the amount from the bank.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; G. PUTERBAUGH, Judge.

Action by T. J. McCord against the California National Bank of San Diego to recover the amount of one of plaintiff's checks, alleged to have been illegally cashed by the bank. From a judgment for defendant, and an order refusing a new trial, plaintiff appeals. Affirmed.

William Darby, (*Hunsaker, Britt & Goodrich*, of counsel,) for appellant. *Conklin & Hughes, H. E. Doolittle*, and *M. T. Allen*, for respondent.

TEMPLE, C. This is an appeal from the judgment, and from an order refusing a new trial. The action is by a bank depositor, and the question is whether the bank rightfully paid a certain check for $1,000. The case was tried without a jury. At the trial there was a material and substantial conflict between the testimony of the bank teller and the testimony of the plaintiff, who was corroborated by another witness. The findings support the testimony of the teller whose statement, therefore, we are forced to adopt. On the 4th of November, 1890, the plaintiff made a bet upon the result of an election. What the election was does not appear, but it seems to be conceded that the wager was forbidden by our Codes. The wager was at night, and a check for $1,000 upon defendant was drawn in favor of J. A. McRae,—the other party to the wager,—and placed in the hands of one Hickman, as stakeholder. The next morning one Frederick, who was authorized by plaintiff to notify the bank not to pay the check, met the paying teller in the street, and told him about the bet and the drawing of the check, and advised him not to pay the check, saying that he had no interest in the matter except as the friend of McCord, and would not like to see the boy lose his money. The teller testified that "he did not at any time demand that I should not pay the check, and conveyed the impression to me that he was acting on his own responsibility." That same day Hickman presented the check for payment, but the teller refused to pay it. Later in the day, Hickman and McRae called together for the same purpose, but payment was again refused. The refusal was because of what Frederick had said, and to give plaintiff a chance to stop the payment. On the morning of the sixth, Hickman again presented the check, and asked that it be certified. Not having heard from plaintiff, and thinking he had declined to pay as long as he would be justified in doing, the teller consented. Of course the bank then became the principal debtor, and the check was then virtually paid. The teller at the time drew a memorandum check against plaintiff's account, as his custom was in such cases. On the twelfth the check was paid, and the amount carried to the account of Hickman, and on the same day, after such payment, plaintiff drew his check for the amount, and presented it in person. Payment was refused, on the ground that plaintiff had no balance to his credit at the bank.

If the facts had been found according to the contention of plaintiff, and as testified to by his witnesses, he would have had a good case. That theory was that he had countermanded the payment of the check. But, as the court found for the defendant on that issue, the question is simply whether the fact that the defendant knew that the money was intended to be used for an illegal purpose will enable the plaintiff to recover. A case can be imagined in which to pay a check might be to aid and abet a crime, but, even then, it is difficult to see how a guilty principal can sue the depositary for obeying his orders. But, independently of that consideration, it would not do to permit a banker to decline payment on the ground that bad use is to be made of the money. His undertaking is to honor his customer's orders so long as he has sufficient funds in his hands; subject to certain limitations for the protection of the banker against spurious orders, the funds are intended and understood to be as much under the control of the depositor as though they were in his own safe. Morse, Banks, § 311, lays down the law upon this subject as follows: "The banker cannot excuse his disobedience of his customer's orders, in the due course of business, by setting up that he knew or had reason to believe that the customer's orders were given in promotion of an unlawful purpose." The banker in paying a check is not, as appellant seems to contend, in the position of one who purchases negotiable paper. He is a custodian of funds, and payment of a check of his customer is payment to his customer, who is in no position to complain. And besides, public policy would not permit a banker to shirk his duty under such defenses. So obvious is this that the books contain no cases where the question is raised, except where the deposit is of trust funds or by an agent. Under these views, it is obvious that the alleged errors of law were not errors or were harmless. I advise that the judgment and order be affirmed.

We concur: Belcher, C.; Haynes, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 181)

SPENCE v. SCOTT et al. (No. 14,774.)[1]

(Supreme Court of California. Sept. 2, 1892.)

BILL OF EXCEPTIONS—WHEN NECESSARY.

Where the only question on appeal is whether the court below erred in striking out certain portions of the answer filed, a bill of exceptions is necessary.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by E. F. Spence against J. W. Scott and others and H. I. Kowalsky for the foreclosure of a mortgage. From the judgment of foreclosure, defendant Kowalsky appeals. Affirmed.

Finlayson & Finlayson and *H. I. Kowalsky*, (*Works & Works*, of counsel,) for appellant. *A. B. Hotchkiss* and *Houghton, Silent & Campbell*, for respondent.

Temple, C. This is an appeal taken from a judgment of foreclosure by one of the defendants. There is no bill of exceptions. Appellant filed an answer, in which he set up various defenses. It is claimed that the court erroneously struck out certain portions of his answer, and this is the only question which he seeks to present on this appeal. Manifestly the question cannot be presented without a bill of exceptions. Dimick v. Campbell, 31 Cal. 239; Douglas v. Hutchinson, 46 Cal. 49; Canal Co. v. Kidd, 43 Cal. 180; Feely v. Shirley, Id. 369; Code Civil Proc. §§ 670, 950. Indeed, the decisions upon this point have been very numerous, commencing with the first volume of the reports. The following are a few of them: Gunter v. Geary, 1 Cal. 462; Griswold v. Sharpe, 2 Cal. 17; Wilson v. Middleton, Id. 54; Castro's Ex'rs v. Armesti, 14 Cal. 39; Dawley v. Hovious, 23 Cal. 103; Harper v. Minor, 27 Cal. 107; Mendocino Co. v. Morris, 32 Cal. 145; People v. Mining Co., 33 Cal. 171; Pardy v. Montgomery, 77 Cal. 326, 19 Pac. Rep. 530; Gilman v. Bootz, 80 Cal. 564, 22 Pac. Rep. 255; Caruthers v. Hensley, 90 Cal. 559, 27 Pac. Rep. 411. We advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

96 Cal. 239

PEOPLE v. URQUIDAS. (No. 20,914.)

(Supreme Court of California. Sept. 23, 1892.)

BURGLARY—CIRCUMSTANTIAL EVIDENCE—NEW TRIAL.

1. The words "intention of stealing" may be used as equivalent to "intention of committing grand or petit larceny," in defining burglary.

2. A charge that "there is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence" correctly states the law. People v. Morrow, 60 Cal. 142, followed.

3. The discovery of new evidence, which is merely cumulative, and would not render a different result probable on a new trial, is not sufficient ground for granting such new trial.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Nicodemus Urquidas was convicted of burglary in the second degree, and, from the judgment and an order denying a new trial, appeals. Affirmed.

Shinn & Ling, for appellant. *James McLachlan* and *Atty. Gen. Hart*, for respondent.

Belcher, C. The defendant was convicted of the crime of burglary in the second degree, and sentenced to be imprisoned in the state prison for the term of one year. The appeal is from the judgment and an order denying a new trial. The charge was that the defendant entered the barn of one Beale with intent to commit larceny, and the evidence on the part of the prosecution tended to show that such an entry was made by defendant about 2 o'clock in the morning. The judgment cannot be reversed, therefore, for want of evidence to justify the verdict.

It is claimed that the court erred in refusing to strike out, on motion of defendant, a portion of the testimony of the witness Rose, and in admitting, over the objection of defendant, another portion of the testimony of the same witness. In answer to this claim we think it enough to say that we see no error in the rulings complained of.

In one of the instructions given at the request of the people the court told the jury: "If you believe from the evidence, beyond a reasonable doubt, that defendant entered the barn of witness Beale, as charged in the information, with the intention of stealing hay therein, then the offense of burglary would be complete, whether the defendant actually stole hay or not, nor would it make any difference how defendant effected his entrance into the barn in question." It is claimed that the instruction was erroneous, and it is said: "The jury were not given the legal definition of 'burglary' in any instruction, unless it be in this one. The words 'stole' and 'stealing' are not equivalent to the word 'larceny,' and, where the court attempts to define the crime, the words, or equivalent words, of the Code must be used. The words 'stole,' and 'stealing' are not equivalent thereto, hence prejudicial error is assumed." We see no merit in this point. If the defendant entered the barn "with the intention of stealing hay therein," he entered "with intent to commit grand or petit larceny," and the jury must have so understood it.

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[1] Affirmed on rehearing. 31 Pac. Rep. 939.

In another instruction given at the request of the people the jury were told: "There is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence." It is claimed that this instruction was erroneous for the reasons (1) "that it directs the jury what weight to give to this particular kind of evidence;" and (2) "that it is not true." The words quoted and objected to are only a part of a quite lengthy instruction. In People v. Morrow, 60 Cal. 142, substantially the same instruction was given to the jury, and it was held by this court that "it contains a correct statement of the law, and was free from legal exception." That decision was undoubtedly correct, and should be adhered to. As a whole, the instructions stated the law applicable to the case very fully and fairly; and if the court should have pointed out more distinctly the difference between burglary of the first and second degrees, still the defendant was not prejudiced by the omission, as he was found guilty only of the lesser offense.

One of the grounds upon which a new trial was asked was that of newly-discovered evidence. In People v. Sutton, 73 Cal. 243, 15 Pac. Rep. 86, it is said: "To entitle a party to a new trial on the ground of newly-discovered evidence, it must appear '(1) that the evidence, and not merely its materiality, be newly discovered; (2) that the evidence be not cumulative merely; (3) that it be such as to render a different result probable on a retrial of the cause; (4) that the party could not with reasonable diligence have discovered and produced it at the trial; and (5) that these facts be shown by the best evidence of which the case admits.' 1 Hayne, New Trial & App. § 88. 'Applications on this ground are addressed to the discretion of the court below, and the action of the court below will not be disturbed except for an abuse of discretion, the presumption being that the discretion was properly exercised.' Id. § 87." In this case the affidavits offered in support of the motion were in contradiction of the evidence introduced by the people, and in support of that given by the defendant. The evidence was cumulative, and it fails to satisfy us that it would have rendered a different result probable on a retrial of the cause. We can therefore see no abuse of discretion by the trial court in denying the motion. We advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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96 Cal. 261

BAUMBERGER v. ARFF. (No. 14,518.)

(Supreme Court of California. Sept. 27, 1892.)

CONTINUANCE—ABSENCE OF COUNSEL.

Absence of a party's attorney from court does not give him an absolute right to a continuance, but it is in the discretion of the court, in view of all the circumstances.

Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by Baumberger against Arff. Judgment was entered against plaintiff by default, and, from an order denying a motion to set aside the judgment, plaintiff appeals. Affirmed.

Wal. J. Tuska, for appellant. *Geo. W. Reed*, *E. Nusbaumer*, and *R. B. Tappan*, for respondent.

DE HAVEN, J. On the day set for the trial of this action plaintiff moved for a continuance upon the ground of the absence of his attorney, who was then engaged in the trial of a case in another court. The motion was denied, and thereupon the person who made the motion in behalf of plaintiff, and who seems to have been the clerk of his attorney, left the room. Neither plaintiff nor his attorney thereafter appeared, although called by the court, and the defendant moved for judgment in his favor, upon the ground that plaintiff had abandoned his cause upon the trial, and before the final submission thereof, and for want of prosecution. This motion was granted, and judgment entered in favor of defendant. The plaintiff afterwards moved, upon affidavits, to set this judgment aside, which motion was denied, and from that order this appeal is taken. The plaintiff did not have an absolute right to a continuance because of the absence of his attorney, but the motion was one which was to be disposed of in the sound discretion of the court, and in view of all the circumstances then made to appear. People v. Collins, 75 Cal. 411, 17 Pac. Rep. 430; People v. Goldenson, 76 Cal. 341, 19 Pac. Rep. 161; Haight v. Green, 19 Cal. 113; Lightner v. Menzel, 35 Cal. 452. The affidavits filed by plaintiff, on his motion to set aside the judgment, do not show that the court failed to exercise a proper discretion in its ruling upon the motion for a continuance. We cannot say that the court would, in view of all the facts disclosed, have committed an error if it had denied the motion unconditionally; and certainly there is nothing unreasonable in the condition upon which it is claimed that the court offered to grant the motion, viz., the payment by plaintiff of the fees of all jurors in attendance upon the court upon that day, amounting to $87, and the defendant's costs for the day. Order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

96 Cal. 243

LORENZ et al. v. WALDRON. (No. 14,895.)

(Supreme Court of California. Sept. 23, 1892.)

INJUNCTION—TO RESTRAIN CONSTRUCTION OF TUNNEL UNDER MINING DITCH—EVIDENCE.

1. In an action to restrain defendant from constructing a tunnel on his mining claim under plaintiff's mining ditch, it appeared that, about two years before the action, defendant, without objection, had run a tunnel into the mountain beneath plaintiff's ditch, extending about 50 feet beyond the ditch, and 35 to 40 feet below it; that this tunnel was abandoned; that afterwards defendant commenced another tunnel, about 300 feet from the first tunnel, and 48 feet, vertically, lower than the ditch. Eight experienced miners testified, on the part of defendant, that, in their opinion, the extension of the lower tunnel under and beyond the ditch would not injure it; that the earth in which the ditch was dug was clay and broken rocks; that the upper tunnel had stood more than two years without injury to the ditch; and that the lower tunnel was partly in bed rock at a distance of 29 feet from its mouth. Five witnesses testified for plaintiff, in substance, that, in their opinion, the construction of the tunnel would injure the ditch; that "the effect of water percolating through ground of this character is to loosen it, and cause it to cave or slide;" that the upper tunnel did not injure the ditch, and that the lower tunnel is 300 feet further down stream. *Held*, that the evidence failed to entitle plaintiff to the injunction.

2. In an action to restrain defendant from extending a tunnel on his claim under plaintiff's mining ditch, where plaintiff has no interest in defendant's claim except the right of way for the ditch, it is immaterial whether defendant's claim is of value as a mine or not.

Commissioners' decision. Department 2. Appeal from superior court, Trinity county; T. E. JONES, Judge.

Action for an injunction by Henry Lorenz and others against John Waldron. Plaintiffs had judgment, and defendant appeals. Reversed.

John W. Turner, for appellant. *James W. Bartlett*, for respondents.

VANCLIEF, C. Action to enjoin defendant from running a tunnel into the side of a mountain, under plaintiffs' water ditch. The judgment was in favor of the plaintiffs, awarding a perpetual injunction; and defendant has appealed from the judgment, and from an order denying his motion for new trial. The plaintiffs' ditch was constructed along the side of a mountain, on the public land of the United States, for mining purposes; and it is not questioned that, under acts of congress, plaintiffs had acquired the right of way for, and were entitled to maintain, their ditch, as constructed. The court found that on the 30th day of October, 1886, the defendant located a mining claim on the side of the mountain, extending across and below the plaintiffs' ditch; that, for the purpose of prospecting this mining claim, the defendant had run a tunnel into the mountain beneath plaintiffs' ditch, extending about 50 feet beyond a vertical plane drawn on the line of the ditch. The floor of this tunnel is 35 to 40 feet, vertically, lower than the bottom of the ditch. At the back end of the tunnel the bed rock inclined downwards, indicating, as defendant believed, the existence of a "back-pay channel," so low that it could not be mined through this tunnel, on account of water. He therefore abandoned it more than two years before the commencement of this action. The plaintiffs made no objection to the running of this tunnel before it was abandoned by defendant. Afterwards defendant made several open cuts into the side of the mountain below plaintiffs' ditch, from 10 to 20 feet in length, for the purpose of prospecting his claim, to which no objection was made by plaintiffs while they were being made. How nearly any of these cuts approached the ditch does not appear. Having answered the purpose for which they were made, these open cuts were also abandoned. Afterwards defendant commenced another tunnel, about 300 feet, horizontally, from a vertical plane drawn on the line of the tunnel first above mentioned, and 48 feet and 4 inches, vertically, lower than plaintiffs' ditch. After driving this lower tunnel in, very nearly horizontally, a distance of 29 feet, this action was commenced, and defendant was enjoined from continuing it, *pendente lite;* and, by the final judgment, he was "perpetually enjoined and restrained from digging or excavating any tunnel or tunnels under and beneath" plaintiffs' ditch. It was not alleged, nor found by the court, that plaintiffs' ditch had been injured, nor that plaintiffs had sustained any damage from any work done by defendant before the commencement of the action; and, of course, there is no judgment for damages. The sole object of the suit is to obtain a perpetual injunction against threatened future injuries to plaintiffs' ditch. The only threat or intention of the defendant, which the evidence tended to prove, was to drive his lower tunnel in the direction in which he had started it, to and beyond a point vertically beneath plaintiffs' ditch, for the purpose of tapping what he believed to be a "pay channel" running through his mining claim. The court found that "defendant is engaged in running tunnels, starting at a point about fifty feet below said ditch; and that he threatens to continue to run said tunnels beneath the bottom of said ditch; * * * that, if defendant is permitted to dig and excavate the above-named tunnels, great and irreparable injury will result to plaintiffs, for which pecuniary compensation would not afford adequate relief; * * * that said second tunnel, if not properly constructed, would be dangerous to the safety of said ditch, and would cause the waters of said ditch to percolate through the roof of said tunnel, and thereby endanger its safety; * * * that said ditch would be in danger of destruction if said tunnel is permitted to be constructed in the manner now pursued by defendant;" and that defendant is insolvent. These findings, except the insolvency, are excepted to on the ground that they are not justified by the evidence, and I think the exceptions are well taken, to the extent hereinafter defined.

1. There is no evidence tending to prove

that defendant was "engaged in running tunnels," or more than one tunnel; nor did the evidence tend to prove that he theatened to "continue to run said tunnels," or any tunnel, except his lower tunnel, which, if continued in its course, will pass under plaintiffs' ditch at a point about 46 feet vertically below it.

2. The finding that, if defendant is permitted to continue the construction of his second (lower) tunnel, "said ditch would be in danger of destruction," construed to mean that there is a reasonable probability of the effect predicted, is not justified by the evidence. Eight experienced miners on the part of the defendant testified that, in their opinion, the extension of the lower tunnel beyond a vertical line from the ditch would not injure the ditch; and also that even the upper tunnel would never injure the ditch. As grounds for their opinion, they testified, among other things, that the earth in which the ditch was dug, and under it, was composed of clay and broken rocks; that the upper tunnel stood more than two years without injury to the ditch; that there was still about 20 feet of solid ground between the upper tunnel and the ditch; that the upper tunnel was partly in bed rock where it passed the ditch; and that the lower tunnel was partly in bed rock at a distance of 29 feet from its mouth. Five witnesses, on the part of the plaintiffs, testified on this point substantially as follows: Mr. Johnson: "Where a ditch is passing over it, [tunnel,] it would be more apt to cave. * * * In my opinion, as a miner, the effect of the running of these tunnels under the ditch, I think it would be an injury to the ditch. I think it would be likely to make it cave down, from the nature of the ground it was in. * * * The effect of water percolating through ground of this character is to loosen it and cause it to cave; it also causes it to slide. * * * The second tunnel is 300 feet further down stream. Question. Did that tend to weaken the bank at all, where the upper tunnel was? Answer. No, sir. Q. Did the upper tunnel tend to weaken the bank where the lower tunnel was? A. No, sir. Q. There could be no relative connection between the two with reference to the caving or sliding? A. No, sir. Q. Each one would have to occasion its own particular injury by weakening the bank? A. Yes, sir; I think so. Q. How could it cause a slide? A. By coming down from the roof. Q. That would be a mere possibility? A. Yes, sir. Q. It might happen, or it might not? A. It might happen, or it might not. Q. Then this is a mere conjecture on your part that it would happen? A. Certainly; because it has not happened yet. That tunnel was run two years ago and over, and we have had two very excessive seasons since then." Mr. Day. "Question. What is the effect of running a tunnel under the bottom of a ditch? Answer. It has a bad effect if it has water in it. It will make it cave; it will get soft and cave easier from water. * * *" Saw water dripping down from above in defendant's tunnel. Could not say where it came from. This witness gave no opinion as to the effect of defendant's tunnels on plaintiffs' ditch. Mr. Hilliard: "Question. Now, describe to the court the appearance of those tunnels? Answer. I should judge the appearance of those tunnels would be very bad,—that is, they would be liable to cave most any time. It is not a solid foundation. It is a kind of a mountain slide, I should judge, broken-up rock and clay mixed in. I saw water coming through the roof of these tunnels. Q. Do you know what the effect upon a ditch would be of running tunnels under it? A. Well, I should consider it to have a very bad effect; the water coming through, and it not being a solid foundation, it is liable to cave. I saw about eight cuts,—some of them would be about 20 feet back; they were about four feet wide. * * * In my opinion, as a miner, if those tunnels were continued under and beneath that ditch the result would be, I think, to cave down and destroy the ditch." On cross-examination he said: "It would be a mere opinion on my part that the tunnels would have the effect of caving the ditch down. It might occur, and it might not. In there it is all loose bed rock. That would be the result of the action of the elements for ages. It is all sliding rocks, so far as I know. There are trees and brush growing on it." Mr. Pelletreau: "In my opinion the effect upon the ditch, if the tunnel is continued in the manner in which they have been running, is that they will cave the ditch down and destroy it. That would be the result." On cross-examination he said: "If it was properly timbered, it would not cave. * * * Question. It has not caused it within two years, and why should it cause it in the future? Answer. It would at any time, if the ditch were to break and cut the foot of the mountain away." Mr. Beavers: "My opinion as a miner is that if those tunnels were permitted to be run beneath the ditch, that if they continued on cutting the face of the hill, that after a while there would be no support at all. The hill is very steep, and a great mass of earth would shove it off."

Neither of the plaintiffs testified on the trial; and the nature and full extent of the threatened injury stated in their complaint is "that defendant is engaged in running and excavating tunnels, starting at a point about fifty feet down the side of the mountain below said ditch, and that he threatens to run and continue said tunnels under and beneath the bottom of said ditch. * * * That the earth and ground composing the surface of the above-named mountain, at the above-named point, and over which said ditch passes as aforesaid, is of such a character that if an excavation is made below or under said ditch, and into said mountain, the waters conveyed in said ditch will percolate through and into said excavation, and thereby cause a slide on said mountain which will destroy and carry away said ditch for a distance of from one hundred to two hundred feet." The evidence has not the slightest tendency to prove that defendant threatens or intends to construct or continue any tunnel or cut except this lower tunnel; therefore the inquiry as to the probability of future injury to plaintiffs' ditch should be confined to the effect of continuing the lower tunnel. The plaintiffs appear to be entitled to the right of way for their ditch, with vertical and lateral support for it; nothing more. Subject to these rights, the defendant is entitled to his mining claim,—to prospect, explore, and mine it through his lower tunnel, or in any other mode he may select. These rights of the parties are not incompatible, though subject to the maxim, *sic utere tuo ut alienum non lædas,* (Clark v. Willett, 35 Cal. 548;) and the complaint is that the defendant threatens and intends to violate this maxim to the injury of plaintiffs. That the injunction granted unnecessarily restricts the defendant in the use of his own property, by enjoining him from digging any tunnel in any manner under and beneath plaintiffs' ditch, is unquestionable. If defendant can construct his lower tunnel, or any other tunnel, beneath plaintiffs' ditch, in such manner as not to injure the ditch, he should be permitted to do so, for the evidence does not tend to prove that even the lower tunnel may not be so constructed; much less, that no tunnel at any other place beneath the ditch may not be constructed without possible injury to the ditch. McMenomy v. Baud, 87 Cal. 139, 26 Pac. Rep. 795.

Furthermore, I think the testimony on the part of the plaintiffs, considered in connection with the undisputed facts and circumstances, had no substantial tendency to prove a reasonable probability that a continuation of defendant's lower tunnel, in the manner and direction in which it had been constructed to the extent of 29 feet, would injure plaintiffs' ditch; or more than a remote possibility of such injury, and therefore there is no substantial conflict of evidence on this issue. Even the possibility of such injury is negatived by a considerable preponderance of the whole evidence. But a mere possibility, or anything short of a reasonable probability, of injury, is insufficient to warrant an injunction against any proposed use of property by its owner. "Injury, material and actual, not fanciful or theoretical, or merely possible, must be shown as the necessary or probable result of the action sought to be restrained." Genet v Canal Co., 122 N Y. 529, 25 N. E. Rep. 522. In Lutheran Church v. Maschop, 10 N. J. Eq. 57, the court said: "The court cannot grant an injunction to allay the fears and apprehensions of individuals; they must show the court that the acts against which they ask protection are not only threatened, but will, in probability, be committed, to their injury." In Sherman v. Clark, 4 Nev. 142, the court said: "It must also appear that there is at least a reasonable probability that a real injury will occur if the injunction be not granted." In High, Inj. § 790, it is said: "Nor will an injunction be continued against the erection of a structure where the facts do not satisfactorily show a probability of irreparable injury to the complainants." See, also, Dorsey v. Allen, 85 N. C. 358; Hall v. Rood, 40 Mich. 49; McMenomy v. Baud, 87 Cal. 139, 26 Pac. Rep. 795, and cases there cited; Hoke v. Perdue, 62 Cal. 545.

It is claimed by respondents that defendant's mining claim is prospectively valueless, and therefore that defendant was never entitled to locate or to explore it, and is not injured by the injunction; and one or two of plaintiffs' witnesses testified that, in their opinion, there is no "pay channel" in defendant's claim, while witnesses on the part of defendant expressed their opinion to the contrary. But it was proved, without contradiction, that defendant's claim is in the midst of a mineral region; that there were paying gravel mines in its immediate vicinity, among them that of the plaintiffs', and that the defendant had washed a small quantity of gold ($1.75) from earth taken from his upper tunnel. That defendant located and prospected his claim in good faith, was sufficiently evinced by the fact that he had expended $1,000 in running the tunnel and cuts complained of. Under these circumstances, the question whether the defendant would succeed in discovering a pay channel was immaterial for any purpose of this action. The plaintiffs did not claim the land for any other purpose than the right of way and support for their ditch, and their right to this extent was not controverted. They were not entitled to question the right of the defendant to locate, possess, and explore the land as mineral land, subject to their admitted right of way. Only the government of the United States, or persons claiming the lands under the government as non-mineral land, could properly raise the question whether the land was subject to be located as mineral land. The court found that "the ground where defendant is running his tunnel is absolutely worthless for mining purposes," and "that there is no evidence of any gravel channel either under or back of said ditch;" and it seems probable that this was the principal ground upon which the perpetual injunction was granted. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: Foote, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

(96 Cal. 322)

GREEN et al. v. ABIETINE MEDICAL CO.

(No. 14,458.)

(Supreme Court of California. Oct. 4, 1892.)

CORPORATIONS—STOCK—ESTOPPEL TO DENY PAYMENT.

Plaintiffs held a majority of the stock of a corporation, which they had taken at the rate of 50 cents a share in return for property turned into the hands of the corporation. Afterwards the board of directors, which plaintiffs controlled, sold the balance of the stock to raise working capital at the same rate per share which plaintiffs had paid, and gave certificates which stated that the stock so sold was fully paid and unassessable, the same kind of certificates which plaintiffs held. After having acquiesced for three years in this sale, plaintiffs claimed that the shares so sold for working capital were subscribed for at the par value of two dollars a share, and that the difference between that and the price paid was still due. *Held*, that plaintiffs were estopped from denying that the price paid was full payment.

Commissioners' decision. Department 2. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

Action by R. M. Green and Perkins & Wise, copartners, against the Abietine Medical Company, a corporation, to vacate an assessment made upon plaintiffs' stock in the corporation, to recover the sum of assessments paid, and to enjoin defendant from further assessing plaintiffs' stock. From a judgment for defendant, and from an order denying his motion for a new trial, plaintiff Green appeals. Affirmed.

H. V. Reardan, for appellants. *F. C. Lusk*, for respondent.

VANCLIEF, C. The defendant is a California corporation, which was organized on the 22d day of May, 1885, for the purpose of manufacturing medicines from the sap of trees known as "abietine trees," and the plaintiffs are stockholders of the corporation. The corporation levied an assessment of 10 cents per share on its capital stock. The plaintiffs having refused to pay the assessment, their stock was advertised for sale. To prevent the sale, plaintiffs paid the assessment under protest that the assessment was void, and that they were under no lawful obligation to pay it. The object of this action is to vacate the assessment, to recover from defendant the sum of the assessments paid by the plaintiffs, and to enjoin the defendant from further assessing plaintiff's stock. Judgment passed for defendant, from which, and from an order denying his motion for a new trial, the plaintiff Green alone appeals. The material facts found by the court and admitted by the pleadings are substantially as follows: On the day the corporation was organized, May 22, 1885, A. F. Jones, John D. Williams, and the plaintiff Green entered into a written agreement with each other, reciting that they had "incorporated themselves into a corporation known as the Abietine Medical Company," and that each of them owned certain described property necessary for the use of the corporation in its business; and agreeing that each would sell such property to the corporation in consideration of a specified number of shares of "full paid, unassessable" stock of the corporation. The plaintiff Green agreed to sell his property for 12,750 shares of such stock and $1,000 in cash, Williams agreed to sell his property for 5,000 shares of such stock, and Jones agreed to sell his property for 12,750 shares of the stock. The whole capital stock, as stated in the articles of incorporation, was $100,000, divided into 50,000 shares. The corporation was not a party to this agreement, but entertained it as a proposal, and thereafter, at a regular meeting of its board of directors, held on June 8, 1885, accepted the proposal, took the property described in the agreement, and ordered the issuance of certificates of stock to Green, Jones, and Williams, according to the terms of their agreement; and such certificates were then issued, stating among other things that the stock was "full paid and unassessable." At the meeting of June 8th, the board ordered the issuance of certificates for 10 shares to E. W. Fogg, and 20 shares to Floyd Taber, which had been given them to qualify them to become directors. Of the remainder of the stock, 19,500 shares were reserved by the corporation to be sold for "working capital," and were ordered to be sold for not less than 50 cents per share, and afterwards were sold to various persons for 50 cents per share. Article 10 of the original by-laws of the corporation prescribed the form of certificates of stock, containing this statement, viz.: "And that the same [shares] is full paid and unassessable stock." But at a meeting of the stockholders held September 6, 1886, this by-law was amended by striking out the words "and unassessable." At a stockholders' meeting, June 2, 1885, it was unanimously resolved "that no assessment be levied on the capital stock of the company without the unanimous vote of the stockholders." It also appears that there was no by-law authorizing the issuance of certificates of stock prior to full payment. At a stockholders' meeting September 6, 1886, at which all the stock was represented, "it was unanimously resolved that it is the sense of the stockholders of this corporation that the directors thereof do levy assessments on the capital stock of said corporation when necessary for the business thereof to be properly conducted, said assessments not to exceed the amount of ten cents per share at any one assessment." At a directors' meeting, April 25, 1887, it was resolved to levy an assessment of 10 cents per share. This assessment was levied on all the stock, and was all paid without objection. Again, August 18, 1887, another assessment of 10 cents per share was levied on all the stock, and was all paid without objection. From the organization of the corporation until the commencement of this action, the appellant Green was a stockholder and director, and voted for each of the above-mentioned orders and resolutions of the stockholders, and of the board of directors, except that at the meeting of August 18, 1887, he moved to amend the resolution by reducing the assessment to five cents per share, and, when his proposed amendment was lost, he voted against the resolution. The assessment to which appellant first objected, and which he seeks to avoid and set aside by this action, was levied November 14, 1889.

The court found that no part of the capital stock of defendant was ever subscribed for by any person, but that the whole stock had been sold by the corporation to various persons, as fully paid-up stock; that the stock sold to Green, Jones, and Williams in exchange for their property was not sold for its par value of $2 per share, and that the consideration paid by them in property did not exceed 50 cents per share; that the 19,500 shares reserved for working capital were sold to various parties for cash, at 50 cents per share, and that all the certificates issued to purchasers of stock were precisely in the same form,—all contained the statement that the stock was "full paid and unassessable;" that there was no unpaid subscription price due or owing to the corporation on any part of the 19,500 shares sold for working capital, nor upon any other stock; that all the stock of the corporation, 50,000 shares, had been issued and is held as fully paid stock, and all stands upon the same footing; that 50 cents per share was the full value of the 19,500 shares sold for working capital at the times it was sold; and that the purchasers thereof never subscribed for any part thereof, and never promised to pay the par value thereof, nor any price exceeding 50 cents per share, which they paid. As conclusions of law the court found that all the stock is alike assessable, and that the assessment in question is valid. It is, tacitly at least, and I think correctly, conceded by appellant's counsel, that, where all the stock of a private corporation in this state is fully paid, it is assessable. Railroad Co. v. Spreckles, 65 Cal. 193, 3 Pac. Rep. 661, 802. But counsel contends that the stock issued to Green, Williams, and Jones in exchange for property was fully paid up, while the 19,500 shares reserved for working capital, and sold for 50 cents per share, must be considered as having been subscribed for by the purchasers thereof at its par value of $2 per share; and that until this is called in or paid, the alleged fully paid stock issued to Green, Williams, and Jones, in payment for property, cannot be assessed. Passing all questions as to the correctness of this theory, it will be sufficient to say that the most material of the assumed facts upon which it is constructed are negatived by the findings of the court. No stock was subscribed for, but all the stock was purchased from the corporation; Green, Williams, and Jones did not pay for the stock purchased by them a sum exceeding 50 cents per share; all the certificates issued to purchasers of stock were in the same form, stating that the stock was fully paid; all the acts of the corporation prior to the assessment of November 14, 1889, were advised and consented to by the plaintiffs in their dual character of stockholders and directors, except that appellant objected to the amount of the second assessment; the actual value of the stock did not exceed 50 cents per share at the times when it was sold by the corporation; and the court found that all the stock was fully paid stock, as stated in the certificates issued by the corporation in obedience to a by-law adopted by the plaintiffs in their character of stockholders.

It should be observed that the rights of creditors are not involved in this suit, and that, from an equitable point of view, and as matter of fact, the suit is a contest between two classes of stockholders, viz., the class which exchanged property for stock, and the class which paid cash for stock. In this view of the case it seems clear that the plaintiffs have no just ground for complaining of the assessment in question. As both parties to the contest paid the same price for their stock, the effect of the assessment upon all stockholders was equal and just. Moreover, on the facts pleaded and found by the court, I think the plaintiffs (especially the appellant) are estopped from denying that the stock sold for cash is not fully paid stock, and from claiming that any sum is due or owing thereon from the purchasers or holders thereof to the corporation. At the time the reserved 19,500 shares were offered for sale at 50 cents per share, Green, Williams, and Jones controlled the board of directors, and were the equitable owners of all the unsold stock, and the legal owners of all stock that had been sold. In the estimation of a court of equity, they constituted the corporation. In obedience to their orders and resolutions their fictitious creature, the corporation, as their trustee, sold the reserved 19,500 shares of stock, representing and certifying to the purchasers that the price paid was full payment, and that the stock was fully paid stock. The trust of this representation and certificate was a contractual condition of the sale, which the stockholders—the real sellers—are equitably, and the corporation legally, bound to make good to the purchasers, unless the contract of sale was unlawful. No reason is perceived why the sale should be held unlawful. It is contended, however, that it was a violation of section 323 of the Civil Code, which provides that "all corporations for profit must issue certificates for stock when fully paid up, * * * and may provide, in their by-laws, for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide." This section does not prohibit the issuing of certificates before the stock is fully paid up. It enjoins the duty of issuing certificates for fully paid-up stock, and authorizes the stockholders to enact by-laws, in accordance with which the corporation may issue certificates before full payment. While "it is true that the unanimous consent of the stockholders cannot cure the illegality of issuing certificates in violation of law," yet "the rule that a corporation is bound by an unauthorized act of its agents after the act has been ratified by all the stockholders applies to an unauthorized issue of certificates for shares." Mor. Priv. Corp. § 290. In the case at bar there was more than a mere ratification by the stockholders. At a regular meeting of all the stockholders before the sale, the corporation was expressly authorized and directed to sell the reserved stock, as fully paid stock, for 50 cents per share. Article 10 of the by-laws required that each certificate of stock should state that the stock was fully paid, and the certificates issued on the sales of the reserved stock so stated. During a period of more than three years immediately after such sales and the issuance of such certificates, all the stockholders acquiesced therein. See Sayre v. Heating Co., 69 Cal. 208,[1] 10 Pac. Rep. 408; Gas Co. v. West, 50 Iowa, 25; Goff v. Windmill Co., 62 Iowa, 691, 18 N. W. Rep. 307; Lumber Co. v. Mittlestadt, 43 Minn. 91, 44 N. W. Rep. 1079; Walburn v. Chenault, 43 Kan. 352, 23 Pac. Rep. 657. The plaintiffs, as against the corporation and the holders of the stock sold for cash, are estopped from denying that the price paid (50 cents per share) for the reserved stock, was full payment, and from asserting that the holders of that stock are indebted to the corporation for the difference between the price paid and the par value, by the terms of the contract of sale made pursuant to their order, and evidenced by certificates issued in accordance with a by-law enacted by them, upon the faith of which the purchasers appear to have relied and acted in good faith, in paying the purchase price and two subsequent assessments; in all which the plaintiffs acquiesced during a period of three years. Mor. Corp. § 630 et seq. The finding that the stock was fully paid stock, construed to mean that the purchase price was fully paid, and that the purchasers were not indebted to the corporation for the difference between the price paid and the par value, is fully justified by the evidence, and is not inconsistent with the finding that all the stock was sold and paid for at 50 cents per share. The authorities above cited show that when, by consent of all the stockholders, stock is sold by the corporation for less than its par value, it is to be considered as fully paid-up stock, in the sense above stated; and it is manifestly in this legal sense only that the court found all the stock to be fully paid-up stock, and not in the sense that the full par value had been paid. In no aspect of the case is the appellant entitled to complain of the assessment in question, nor has he been injured thereby. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

DE HAVEN, J. I concur in the judgment affirming the judgment and order appealed from.

96 Cal. 262

PEOPLE ex rel. JENNINGS v. MARKHAM, Governor. (No. 15,176.)

(Supreme Court of California. Sept. 27, 1892.)

STATE LEGISLATURE — TERM OF OFFICE OF SENATORS — DIVISION OF DISTRICT.

In 1890, S., a qualified resident of B. county, was elected state senator for the fortieth district, composed of B. and D. counties, for a full term of four years. In 1891 the legislature, by reapportionment, made D. county alone the fortieth district, and provided that there should be an election in 1892 in the odd-numbered districts, and that the senators elected in 1890 from the even-numbered districts should continue in office four years. Const. art. 4, § 4, provides that a senator shall be a citizen "of the district for which he shall be elected one year next before his election." *Held*, that S. remained senator for the fortieth district for the full term of four years, his residence in B. county causing no vacancy.

In bank.

Application by the people ex rel. Jennings, petitioner, against H. H. Markham, as governor, for a *mandamus*. Proceeding dismissed on demurrer to petition.

Gibson & Titus, for petitioner. *Atty. Gen. Hart*, for respondent.

MCFARLAND, J. This is an application for a writ of mandate to compel the respondent, as governor of the state, to issue a proclamation for a special election in the fortieth senatorial district to fill what is alleged to be a vacancy in the office of senator for said district. No question is raised as to the jurisdiction of this court to issue such a writ in a proper case. The facts disclosed by the petition are these: At the general election held in November, 1890, Hon. H. M. Streeter was duly elected state senator for the full constitutional term of four years for the senatorial district composed of the counties of San Bernardino and San Diego, then called the "Fortieth District." At that time he was a resident of the said county of San Bernardino, and was in every way qualified for the office of senator for said district. He has ever since been, and now is, a resident of said county of San Bernardino. In 1891 the legislature passed an act by which, for purposes of legislative representation, it reapportioned and redistricted the state; and in that act it provided that thereafter the county of San Diego alone should constitute a senatorial district, to be called the "Fortieth." (The act also provided, however, that there should be an election in 1892 for senators from the odd-numbered districts, and that senators who had been elected from the even-numbered districts in 1890 should continue in office for four years.) The only point made by petitioner is that, by virtue of said act making San Diego alone the fortieth district, the said Streeter ceased to live in the fortieth district; and that, therefore, under the constitution of this state, there is a vacancy in the office of senator for said district. But the only constitutional provision upon the subject is in section 4 of article 4, and is as follows: "No person shall be a member of the senate or assembly who has not been a citizen and inhabitant of the state three years, and of the district for which he shall be elected one year, next before his election." And it is quite clear that, so far as residence is concerned, this provision does not in the least affect the question before us. Streeter was elected for a district composed of the counties of San Bernardino and San Diego; and at the time of his election he was, and for a year theretofore had been, and (if that be material) still is, a resident of said district. The cases cited by petitioner are not in point. They were cases where officers of counties, or other municipal corporations, were required by law to reside at the seat of government of the municipalities; and the provisions of law under review in these cases were materially different from the provision of our constitution above quoted. For instance, in the leading case cited by petitioner, of State v. Choate, 11 Ohio, 511, the constitutional provision construed was as follows: "There shall be appointed in each county not more than three, nor less than two, associate justices, who during their continuance in office shall reside therein." It is to be observed that in this case petitioner raises no question arising out of the said act of the legislature redistricting the state other than the said question of residence. The demurrer to the petition is sustained, and the proceeding dismissed.

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[1] 7 Pac. Rep. 437.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; DE HAVEN, J.; GAROUTTE, J.

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96 Cal. 289

PEOPLE ex rel. SNOWBALL v. PENDEGAST, County Clerk. (No. 15,184.)

SAME v. MARKHAM, Governor. (No. 15,185.)

(Supreme Court of California. Oct. 3, 1892.)

ELECTIONS OF SENATORS—TIME—REAPPORTIONMENT OF DISTRICTS.

Under Const. 1879, art. 4, §§ 1–6, the state is divided into senate districts numbered from 1 to 40, and senators are chosen for terms of 4 years. The only exceptions stated are that the senators elected in 1879 shall be limited to 3 years, and those elected in 1882 from the odd-numbered districts to 2 years, so that one half may thus be elected every second year. *Held* that, notwithstanding a county may by a new apportionment be transferred from an odd to an even numbered district, and so lose the opportunity of participating in an election, the courts will not interfere; but the senator elected in the said even-numbered district, before the change, will hold for the full term. McPherson v. Bartlett, 4 Pac. Rep. 582, 65 Cal. 577, distinguished.

In bank.

Applications, on relation of Snowball, for writs of mandate to Pendegast, county clerk of Yolo county, and Gov. Markham, governor of California. Denied.

G. W. McInerney, for petitioner. *Atty. Gen. Hart*, for respondent.

BEATTY, C. J. These are original applications for writs of mandate. The relator is a citizen of Yolo county, and possesses the qualifications entitling him to represent the senatorial district of which Yolo county is a part. He claims that under the constitution and laws of the state a senator is to be elected in said district at the approaching election, and he has been regularly nominated as a candidate for the office. He has made formal demand upon the governor to issue his proclamation for the election of a senator from said district, and upon the county clerk of Yolo county to file his certificate of nomination pursuant to the election law. Both demands have been refused, and he seeks by these proceedings to enforce compliance therewith. In each case a general demurrer to the petition has been interposed, which raises the question whether, under a proper construction of the constitution and laws of the state, the terms of the senators elected in the year 1890 from the even-numbered senatorial districts, as well as those of the senators elected in 1888 from the odd-numbered districts, expire on the first Monday after the 1st day of January next. If they do not so expire; if, notwithstanding the redivision of the state into new senatorial districts by the act of March 11, 1891, the senators elected in 1890 continue to hold office for the full constitutional term of four years,—it is conceded that the writ in each case must be denied. As we are very clearly of the opinion that this proposition must be affirmed, it will not be necessary to consider any other questions affecting the right of the relator to the relief which he demands.

So far as it rests in the power of the legislature to regulate the senatorial terms, there is no doubt as to the law. The act above cited, by which the state was redivided into legislative districts, as required by section 6, art. 4, of the constitution, is plain and explicit, to the effect that the senators elected in 1890 from the even-numbered districts, as defined by the act of 1883, shall continue in office for four years; that at the approaching election only senators from the odd-numbered districts are to be elected, and that the first election of senators from the even-numbered districts, as now defined, shall be in 1894. St. 1891, p. 83, § 4. But it is contended that this act, in so far as it attempts to continue the senators from the even-numbered districts in office for a full term of four years, is in conflict with the constitution; and the question for determination, therefore, is the true construction of the provisions of the organic law with respect to this matter. The number and arrangement of assembly and senatorial districts, the election of senators and assemblymen, and their terms of office, are all regulated with minute particularity by the constitution, (article 4, §§ 1-6;) and the meaning of these provisions, so far at least as the question here presented is involved, seems to us to be plain and unambiguous. The legislative power is vested in a senate and assembly. Section 1. The senate consists of 40, and the assembly of 80, members, to be elected by districts numbered respectively from 1 to 40, and from 1 to 80, each district to be represented by 1 member. This numbering is to commence at the northern, and end at the southern, boundary of the state. In the formation of the districts no county is to be divided unless it contain sufficient population within itself to form two or more districts, nor is any part of any county to be united with any other county; but, subject to these restrictions, the districts are to be made and kept as nearly as possible equal in population. For this purpose the census, taken under the direction of the congress of the United States in the year 1880, and every 10 years thereafter, is made the basis of fixing and adjusting the legislative districts, and it is made the duty of the legislature at its first session after each census to adjust such districts and reapportion the representation. Sections 5, 6. Senators are chosen for a term of four years, (section 4,) and one half of the members are to be elected every two years. All the members of the assembly are chosen biennially for a term of two years. Section 3. The members of both houses are elected on the first Tuesday after the first Monday of the even-numbered years, and their terms of office and the session of the legislature commence on the first Monday after the first day of January next ensuing. Sections 2, 3; article 20, § 20.

These are the general, important, and permanent features of the scheme of legislative organization embodied in the constitution. Confining ourselves to the senators, it is important to note these two fundamental provisions respecting their election and terms of office: Their term of office is four years, and one half of their number is to be elected every two years. If there are any exceptions to this rule they should be found in the constitution itself, and, if any such exceptions are found, it must be held, upon a familiar principle of construction, that they are the only exceptions, and that the rule, subject to such exceptions as are expressly enumerated, is invariable in its operation. Looking, then, to the terms of the constitution, we find that there are two, and only two, exceptions made to the rule therein prescribed, and these evidently designed for the mere purpose of putting into regular operation the permanent system and policy indicated by the rule itself. At the time of the adoption of the constitution in 1879, the state was divided by law into 29 senatorial districts, numbered from 1 to 29, from which 40 senators were elected,—20 from the odd-numbered and 20 from the even-numbered districts. Act March 16, 1874. The first election under the new constitution was to take place in 1879 for all the members of the legislature and all the officers of the reorganized state. The regular terms of the members of the senate and assembly were four and two years respectively; of the officers of the executive department, four years; of the justices of the supreme court, twelve years; of the superior court justices, six years. But since it was desired that the general state elections should be held on the even-numbered years, it was provided that the terms of all the officers elected at the first election should be shortened one year so that their successors could be elected in 1880, 1882, 1884, and so on. For this reason the 40 senators elected in 1879, in common with all other persons elected at the same time to offices, the regular term of which is 4 years, were limited to a term of 3 years. This was one necessary exception to the rule, and there was one other equally necessary. The 40 senators elected in 1879 for a term of 3 years would go out of office at the beginning of 1883, and their 40 successors would be elected in November, 1882. In order to bring about the alternate election every 2 years of one half of the senators, it was necessary, sooner or later, to shorten the terms of one half of them by 2 years. It was assumed that the legislature of 1881, in obedience to the express injunction of the constitution, (article 4, § 6,) would redistrict the state for legislative purposes upon the basis of the census of 1880, and in accordance with the constitutional scheme; that the state being so redistricted, the 40 senators elected in 1882 would be chosen from the new districts, and that the time would be ripe for putting in operation the system of electing one half of the senators every 2 years. Accordingly, it was provided that the seats of the 20 senators elected in the year 1882 from the odd-numbered districts should be vacated at the end of the second year. These, and no other, exceptions are made by the constitution to the rule which it prescribes, and we know of no authority in the courts or the executive or the legislature itself to enlarge the list. This, however, is what in effect we are asked to do. Yolo county, which by the act of 1883 constituted, together with Napa county, the ninth district, is by the act of 1891 joined with Sutter and Yuba counties to form the new sixth district. Sutter and Yuba were, under the act of 1883, in the twelfth district. Similar changes have been made all over the state. Very few counties are now in a senatorial district bearing the same number as that under which they were ranged before the new act. Of the rest some have been changed from one odd to another odd number, others from one even to another even number, others from even to odd, and no less than four counties, Lassen, Modoc, San Luis Obispo, and Yolo, from odd to even numbers. In such counties as were comprised under odd numbers, and so remain, the voters will of course have an opportunity of choosing senatorial representatives at the approaching election. In counties that were comprised under even numbers and which so remain, the voters will not have an opportunity of choosing senatorial representatives this year, but they will be represented by the senators for whom they voted two years ago. In counties formerly in even, but now in odd, numbered districts, the voters will participate in the choice of senators at this election, notwithstanding the senators for whom they voted two years ago in their old districts hold over for two years longer. In other words, they will have double their fair and equal representation in the senate; while the voters in counties like Yolo, which have been transferred from odd to even numbered districts, will have no opportunity of participating in the choice of senators at this election, notwithstanding the terms of the senators chosen by them four years ago will have expired. In other words, such counties will be deprived of their fair and equal share of representation in the senate. Undoubtedly these are inconvenient and deplorable results, but it must be assumed that they were foreseen and deliberately accepted by the framers of the constitution. Whatever the fact may be as to the actual amount of prescience by which the deliberations of the convention were guided, the courts in construing the constitution are bound to suppose that any inconveniences involved in the application of its provisions, according to their plain terms and import, were considered in its formation, and voluntarily accepted as less intolerable than those which are thereby avoided, or as fully compensated by countervailing advantages. But with respect to this matter, it cannot be doubted that the framers of the constitution fully understood that at every redivision of the state into senatorial districts inconveniences similar to those above set forth must necessarily ensue, and the fact that they made no provision for a remedy proves that they did not regard them as of paramount importance. Certain it is, at all events, that so far from attempting to remedy the evil by providing that all of the senators should go out of office together after every redivision of the state, they placed in the constitution more than one clear and express injunction, which must be willfully disregarded in resorting to that method of correction.

It is conceded in the argument, and it is manifestly true, that if there is to be an election in the sixth district in 1892 there must be an election in every other even-numbered district in the state, or, in other words, that the whole 40 senators must be elected at one time instead of one half every two years as the constitution requires. And another consequence involved in this contention is that not only must the constitutional term of the senators elected in 1890 be reduced by two years, but, unless we are to abandon for all time the constitutional scheme of rotation in senatorial elections, the terms of one half of the 40 senators chosen this year would have to be reduced to two years, in order that half of the senators might be chosen in 1894. But if this were to be done, how would it be done, and by what authority? The constitution contains no provision on the subject, and affords no rule of decision except a rule by analogy, under which it might be plausibly argued that the provision respecting the senators chosen in 1882 should be applied to those chosen in 1892, with the effect of vacating the seats of all senators from odd-numbered districts at the end of two years. But such an argument, we think, would be more plausible than sound, and such a decree would be more like making than expounding the law.

The case of McPherson v. Bartlett, 65 Cal. 577, 4 Pac. Rep. 582, was referred to in the argument, but we do not understand that counsel make any claim that the point involved in these proceedings was there decided. The opinion, it is true, contains an observation, not necessary to the argument and purely *obiter*, to the effect that the terms of one half of the senators will necessarily be shortened to two years every time the legislative districts are readjusted. But this was a question not involved in the case, either directly or indirectly, and the *dictum* of the court cannot have proceeded from very mature consideration. The history of that case is as follows: It was, as we have seen, made the duty of the legislature of 1881 to divide the state into 40 senatorial districts upon the basis of the census of 1880 for the purpose of electing 40 senators in 1882 to succeed the 40 senators elected in 1879 for a term of 3 years; and in order to put in operation the system of rotation by which one half of the senators should be elected every 2 years, it was provided that the seats of the 20 senators elected in 1882 from the odd-numbered districts should be vacated at the expiration of the second year. Article 4, § 5. In anticipation, apparently, that the legislature of 1881 might fail to redistrict the state as enjoined in section 6, it was provided that, until such redistricting, senators and assemblymen should be elected by the districts and apportionment then established by law. Section 6. The legislature of 1881 did fail to redistrict the state, and, as a consequence, 40 senators were chosen in 1882 from the 29 old districts to succeed the 40 senators chosen from the same districts in 1879 for the shortened term of 3 years. These senators and assemblymen elected at the same time constituted the legislature of 1883, which took up and performed the task, neglected by their predecessors, of redistricting the state for legislative purposes in the manner enjoined by the constitution. St. 1883, pp. 58-85. By the forty-second section of the act establishing senatorial districts, (page 61,) it was provided that, at the general election in 1886, 40 senators should be elected, 1 from each district; that those elected from the odd-numbered districts should hold office for 2 years; and that their successors should be elected in 1888, and every 4 years thereafter; that the senators elected from the even-numbered districts should hold their office for 4 years, and that their successors should be elected in 1890, and every 4 years thereafter. By these provisions the legislature undoubtedly supposed that they had put into regular and permanent operation the scheme of the constitution, and, evidently, they also supposed that all the senators elected in 1882 would hold their offices for the full constitutional term of 4 years, and until the election and qualification of the 40 senators to be elected in 1886. But in McPherson v. Bartlett, decided just prior to the election of 1884, it was held that the 20 senators chosen in 1882 from the 15 odd-numbered districts according to the old apportionment held their offices for only 2 years, and, consequently, that their successors must be elected in 1884. The point actually involved and decided was certainly a doubtful one, and three of the justices dissented from the conclusions of the court; but the decision, whether right or wrong, has no application here. It merely gave effect to a clause of the constitution which in terms applied to the senators elected from the odd-numbered districts in November, 1882. There is no similar clause applying to any subsequent election, and to make that special and exceptional provision a ground for shortening the terms of the senators elected in 1890 would be to decide not only without a rule, but without even a plausible argument from analogy.

In short, the theory of the petitioner is too widely at variance with the theory of the constitution to bear investigation. By the scheme of the constitution we have biennial sessions of a legislature, composed of 80 assemblymen elected biennially, and of 40 senators chosen one half every 2 years for a term of 4 years, covering 2 sessions of the legislature. Under the theory of the petitioner, with nothing to support it, against the plain terms of the constitution, except the *argumentum ab inconvenienti*, at every fifth election 40 senators must be elected at once, and at 2 out of every 5 elections 20 senators must be elected for terms of 2 years instead of terms of 4 years. It is impossible to reconcile the provisions of the constitution with such an intention on the part of its framers, and equally impossible, in view of the painstaking detail with which their intentions in other respects are set forth, to suppose that they would have omitted to make express provisions covering matters of so much importance if they wished to accomplish that for which the relator is contending. Our conclusion is that the senators chosen in 1890 hold their offices until January, 1895, and, consequently, that there can be no election of a senator from the sixth district in 1892. The writs are denied.

We concur: GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.; DE HAVEN, J.; PATERSON, J.

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96 Cal. 310

JOHNSON v. VISHER. (No. 14,859.)

(Supreme Court of California. Oct. 4, 1892.)

EJECTMENT—COMPLAINT—VERDICT.

1. A complaint in ejectment alleging that defendant wrongfully ousted plaintiff, and took possession of the premises to plaintiff's damage, is sufficient without an averment that defendant had received the rents and profits.

2. Where there is no request that an informal verdict be made formal and specific, and the construction of the verdict by the trial court is relevant and responsive to the pleadings, an objection to it will not be heard on appeal.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Action of ejectment by Phœbe F. Johnson against S. Visher. From a judgment for plaintiff, defendant appeals. Affirmed.

Cobb, Kinley & Burris, for appellant. *Baldwin & Campbell*, for respondent.

VANCLIEF, C. Action of ejectment; the complaint alleging that plaintiff is owner of the demanded premises that defendant wrongfully ousted her from, and took possession thereof, "and now retains possession of the same from plaintiff, to plaintiff's damage in the sum of five hundred dollars;" and "that the rental value of said real estate is the sum of $1,500 or thereabouts per annum;" and prays judgment for the possession, and "for the sum of two thousand dollars damage." The answer of the defendant denies plaintiff's title, right of possession, and all damages; and denies that the value of the rents and profits exceeds $200 per annum; and for further answer alleges that defendant has been in the peaceable and uninterrupted possession of the land for more than five years next before the commencement of this action, claiming the same adversely by farming the same, etc., and that plaintiff's alleged cause of action is barred by section 318 and by section 338 of the Code of Civil Procedure. The answer also alleges other affirmative matter as a defense to the action. The case was tried by a jury, whose verdict was: "We, the jury in the above-entitled cause, find for the plaintiff, and judgment in the sum of ($1,175) eleven hundred and seventy-five dollars." Whereupon it was adjudged by the court that plaintiff have and recover from the defendant the possession of the demanded premises, and "the sum of $1,175, rents and profits," and $74.25 costs. The defendant brings this appeal from the judgment on the judgment roll without a bill of exceptions.

1. Appellant contends that neither the complaint nor the verdict is sufficient to support the judgment. The complaint, as against a general demurrer, warrants a judgment for the possession of the demanded premises, and for the value of the rents and profits during the period of the wrongful withholding. It was not necessary that there should have been an averment that the defendant had received the rents and profits. Patterson v. Ely, 19 Cal. 28; Sullivan v. Davis, 4 Cal. 291. The questions as to what was the value of the rents and profits, and as to what was the period of wrongful withholding, must have been submitted to the jury, whose verdict must be presumed to have been justified by the evidence. The verdict, though informal, was properly construed by the court to be a general verdict, with a special finding of the value of the rents and profits for the whole period of the wrongful withholding, and, so construed, supports the judgment. As a general verdict it determines that plaintiff was the owner of the demanded premises, and

that defendant wrongfully withheld the possession; from which it follows, as matter of law, that plaintiff was entitled to recover the possession and the value of the rents and profits for the whole period of the wrongful withholding. The remaining question propounded is, does the special finding of the jury, viz., "and judgment in the sum of $1,175," construed in connection with the pleadings and evidence, mean that $1,175 was the value of the rents and profits for the wrongful withholding, so as to support the judgment for that sum, as "rents and profits?" As the record gives no account of the proceedings on the trial, and contains no part of the evidence, the appellate court is not placed at the point of view occupied by the trial court when the latter construed the verdict. Only the relation of the verdict to the pleadings can be seen by this court; and it appears that the verdict, as construed by the trial court, is relevant and responsive to the pleadings, and, to some extent, includes facts admitted by the pleadings, viz., that defendant withheld the possession, and that the value of the rents and profits was $200 per annum. To the extent of the admissions of the pleadings both the jury and the court were bound by them. McLaughlin v. Kelly, 22 Cal. 213; Hutchinson v. Inyo Co., 61 Cal. 119; Pierce v. Schaden, 62 Cal. 283. If necessary to uphold the construction given to the verdict by the trial court, it may be presumed that, in addition to the admissions of the pleadings, it was clearly proved or admitted at the trial that the value of the rents and profits for the period of the wrongful withholding was $1,175, and that there was no evidence of damage from any other cause. But, supposing that there was evidence of damage other than the loss of rents and profits, to the extent of the *ad damnum* allegation, ($500,) and that the jury included this in their estimate,—adding it to $675 for rents and profits,—the defendant was not injured, either by the form of the verdict or by the misconstruction of it by the court; for, so far as he was concerned, the result would have been the same as if the verdict had been perfectly formal, in two parts,—$675 rents and profits, and $500 damages from other causes. If the defendant was dissatisfied with the form of the verdict, he should have asked, at the time it was announced, that it be made formal and certain; otherwise it was the duty of the court to construe it so as to give it the effect intended by the jury, if the intended effect could be ascertained from its language, considered in connection with the pleadings and evidence; provided, however, that the intended effect was not unlawful and not irrelevant to the pleadings, (Truebody v. Jacobson, 2 Cal. 270; People v. McCarty, 48 Cal. 557; People v. Perdue, 49 Cal. 425;) and, as a general rule, a party will not be heard to object to a verdict for the first time on appeal from the judgment, if it is susceptible of a construction which may have a lawful and relevant effect, (Douglass v. Kraft, 9 Cal. 562;) and this case does not appear to fall within any exception to the rule.

2. Appellant complains that his equitable defense was not disposed of before the trial at law. The ready answer to this is that no affirmative matter constituting an equitable cause of action against the plaintiff was pleaded. I think the judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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96 Cal. 315

PEOPLE v. DOLAN. (No. 20,905.)

(Supreme Court of California. Oct. 4, 1892.)

ABDUCTION—HABITS OF FEMALE—APPEAL FROM ORDER REFUSING ARREST OF JUDGMENT—COMMITMENT—PEREMPTORY CHALLENGE.

1. Appeal does not lie from an order refusing to grant a motion in arrest of judgment.

2. The validity of a conviction on an information filed against one charged of an offense is not dependent on the regularity of the complaint on which he was arrested and brought before the committing magistrate.

3. Pen. Code, § 872, provides that if on a preliminary examination it appears that a public offense has been committed, and there is sufficient cause to believe defendant guilty thereof, the magistrate must make or indorse on the depositions taken on such examination an order to that effect, and that defendant be held to answer to the same. *Held*, that the section is sufficiently complied with where an order of commitment in due form was filed with the other papers in the case, and referred to the complaint as "the within deposition."

4. In a prosecution under Pen. Code, § 267, which makes it unlawful to take any female under the age of 18 away from the person having legal charge of her person without his consent, for the purpose of prostitution, evidence as to whether the child had a habit of being away from home at night is immaterial.

5. In such case, it is no defense that defendant believed the female to have been over 18 years of age.

6. Pen. Code, § 1088, provides that, after the challenges of both sides are disallowed, "either party, first the people, and then defendant, may take peremptory challenges, unless the parties' peremptory challenges are exhausted." *Held*, that the prosecution may exercise the right of peremptory challenge after once passing the jury, and the right has been exercised by defendant.

Commissioners' decision. Department 2. Appeal from Superior court, Sacramento county; W. H. GRANT, Judge.

D. F. Dolan was convicted of abducting for the purpose of prostitution a female under the age of 18, and appeals. Affirmed.

Carroll Cook and *J. E. Foulds*, for appellant. *Atty. Gen. Hart*, for the People.

FOOTE, C. The defendant was convicted of the abduction of a female, under section 267 of the Penal Code. From the judgment rendered, and from an order refusing a new trial, and also from an order refusing to grant a motion in arrest of judgment, he appeals.

No appeal lies from the order last mentioned. People v. Markham, 64 Cal. 157, 30 Pac. Rep. 620.

One of the material points made for the reversal of the judgment and order is that the magistrate before whom the preliminary examination was had, after the defendant's arrest, did not himself swear the complaining witness to the complaint filed against the defendant in the magistrate's court. The magistrate was the judge of the police court of Sacramento, and the affidavit to the complaint was taken by the clerk of that court. Even if it be admitted that such clerk had no power to take the affidavit or oath, we do not see how that affects the question of the validity of the information which, upon this as one ground urged by the appellant, the superior court refused to set aside. For it was said by the appellate court in People v. Velarde, 59 Cal. 457: "The regularity of the proceeding by information did not therefore depend in any manner upon the affidavit on which the warrant of arrest was issued, and had no connection with it." If the affidavit or deposition of the informant or prosecutor under section 811 of the Penal Code, or the sworn complaint which it is the usual practice to demand of the informant or prosecutor, has no connection with the information, we do not perceive how this defect can affect the validity of the information filed in this case, if in other respects the committing magistrate has proceeded properly.

It is further claimed, in support of appellant's contention, that the magistrate did not make a proper order of commitment, because he made no such order on any deposition which was valid. It seems that an order of commitment in due form was made in writing and filed with the clerk of the superior court with the other papers, which referred to the complaint as "the within deposition." This seems to have been held as sufficient to meet the requirements of section 872[1] of the Penal Code, in People v. Wilson, 93 Cal. 377, 28 Pac. Rep. 1061.

The appellant also contends that the complaint is defective in not stating any public offense, or facts sufficient to constitute the public offense for which the defendant was committed, and this he claims, as we understand, to be a jurisdictional matter upon which the information should have been set aside. But the appellate court, as we have seen, does not coincide with appellant's view of the law; and besides, under the rule announced in People v. Fowler, 88 Cal. 138, 25 Pac. Rep. 1110, the complaint did sufficiently charge the offense described in section 267 of the Penal Code. "The gist of the offense is the taking away of the child against the will of the person having lawful charge of her, for the purpose of prostitution; and one who does so acts at his peril, and cannot defend himself on the plea of ignorance as to the age of the child." People v. Fowler, supra. This language of the appellate court is not only decisive of the question of the insufficiency of the complaint, but it also disposes of the argument of defendant that the court should have permitted evidence to go to the jury as to the habits of the child in not being at home at night, contradictory of what her father had testified was her habit. If this was not the fact, and the father had testified to what was not so, as to her habits, it was not matter of impeachment, because whether she stayed at home or wandered abroad at night could not affect the material questions at issue, under section 267 of the Penal Code. For if she was a girl of exemplary or bad habits, or if her father represented her to be of good habits when she was not, these things did not affect the question as to whether or not she was taken off, while under the age of 18 years, for purposes of prostitution, without the consent of her parents.

The point is also made that as to the juror Slaughter the people erroneously exercised the right of peremptory challenge, under the provisions of section 1088 of the Penal Code.[2] It seems that the name of Slaughter was drawn from the jury box, and he was passed by the people, and then the defendant exercised the right to challenge four jurors peremptorily, whereupon, Slaughter not having been sworn, and the panel being uncompleted, the people asked the right further to examine the juror, and then challenged him peremptorily, which was objected to by defendant. We do not see how the defendant's rights were materially affected. He had all the jurors that had not been properly challenged presented him, and he did not challenge the juror Slaughter, and if after that the people exercised a peremptory challenge, when such challenges on their part were not exhausted, how could the defendant be injured? We do not perceive that the case cited on this point (People v. McCarty, 48 Cal. 558) supports the contention of defendant. "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Pen. Code, § 1404.

There is much said by defendant's counsel about the admission and rejection of certain evidence. We have given the whole matter thorough examination, but can perceive no prejudicial error in these regards. The cause was tried by the jury, and upon sufficient evidence, as we think, they convicted the defendant, and that is all that need be said upon the argument made that the evidence does not sustain the verdict. It is assigned for error that the court did not give, as requested, the tenth instruction asked for by the defendant. That instruction runs thus: "If one set or chain of circumstances lead to two conclusions, one or the other of such conclusions must be wrong, and, therefore, in such a case, there must be a reasonable doubt, and the defendant should be acquitted." In lieu of that the court gave this instruction: "If one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong, and, therefore, if in such a case you have any reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt would be thereby created, and you should give the defendant the benefit of the doubt and acquit him." It must be apparent at a glance that the instruction as given was clearer than the one proposed, and stated the law correctly. It is further claimed that instruction 24 asked by defendant should have been given as requested. It ran thus: "Every witness, the defendant included, (if called as a witness,) is presumed to speak the truth, and the jury are bound to remember such presumption, in determining the facts admitted to them, for their consideration." To which the court added this: "But this presumption is a disputable one, and is not conclusive upon you. You are the sole and exclusive judges of the credibility of the witnesses, and of the weight to be given to the testimony of each. In determining the weight of the testimony, you have the right to take into consideration the interest, if any, which the witness may have in result of the trial; his conduct on the stand, his general appearance and demeanor before you, and whether or not it is such as convinces you that he is speaking the truth or otherwise." There appears to be nothing in this act of the court to condemn. The refusal of the court to give the twenty-eighth and twenty-ninth instructions asked by defendant was warranted, for the reasons given by that tribunal, under the circumstances, as they appear in the record. We do not observe any error in the court's charge that the defendant, when a witness in his own behalf, having introduced no evidence of his good character, is not to be assailed by the prosecution being permitted to introduce proof of his general bad character. The charge was in favor of the defendant, and not against him. Neither do we perceive any error in this instruction for the people, viz.: "You are instructed that the child, Kittie Sheridan, (if she did consent,) is of no avail to the prisoner if she is under age, notwithstanding that the defendant *bona fide* believed and had reasonable grounds for believing that she was over age." There was no dispute but that the girl was under age, as we read the record, and counsel concede that this fact was proven; and the defendant must in a case of this sort act at his peril in abducting a girl under age, and cannot defend himself on the plea of ignorance as to her age. People v. Fowler, 88 Cal. 138, 25 Pac. Rep. 1110. We have carefully examined the whole record, and the very voluminous brief of counsel for appellant, but we find no prejudicial error in the record, and advise that the judgment and order denying a new trial be affirmed.

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[1] This section provides that if, on the preliminary examination, it appears that a public offense has been committed, and there is sufficient cause to believe defendant guilty thereof, the magistrate must make or indorse on the depositions taken on such examination an order to that effect, and that defendant be held to answer to the same.

[2] The section provides that, "if all challenges on both sides are disallowed, either party, first the people, and then defendant, may take a peremptory challenge, unless the parties' peremptory challenges are exhausted."

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

DE HAVEN, J., (*concurring*.) I concur in the judgment. The court, at the request of defendant, instructed the jury as follows: "(7) Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other reasonable hypothesis consistent with the proof. (8) Where circumstantial evidence alone is relied upon to sustain a criminal charge, the true rule is that the proof ought not only to be consistent with the prisoner's guilt, but inconsistent with every other rational conclusion, and must exclude to a moral certainty every other hypothesis but the single one of guilt." In view of these clear and explicit instructions, and which stated the law correctly upon the point to which they relate, I do not think it possible that the jury could have been misled by the tenth instruction as modified and given by the court.

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96 Cal. 251

KREUZBERGER v. WINGFIELD. (No. 14,828.)

(Supreme Court of California. Sept. 23, 1892.)

PAROL EVIDENCE — MEMORANDUM IN WRITING — ACTION ON CONTRACT—OPINION EVIDENCE—MECHANICS' LIENS—VALIDITY OF ORAL CONTRACT.

1. The rule that parol evidence is not admissible to vary the terms of a written contract does not apply to a memorandum, signed by one of the parties, which contains no contract stipulations, and does not define the mutual obligations, and which appears on its face to be intended as an informal memorandum, to be considered in connection with oral negotiations which preceded it.

2. In an action for work done and materials furnished, where plaintiff has testified to the work which he agreed to do and the kind of materials he was to furnish, a question whether he completed the work in accordance with the contract is not objectionable, as calling for the opinion of the witness. Conner v. Stanley, 7 Pac. Rep. 723, 67 Cal. 315, and Estate of Taylor, 28 Pac. Rep. 603, 92 Cal. 564, distinguished.

3. Code Civil Proc. § 1183, which gives mechanics a lien on buildings, etc., for work and materials, but provides that, where the amount agreed on exceeds $1,000, the contract is void unless in writing, has no application to a contract to construct a sidewalk in a city; but such a contract may be oral, under Code Civil Proc. § 1191, which provides for a lien for the construction of sidewalks, but does not require a writing.

Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Action by Lucus Kreuzberger against Wingfield for a balance for work done and materials furnished in the construction of a sidewalk. Judgment for plaintiff. Defendant appeals. Affirmed.

Johnson, Johnson & Johnson, for appellant. *Chauncey H. Dunn*, for respondent.

DE HAVEN, J. Action to recover an alleged balance for work done and materials furnished by plaintiff to defendant in the construction of a sidewalk in the city of Sacramento. The plaintiff recovered judgment in the superior court, and the defendant appeals. The claim made by the plaintiff in the court below was, in substance, that by the terms of his contract he was to erect a wooden and cement sidewalk for defendant, with a brick bulkhead around its outer edge, the portion on Eighth street to be made of new lumber, except that the old posts were to be used as supports for it, the new lumber to be of the usual size and quality for such work, and to be covered over with a good quality of cement four inches thick, etc., and that part of the sidewalk to be placed on I street was to be made of the best of the lumber taken from the old sidewalk around the premises at the time of making the contract, except that the top was to be covered with new one-inch redwood lumber, upon which was to be laid the cement. On the other hand, the defendant in his answer alleged that there was no agreement that old lumber should be used in the construction of the sidewalk referred to, but that it was "agreed between the parties that the said carpenter work should be first class in all particulars, and that the materials should be new, strong, and of the best kind. It was further understood and agreed that the said work and labor should be performed in first-class manner, and that the work and materials should in all matters comply fully with the ordinances and directions of the city of Sacramento," etc. The answer further alleged that the work was not performed according to this contract; that the old lumber used was weak, decayed, and broken, and the sidewalk, as constructed, unsafe and insecure.

1. Upon the trial plaintiff introduced oral evidence, tending to show the making of the contract with the agent of defendant, and that its terms were as contended for by plaintiff. It appeared, however, that after the oral negotiations were fully completed, and the terms of the contract agreed on, and about the time plaintiff commenced the work of building the sidewalk, he made and signed the following writing, and gave the same to the defendant or his agent:

"To Right Rev. Bishop Wingfield: 'Contract for brick bulkhead to be built in this manner: Four feet six inches between buttresses to two brick or seventeen inches thick, and to be tapered in as you see the pier on outer side; the circle wall to be eight-inch wall, and all to be plastered outside with cement mortar. There is cement walk to be laid the full length, width, and also to do carpenter work, and to be made ready to receive cement walk. All to be done in a good workmanlike manner, for the sum of one thousand and eighty-one dollars, ($1,081.)

"LUCUS KREUZBERGER,
"No. 1622 K St., Sacramento."

The defendant thereupon moved to strike out all evidence relating to oral negotiations and conversations between the parties prior to the making of this writing, upon the ground that the writing itself constituted the contract between the parties, and contained the only evidence of its terms. The motion was denied, and the court found the terms of the contract to be as testified to by the witnesses for plaintiff. The motion of defendant was properly denied. The rule is, of course, a familiar and salutary one, that when a contract has been reduced to writing, parol evidence is not admissible for the purpose of cutting down or adding to its terms. But, in order for this rule to have any application, the writing must be one which by legal construction shows upon its face that it was intended to express the whole contract between the parties. Naumberg v. Young, 44 N. J. Law, 338; Harrison v. McCormick, 89 Cal. 327, 26 Pac. Rep. 830. It does not apply to a mere memorandum like the one we are now considering, and which does not of itself import any contract. Brigg v. Hilton, 99 N. Y. 517, 3 N. E. Rep. 51. It certainly cannot be determined from this writing whether the sidewalk therein referred to was to be constructed by the plaintiff, who signed it, or by the defendant, to whom it seems to have been addressed, and, of course, there is the same uncertainty as to who shall pay for the work. It does not define the mutual obligations of the parties, and is only signed by the plaintiff. In fact, it does not purport to bind any one. It contains no contract stipulations, and shows upon its face that it was only intended as an informal memorandum, to be considered in connection with the oral negotiations which preceded it.

2. While plaintiff was on the stand as a witness, and after he had testified fully in relation to the terms of the contract, as he claimed them to be, he was asked the following: "And your work is in every way according to the contract that you agreed to do with Von Herlich? What is the character of the work on the Eighth-Street side as regards the contract? Is it in accordance with the contract?" The defendant objected to each of these questions upon the ground that the same were irrelevant and incompetent, and called for the conclusion of the witness. The objection was overruled. The court did not err in these rulings. The questions did not call for the opinion of the witness, within the meaning of the law which excludes the opinions of witnesses, but for facts within his knowledge. The witness had just testified to the terms of the contract, that is, as to the precise work which he had agreed to do, and the kind of materials he was to use in the construction of the sidewalk, and it was certainly competent for him to state whether in point of fact this particular work had been done, and such quality of materials used, and that was, in substance, all that the witness was called upon to say or did say in answer to the questions. In the case of Brink v. Insurance Co., 80 N. Y. 108, the witness was allowed to answer this question: "So far as you could, individually, did you get those proofs of loss forwarded as soon as it was possible for you to do so?" And the court of appeals, in disposing of the objection that this question called for the conclusion or opinion of the witness, speaking by CHURCH, C. J., there said: "While it would not have

been a legal error to have sustained the objection, I am of the opinion, under the circumstances of this case, that it was not a legal error to overrule it. The object of all examinations in judicial tribunals is to elicit truth, and there are many cases where the form of questions and the manner of examination must be left to the discretion of the trial judge. No injustice could have been done, because the answer would not be likely to prevail against facts which might be drawn out on cross-examination, or proved by other witnesses inconsistent with it." So in this case the trial judge might properly have required the plaintiff to ask questions touching all the details of the work of constructing the walk, its dimensions, and the grade upon which it was laid, and the quality of the materials used in its construction; but it was clearly a matter within the discretion of the trial judge to permit the general question, and the defendant could, if he had so desired, have called for more minute particulars upon the cross-examination of the witness. The cases of Conner v. Stanley, 67 Cal. 315, 7 Pac. Rep. 723, and Estate of Taylor, 92 Cal. 564, 28 Pac. Rep. 603, are not in conflict with these views. In those cases the questions held to be erroneous called upon the witness for answers, which necessarily must have been based upon his opinion of the law governing the case, as well as his knowledge of the facts. The distinction between those cases and this one is in this respect marked and important.

3. The appellant further contends that the contract upon which plaintiff has recovered judgment in this action is void, under section 1183[1] of the Code of Civil Procedure, as such contract was oral, and the price fixed for doing the work therein mentioned exceeded $1,000. It is sufficient to say, in answer to this position, that the section referred to does not by its terms expressly relate to contracts for building sidewalks in cities, and we are unwilling to construe the section as applying to any contract not clearly within its letter as well as its reason. Section 1191[2] of the Code of Civil Procedure is the one that governs contracts for the construction of sidewalks, and that section does not provide that the contract for such work, when exceeding $1,000, shall be void if not in writing. We do not deem it necessary to particularly notice the other points made. We have considered them all, and find no error in the record.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

LEVY v. EVERETT et al. (No. 18,044.)

(Supreme Court of California. Oct. 4, 1892.)

APPEAL—FAILURE TO FILE TRANSCRIPT—DISMISSAL.

Where no sufficient excuse is shown for failing to file transcript within time, an appeal will be dismissed.

In bank. Appeal from superior court, Yolo county; W. N. GRANT, Judge.

Action by Levy against Everett and others. There was a judgment, from which plaintiff appeals. Dismissed.

F. E. Baker and *C. W. Thomas*, for appellant. *J. C. Ball* and *Armstrong & Platnauer*, for respondents.

SHARPSTEIN, J. The transcript in this case was not filed within the time fixed by rule 2 of this court for filing transcripts. Respondents, on that ground, move to have the appeal dismissed. Appellant attempts to excuse the failure to file within the prescribed time. We think no sufficient excuse is shown for not filing it within the time prescribed by the rules of this court, and, therefore, the motion is granted. Appeal dismissed.

We concur: DE HAVEN, J.; McFARLAND, J.; PATERSON, J.

(96 Cal. 265)

BRUSIE v. GATES et al. (No. 14,792.)

(Supreme Court of California. Sept. 30, 1892.)

ACTION TO QUIET TITLE—EVIDENCE.

In an action to quiet title, defendant alleged that on November 20, 1879, W. was owner of the land, and on that day he received from W. a conveyance thereof. Plaintiff's evidence showed that in October, 1878, he recovered a judgment against W., and on the execution thereof he purchased the land in October, 1880, receiving a sheriff's deed in October, 1881. At the close of plaintiff's evidence the court granted a nonsuit. *Held*, that the nonsuit was erroneous, as plaintiff's admission, by claiming under him, that W. had been owner of the land as alleged in the answer, was not an admission that W.'s conveyance to defendant antedated the sheriff's sale.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; JOHN W. ARMSTRONG, Judge.

Action to quiet title by James Brusie against Samuel Gates and another. Defendants had judgment, and plaintiff appeals. Reversed.

For former report, see 22 Pac. Rep. 284.

Judd Brusie, *T. B. Bond*, *Stonesifer & Minor*, and *W. H. Layson*, for appellant. *W. E. Turner*, *W. H. Hutton*, and *E. W. McKinstry*, for respondents.

VANCLIEF, C. Action to quiet title to land. The complaint is in the usual form, praying that defendant be required to set forth the nature of his adverse claim, etc. Defendant's answer admits that he claims the land adversely to the plaintiff, and avers "that on or about the 20th day of November, 1879, for a good, valuable consideration, a grant, bargain, and sale deed of the whole of said described premises was duly executed and delivered to him by one Miner Walden, in whom the legal title to the whole of said described premises was then vested, and who was then in the open and notorious possession of said described premises, and the whole thereof, as the legal and lawful owner thereof, which said deed was sufficient in form and recitals to vest, and it did vest, the title in fee simple of said premises in this defendant." That said deed was duly recorded on the 6th day of January, 1880, and under it defendant entered into possession on November 20, 1879, and has ever since remained in exclusive possession, claiming absolute ownership of the premises. At the trial, plaintiff claimed title from the same Miner Walden by a sheriff's sale made by virtue of a writ of execution on a money judgment in a justice's court in his favor, against Walden, rendered October 12, 1878. The execution on which the premises were sold was issued October 1, 1880. The property was sold October 30, 1880, and the sheriff's deed to plaintiff was executed May 10, 1881. For the purpose of proving that his title acquired by this deed antedated the alleged deed from Walden to defendant of November 20, 1879, the plaintiff proved the regular issuance of a writ of attachment from the justice's court on October 2, 1878; and, to prove that this writ had been levied on the property in question, introduced the constable's return indorsed thereon, certifying that the constable had received the writ on the 2d day of October, 1878, "and served the same on the same day by attaching the following described real estate, [describing the land in question,] and filing a notice thereof with the county recorder of said county, and delivering a copy of said attachment to B. B. Garner, an occupant of said real estate." Plaintiff then proved that a copy of the writ, with the following notice attached thereto, had been filed in the recorder's office October 2, 1878: "Notice is hereby given that by virtue of the annexed writ of attachment issued in the above-entitled action, the following described real estate is attached as the property of the said Miner Walden, defendant, to wit:" (Here follows description of the property as in the return.) Then to prove that a similar notice, with a description of the property, had been served on the occupant of the land as required by section 542 of the Code of Civil Procedure, the plaintiff called the constable, who testified substantially the same as he had testified on a former trial of the same case. His testimony on the former trial is stated in the opinion of this court on a former appeal, (Brusie v. Gates, 80 Cal. 470, 22 Pac. Rep. 284,) where it was held that his testimony was insufficient to prove the requisite notice to the occupant, and consequently that no valid levy of the attachment had been proved. Upon the foregoing evidence the plaintiff rested, and the defendant moved for a nonsuit, which was granted. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

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[1] Code Civil Proc. § 1183, gives mechanics and others a lien for labor performed and materials furnished in the construction, etc., of any building, etc., but provides that the contract must be in writing when the amount agreed to be paid exceeds $1,000, and must be filed with the county recorder; otherwise it shall be void.

[2] Code Civil Proc. § 1191, provides that "any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, has a lien upon such lot for his work done and materials furnished."

As contended by counsel for the appellant, I think the court erred in sustaining the motion for nonsuit. Both parties claimed title from Walden. That Walden was the owner of the property on the 20th day of November, 1879, and that defendant claimed title from him by deed of that date, are distinctly averred in defendant's answer. The complaint does not show the source of plaintiff's alleged title, but on the trial plaintiff proved a sheriff's sale of the land to him, authorized by an execution in due form, issued to him by the justice of the peace on a valid judgment; a certificate of which sale in due form, reciting a levy of the execution, was issued to plaintiff, and a duplicate thereof duly filed in the recorder's office, October 30, 1880. Also the execution of a sheriff's deed in due form, reciting the judgment, the execution and levy thereof, the sale after due notice, and the certificate of sale. This made a *prima facie* case for the plaintiff, independently of any lien by attachment, subject, however, to be overcome by proof on the part of the defendant that Walden had conveyed to him on November 20, 1879, as alleged in his answer, or at any time prior to the sheriff's sale to plaintiff. Blood v. Light, 38 Cal. 649; Wilson v. Madison, 55 Cal. 5; Hibberd v. Smith, 67 Cal. 564, 4 Pac. Rep. 473, and 8 Pac. Rep. 46. The admission by plaintiff that Walden had been the owner, as alleged in the answer, by claiming title under him, was not an admission that Walden had conveyed to defendant as alleged in the answer, at any time prior to the sheriff's sale to plaintiff. The averment in the answer that Walden had conveyed to defendant was denied by implication of law; and after plaintiff had made a *prima facie* case, by proving a conveyance from Walden to himself, the burden of proving a prior conveyance from Walden to defendant was on the defendant, since he was not at liberty to dispute the positive averment in his answer that Walden owned the land on November 20, 1879. People v. Railroad Co., 49 Cal. 420; Bigelow, Estop. pp. 687-690. As before remarked, the testimony of the constable as to what he did to effect the alleged attachment was substantially the same as on the former trial; and as on the former appeal that testimony was held to be insufficient to prove notice of the attachment to the occupant of the land, it was conclusively insufficient on the second trial. In that respect the decision on the former appeal had become the law of the case, and the trial court correctly so considered it on the second trial. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

(101 Cal. 42)

NATOMA WATER & MIN. CO. v. HANCOCK et al. (No. 14,847.)[1]

(Supreme Court of California. Oct. 4, 1892.)

APPROPRIATION OF WATER — RIGHT TO DAM—INJUNCTION.

Where plaintiff constructs and maintains a dam in a stream on public lands for the purpose of supplying a canal with water to be used for beneficial purposes, he acquires a possessory

[1] Rehearing granted.

interest in the dam, the pond formed by it, and the land under the pond, and defendants were properly enjoined from extending a canal into the pond, even though their intention was to take only the surplus water after plaintiff's canal had taken its supply.

Department 2. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Action by the Natoma Water & Mining Company against John Hancock and Joseph Wild to restrain them from diverting the water from the South Fork of the American river at a point on the stream where plaintiff had built and was maintaining a dam. From a judgment for plaintiff, defendants appeal. Affirmed.

Barclay, Wilson & Carpenter and *Solon Hall*, for appellants. *Daniel Titus*, for respondent.

MCFARLAND, J. This action was brought to restrain defendants from diverting water from a stream called the "South Fork of the American River," at and from a certain dam of plaintiff on said stream. Judgment went for plaintiff, and defendants appeal from the judgment and from an order denying a new trial. The main facts in the case are these: In 1851 plaintiff located a dam and canal,—the dam to be at a point on said South Fork at a place called "Rocky Bar," and the canal to run to various localities to carry water for mining and agricultural purposes. In 1852 and 1853 the dam and canal were completed. The structure of the dam was at first made of wood, but in 1868 it was rebuilt of stone. The canal was of quite large dimensions and about 18 or 20 miles long, and during the later months of the dry seasons carried all the water of the stream. At other times there was a surplus of water, which ran over the crest of the dam. The water was backed up behind the crest of the dam so as to make a pool or pond. The dam and canal have been in this condition ever since 1853, and have been since then continuously used by plaintiff for beneficial purposes,—for carrying water for sale to miners and agriculturists and for irrigating vineyards and orchards owned by plaintiff. On March 27, 1854, the plaintiff by a written instrument granted to an association of persons, called the Boyd's Bar Water Company, "the right, privilege, and emblement to put in, insert, and maintain in the dam of said Natoma Water & Mining Company * * * a box of sufficient size, width, and depth to draw water sufficient to fill and supply the ditch, flume, and race of said Boyd's Bar Water Company, at, in, and with its present dimensions, say of two feet square." This instrument also provided that the plaintiff should not be obliged to maintain the said dam; and, further, that if there should occur any deficiency of water to plaintiff's canal, the plaintiff should have the right to close the gate supplying the Boyd's Bar ditch, and keep it closed while the deficiency continued. (In this instrument the word "dam" is evidently used, not in the strict sense of a structure across a water course, but in the sense frequently given the word, which includes the pool or pond created by the structure.) Immediately after the execution of this instrument, in 1854, the Boyd's Bar Company under said instrument "put into" the northerly side of the pool of plaintiff's dam, at a certain place, a certain box, through which the owners of the Boyd's Bar ditch have ever since been accustomed to take water to fill said ditch. And there seems to have been no difficulty about the right to take water under said instrument through said box placed in the side of the dam as aforesaid. Once or twice the plaintiff closed the gate, without objection. In 1883 the defendant Hancock became the owner of said Boyd's Bar Company's ditch and its rights under said instrument. This ditch is also sometimes called the "Clarke & Eastman Ditch." There is some contention as to that part of the judgment which deals with the Boyd's Bar ditch, and the amount of water to which it is entitled, and that part of the judgment will be hereafter noticed. But the most important contention in the case relates to a new right asserted by defendants, apart from and beyond the right accruing through said Boyd's Bar ditch. In 1887 the defendant Hancock posted a notice at plaintiff's dam to the effect that he intended to widen his ditch, so that it would carry 2,000 inches of water; that he claimed that much of the water of said South Fork, and that he intended to divert it "from said Natoma dam on the west side of the river." (The canal of plaintiff takes its water from the opposite side of the river, which is sometimes called the "south side" and sometimes the "east side.") Under said notice defendants commenced to enlarge said ditch and to construct additions to it, and at the commencement of this action a new piece of ditch was being constructed by them near the dam, and had reached within about 75 feet of plaintiff's said pond or pool. Shortly afterwards this piece of ditch, which partly consisted of a tunnel through granite rock, had reached to within 10 feet of the water of plaintiff's dam, leaving between the ditch and the water only a few feet of earth, which could have been removed by a few hours' work. This ditch, if permitted to be completed, would tap the water unrestrained by the dam at a point about 40 feet above the crest of the dam, and 10 inches lower than the bottom of plaintiff's canal on the other side of the stream. The result would be that defendants' ditch would drain the water raised by the dam so as to take it nearly all from plaintiff's canal. The judgment restrains defendants from thus completing their ditch, and running it into the backwater of plaintiff's dam.

Appellants say that they intended only to appropriate the surplus waters of the stream after plaintiff's canal had taken its supply, although their notice does not state such intention; and they invoke the rule that surplus water may be appropriated. There is no doubt that surplus water may be appropriated; and the quotation in appellants' brief from section 83 of Pomeroy on Riparian Rights correctly states the rule on the subject. But the author says in that section that such appropriation of surplus water may be made, "if no interference with the rights of the prior appropriator is thereby caused." But have appellants the legal right to tap the head of water created by respondent's dam, to inaugurate a perpetual trespass upon respondent's property, to practically take control of that over which respondent has exercised complete dominion and control for nearly 40 years, and to take possession of that which respondent has possessed during that period of time? The principles upon which property rights on the public lands of the United States in California were acquired, before government surveys and sales, have long been settled; the main rule being that a prior appropriation gives title. "Legislation and decisions have been uniform in awarding peaceable enjoyment to the first occupant either of the land or of anything incident to the land." Tartar v. Mining Co., 5 Cal. 398. Such appropriation was effected either by taking actual possession,—*possessio pedis*,—or by doing such acts as, considered with reference to the nature of the right to be acquired, were, in good sense and according to established customs, equivalent to actual possession. Water was appropriated by constructing ditches and turning water into them by means, generally, of dams erected across water courses; rights to the future diversion of the water, pending the completion of the ditches, being preserved by notices of intention to divert. Under this system properties of immense values were created in ditches, canals, and dams; and congress, by the act of July 26, 1866, enacted that such properties should be maintained and protected. This act was held by the United States supreme court in Broder v. Water Co., (respondent in the case at bar,) 101 U. S. 274, to be a mere "recognition of the pre-existing right of possession;" and it is clear that respondent's pre-existing right of possession embraced its dam, and the head and elevation of water created by it, and the pond and pool behind it, and the land perpetually covered and occupied by the water, as fully and effectually as it did any other part of its canal property. The dam, including the land which is necessarily covered with water in order to be of any beneficial use, the water head, and the pool or pond with its lateral approaches and supports, was an integral part of the canal itself. Indeed, as stated in Hutchinson v. Railroad Co., 37 Wis. 604, although the strict meaning of the word "dam" is a barrier built across a water course to confine and keep back flowing water, yet it is frequently used to designate all that results from the barrier. It was said in that case: "So we sometimes hear of fishing or bathing in a dam; and often of water in a dam,—meaning in the pond. So a pond is made to include the dam, even in judicial phrase. Jackson v. Virmelyea, 6 Cow. 677. And the grant of a dam is held to include an easement in the pond. Maddox v. Goddard, 15 Me. 218." But, by whatever name it may be called, respondent obtained a possessory right and title to the land which it appropriated and permanently occupied by means of its dam, and acquired the right to maintain the pond or pool and head of water above the barrier which it built across the stream; and this title was as perfect as any other title to a part of the public domain acquired by appropriation for any other legitimate purposes. It was expressly held in Rupley v. Welch, 23 Cal. 453, "the construction of a reservoir across the bed of a ravine for the purpose of collecting the water flowing down the same, to be used in irrigating a garden or fruit trees, gives to the party constructing the same a vested right of property in the reservoir." (Of course, in all such appropriations—even of mining claims—there had to be a reasonableness as to the amount or extent of the appropriation; but no such question arises in the case at bar.) According to the foregoing views the court below was right in enjoining appellants from running their ditch into respondent's pool, and into and upon the land possessed by respondent by means of its dam and pool. An injunction always lies to restrain threatened permanent interference with water rights. Ang. Water Courses, § 444 et seq.; California cases cited in Gear's Index Digest, at foot of page 426. "The interposition of a court of equity was required to prevent defendant's wrongful acts from ripening into a right, and on that ground alone the interference of a court of equity was properly asked and granted." Moore v. Waterworks Co., 68 Cal. 146, 8 Pac. Rep. 816; Mott v. Ewing, 90 Cal. 231, 27 Pac. Rep. 194. Moreover, whenever there is a threat and intent to wrongfully enter upon another's real property, and to take permanent possession thereof, and effect a permanent lodgment there, the threatened injury is "irreparable in itself," and the insolvency of the intruder or the actual damage which may ensue is immaterial. More v. Massini, 32 Cal. 595; Richards v. Dower, 64 Cal. 62, 28 Pac. Rep. 113; Lighter Co. v. Simpson, 77 Cal. 290, 19 Pac. Rep. 426. Again, the threatened acts of appellants would be in the nature of waste, would destroy the very susbtance of respondent's estate, and would create a perpetual nuisance; and against such acts injunction is the proper remedy. Such acts would not constitute mere fugitive and temporary trespasses, but a trespass of a continuing nature, whose constant recurrence would render a remedy at law entirely inadequate.

With respect to respondent's rights under the Boyd's Bar contract, we think that they are sufficiently preserved by the judgment. The judgment decrees that "defendants may take sufficient water from plaintiff's said dam to supply a ditch two feet wide and two feet deep with the grade of the ditch known in 1854 as the 'Boyd's Bar Ditch;'" and we do not think that the specification of the box (and its location) through which the water is to be taken is any abridgment of the right. The water is to be taken substantially in the manner in which it has always been taken since 1854. It is contended that respondent's canal has been enlarged since the date of the contract, and that therefore respondent should not now have the right to close the Boyd's Bar ditch when the canal is not supplied. But the court does not find that the carrying capacity of the canal has been increased. In 1862 and 1864 the respondent cleaned out the canal, and reconstructed some portions of it by substituting earthwork for wooden flumes; and the court merely finds that in "some places" it was made wider, and that at those places the capacity was increased, but to what extent the evidence does not show. The evidence does not show an increase of the capacity of the whole ditch, and it is not likely that if there had been any substantial increase the owners of the Boyd's Bar ditch would have acquiesced therein for nearly 30 years. Indeed, there is not and has never been any serious trouble between the parties growing out of the Boyd's Bar contract; the real contest is about the new right asserted by appellants. The doctrine that the point of diversion of water may be changed, is, of course, subject to the condition that the change must not interfere with the rights of other parties. With respect to the minor points in the case, it is sufficient to say that, in our opinion, the findings are sustained by the evidence, and that the findings are full enough to determine the material rights of the parties. We see no error in the record. Judgment and order affirmed.

We concur: De Haven, J.; Sharpstein, J.

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96 Cal. 310

In re WIERBITZKY et al. (No. 14,913.)

(Supreme Court of California. Oct. 4, 1892.)

Appealable Orders—Insolvency Proceedings.

An order denying a motion made by an alleged creditor, to dismiss insolvency proceedings against a firm which has been adjudicated an insolvent debtor on the petition of one of the members of the firm, is not appealable.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Insolvency proceedings against the firm of H. Wierbitzky & Co. From an order denying his motion to dismiss the proceedings an alleged creditor appeals. Appeal dismissed.

G. H. Perry, for appellant. *Pierson & Mitchell*, for respondent.

Per Curiam. The firm of H. Wierbitzky & Co., and the individuals composing it, were, upon the petition of one of the members of the firm, adjudicated insolvent debtors. After such adjudication, one of the alleged creditors moved to dismiss the insolvency proceedings on various grounds. The motion was denied, and from the order denying the motion this appeal is taken. The order is not appealable. Appeal dismissed.

(3 Cal. Unrep. 565)

PRIOR v. DIGGS. (No. 14,874.)

(Supreme Court of California. Oct. 1, 1892.)

SALE OF GOOD WILL — ACTION FOR BREACH OF CONTRACT—EVIDENCE.

1. Defendant sold to plaintiff the good will of his "saddlery, harness, and carriage trimming business," and agreed not to enter a like business in the same place while plaintiff, or any one deriving title to the good will from him, was engaged in such business. Later he engaged in a general merchandise business in that place, and, among other things, sold horse blankets, buggy robes and dusters, whips, and collar pads. *Held*, in an action for breach of contract, that evidence showing that such articles did not belong to the saddlery and harness business, but were articles of general merchandise, was admissible to prove there was no breach of contract.

2. Where a witness states that he "does not consider" or "does not think," etc., such expressions are not expressions of opinion, merely, as witnesses are not required to give their testimony with absolute positiveness.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county: C. H. GAROUTTE, Judge.

Action by T. M. Prior against Marshall Diggs for breach of contract. Judgment for defendant. From the judgment and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

J. C. Ball, for appellant. *F. E. Baker* and *Clark & Aram*, for respondent.

BELCHER, C. The plaintiff commenced this action on November 24, 1888, to recover damages in the sum of $2,000 for the alleged breach of a written contract, which reads as follows: "Whereas, I, Marshall Diggs, of the county of Yolo, state of California, have this day sold to T. M. Prior, of the same place, the good will of the saddlery, harness, and carriage trimming business lately carried on by me in the town of Woodland, in said county, now, therefore, in consideration of said sale and of the sum of two hundred and twenty five dollars, gold coin of the United States, to me in hand paid by the said T. M. Prior, I hereby covenant and agree to and with the said T. M. Prior that, so long as the said T. M. Prior, or any person deriving title to the good will of said business from him, shall carry on a like business within said town, I will not, directly or indirectly, either for myself or as the agent or employe of any other person, carry on, or aid in carrying on, at any place within said town of Woodland, the business of saddlery, harness making, or carriage trimming, or the selling of saddles, harness, carriage trimmings, or other articles usually sold, or which I have been accustomed to sell, in connection with said business, or any other business usually carried on in connection therewith or subsidiary thereto. And whereas, from the nature of the case, it would be extremely difficult to fix the actual damage arising from a breach of this contract, now, therefore, it is hereby agreed that the sum of two thousand dollars shall be presumed to be the amount of damage sustained by a breach of this contract, and the said amount is hereby fixed and agreed upon as liquidated damages for such breach. Witness my hand this 17th day of January, A. D. 1883. M. DIGGS."

By his answer the defendant denied all the averments of the complaint, and set up numerous defenses. The case was tried before a jury, and the verdict and judgment were in favor of the defendant. The plaintiff moved for a new trial, which was denied, and has appealed from the judgment and order. The Civil Code provides that "the good will of a business is the expectation of continued public patronage," (section 992,) and that "the good will of a business is property, transferable like any other," (section 993.) It also provides that "every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void," (section 1673,) except that "one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein." Section 1674. Here the good will sold was only that "of the saddlery, harness, and carriage trimming business," and the question is, did the defendant violate his contract by thereafter carrying on "a similar business" while the plaintiff was carrying on "a like business?"

The facts proved, and bearing on this question, are, in substance, as follows: Prior to his sale to the plaintiff, defendant had been engaged in the saddlery, harness, and carriage trimming business for about a year, and, among other things, had kept and sold to his customers "horse blankets, buggy robes and dusters, whips, and collar pads.' In June, 1883, he bought in with Freeman & Co. as a partner in a general merchandise store, situated upon the same street and within a few feet from the place where the saddlery business which he had sold to the plaintiff was then being carried on. He remained in business as a member of the firm of Freeman & Co. until October, 1884, when he bought out his partners, and afterwards conducted the business at the same place in his own name. His business was principally the sale of hardware, agricultural implements, wagons, carriages, and buggies; but when he went in with Freeman & Co. there were in stock, and for sale, in the store, horse blankets, buggy robes, and dusters, whips, and collar pads, and he afterwards kept and sold some of each class of such goods and enumerated articles each year, down to the time of the commencement of this action. In October, 1883, the plaintiff sold and transferred the business, the good will of which he had purchased from defendant, to one Barney, but did not assign to him the contract on which this action is based; and in November, 1884, Barney sold and transferred the said business back again to plaintiff. After his purchase from Barney, the plaintiff continuously, up to the time of the trial, carried on in the town of Woodland "the business of saddlery, harness, and carriage trimming, and, in connection therewith, kept for sale, and sold therewith, robes and dusters, horse blankets, whips of all kinds, collars and collar pads, and other articles." It was claimed by the plaintiff in the court below that the sale of horse blankets, buggy robes, etc., was a part of the saddlery and harness business, and that defendant, by selling these articles after he bought in with Freeman & Co., violated his contract, and rendered himself liable for the stipulated damages. On the other hand, the defendant claimed that the articles named were general merchandise, and that the sale of them was not a part of any particular business or trade.

Upon this question the plaintiff's witnesses testified that the sale of the said articles was a part of the saddlery and harness business, and as much a part of it as the sale of any other article sold in connection therewith. The same witnesses, however, testified, on cross-examination, that the articles were sold in connection with other businesses, that they were sold in grocery stores and carriage repositories, and that more of them were kept and sold in general merchandise stores than in harness shops. One of the witnesses for defendant testified that he had been in business in Woodland for 30 years, and had kept general merchandise for sale; that he did not "consider horse blankets, buggy robes, or lap dusters or collar pads or whips, as belonging to the saddlery, harness, or carriage trimming business;" and that they were recognized as articles of general merchandise. And the defendant testified to the same effect, and, among other things, said: "I don't think they belong to any particular business. They are articles of general merchandise. They are so usually sold in all classes as general merchandise, in dry-goods stores, hardware stores, and especially whips and robes are sold with carriages in carriage repositories;" and that after he bought in with Freeman & Co., in connection with his hardware and agricultural business, he kept a carriage repository, and kept carriages and buggies on hand for sale. Defendant further testified that the plaintiff had every opportunity to know he was selling these articles; that plaintiff was often in his place; that the robes, whips, and blankets were lying in the most prominent places near the door, where people could see them; and that plaintiff made no objection before the commencement of this action. The testimony on both sides as to the sale of the said articles in connection with other classes of business than the saddlery and harness business was objected to by plaintiff, and it is urged that the court erred in admitting it. We see no error in the rulings. The evidence tended to support the defendant's theory, and was admissible for that purpose. It is further urged that the defendant's witnesses only stated that they did not "consider" and did not "think," etc., and that these were expressions of opinion, merely, and hence not sufficient to create a conflict in the evidence. We cannot accede to this view. Witnesses are not required to give their testimony with absolute positiveness. 1 Greenl. Ev. § 440; Hoitt v. Moulton, 21 N. H. 588. The witnesses, however, did state positively that the said articles were articles of general merchandise, and, if this was so, they did not belong to any particular trade or business. We think there was a substantial conflict in the evidence upon the question under consideration, and that the verdict and judgment cannot, therefore, be disturbed. In view of what has been said, it would subserve no useful purpose to consider the other questions discussed by counsel. We discover no error which could affect the result, and therefore advise that the judgment and order be affirmed.

We concur: HAYNES, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 559)

ROGERS v. ROGERS. (No. 14,870.)

(Supreme Court of California. Sept. 13, 1892.)

DIVORCE — CUSTODY OF CHILD — INCREASING ALLOWANCE—SCANDALOUS AFFIDAVIT.

1. Plaintiff, by a decree of divorce in 1885, obtained the custody of the child, with a monthly allowance of $5 from defendant for its support. In 1891, plaintiff applied to the court for an increased allowance, and made affidavit that $30 per month was required, and that defendant's income was $250 per month; all of which defendant denied by his affidavit. *Held*, that an allowance by the court of $20 per month was not excessive.

2. Where, in such case, defendant's affidavit contained impertinent and scandalous matter reflecting on the character of plaintiff, such matter was properly stricken out.

Department 2. Appeal from superior court, Marin county; F. M. ANGELLOTI, Judge.

Application by Mary E. Rogers for an increased monthly allowance from S. L. Rogers, her divorced husband, for the support of their child. From an order granting the application, defendant appeals. Affirmed.

The following is the portion of the affidavit referred to in the opinion: "Affiant says that plaintiff is not a suitable or proper person to have the care, custody, or control of said child Herbert, or any other child, for the following reasons and others: That when affiant married said plaintiff, he supposed she was a single woman of good moral character, but that after a period of about one year affiant learned that plaintiff had, for nearly two years next prior thereto to said marriage, constantly been associating and running around and about San Francisco with a gay, fast man by the name of Dr. Moreno. That plaintiff even went to the cabin, house, domicile, or *quasi* residence of said Moreno, and there remained under the same roof, in the same house or cabin, with said Moreno, for a long time, Moreno's wife then not being there. That said Moreno at one time stayed at the rooms or residence of an unmarried Spanish woman at Sacramento, by the *alias* name of 'Corina,' a woman of unchaste reputation. That affiant married plaintiff in 1871, and on or about the 9th day of December, 1871, plaintiff then being *enceinte*, she by the use of a steel instrument called 'catheter,' —(which affiant now has in his possession,)—she used the same upon her person in such a manner as to produce a miscarriage or an abortion, whereby plaintiff was delivered of two stillborn male infants, which were thereafter buried in the garden of affiant's then residence at Sacramento, whereby affiant was put to very great expense on account thereof, to wit, several hundred dollars. That on the 27th day of May, 1872, while affiant was attending court at Woodland, plaintiff, without the knowledge or consent of affiant, went to the store of Hamburger & Co., in said Sacramento, and, by false and deceptive statements, bought and had charged to this affiant dry goods to the amount of over $218, mostly for silk dress patterns, then took from affiant's house all the silverware, table linen, a large amount of sheets, pillowcases, towels, napkins, bedclothes, knives, forks, spoons, etc., and many other things, (all of which belonged to affiant long before affiant ever saw or was married to plaintiff,) and said plaintiff 'ran away,' and left for San Francisco, and there got credit on account of the said firm of said Hamburger & Co., and to their indebtedness, which shameful and disgraceful transaction cost affiant to settle said bills, get plaintiff home, and attempt to keep the said 'runaway' out of and from the public and press, more than $1,000. That plaintiff on the ——— day of ———, 1872, she then being again *enceinte*, by the use of said catheter, again used the same upon her person so as to produce another abortion or miscarriage, whereby she was again delivered of a stillborn male infant, which said infant was buried in said garden, beside those aforesaid, whereby affiant was again put to great costs, trouble, and expense thereby, to wit, several hundred dollars. That on the ——— day of ———, 1873, plaintiff asked affiant for $30, as she said, to buy jewelry for her mother. Affiant refused to give it, when plaintiff immediately took a gold watch and chain of hers, (a gift from affiant,) and went to the pawn shop of one Stineman, on Second street, in said Sacramento, and there pawned said watch and chain, and got $30 from said Stineman, which said sum affiant, to save his shame and mortification, paid to said Stineman to keep said transaction from becoming publicly known. That by reason of plaintiff's disgraceful conduct and transactions at Sacramento and Davisville, affiant was greatly mortified, disgraced, and for a long time they were the scandal of society, whereby affiant was irreparably injured in his position in the community, at the bar, and everywhere wherein his business relations or acquaintance extended, and especially in his profession, he having, before that time, been counsel for many of the largest firms in Sacramento, to wit, D. O. Mills & Co., Baker & Hamilton, Adams McNeal, N. L. Drew & Co., besides many others, nearly all of whom greatly disapproved and severely censured affiant for ever living with, or having anything to do with, plaintiff after her said 'run away.' That by reason of affiant's mortification, disgrace, and chagrin, caused as aforesaid by the acts of plaintiff, it was impossible for affiant to remain longer in said Sacramento, where he had a large and profitable practice, and he thereby gave up and sacrificed his business and came to Sausalito, plaintiff in the mean time pledging herself in the future to thus conduct herself different. That at Sausalito affiant built a comfortable residence for his family, was free from debt, had other property, and some money besides. That plaintiff, disregarding her said promise and duties as a wife and mother to her child, did on or about the 25th day of June, 1882, when she then expected in a few days to be confined and mother to another child, tell affiant with her own lips that the child then soon expected to be born,—these words, 'It is a matter in which you have no interest.' The effect of these words from the lips of plaintiff to affiant was such as may better be imagined than described. That on the 26th day of July, 1882, when plaintiff was about to be confined, she took a large quantity of ether or chloroform, with the intention, as affiant has reason to believe and does believe, she took the same for the express purpose of getting rid of her child. That she remained in a stupefied condition therefrom until July 28, 1882, at about 2 o'clock A. M., when she, her nurse, and the physician, who had been present for more than 30 hours, believed the said child then to be dead, and that unusual means must speedily be taken to try to save the life of plaintiff. That affiant, at that hour of the night, rode from Sausalito to San Rafael in the most hasty method, to procure another physician for consultation and assistance. That affiant thereby, by reason of plaintiff's taking said chloroform, was put to very heavy expense and trouble to save the life of plaintiff, and fortunately the child, who is now called 'Herbert,' plaintiff's sixth child, the subject of this controversy. That on the 16th day of July, 1883, while affiant was attending court at Suisun, plaintiff, unknown to affiant, gathered all the silverware, table linen, most of the blankets, sheets, much of the bedding, a lot of chinaware, and other household effects too numerous to mention, and, taking affiant's two children, again 'ran away,' leaving affiant's house, and the next day served papers upon affiant for a divorce, and which said papers are now on file in this court, and are a lasting disgrace and forever a stain to the name of her children. That thereby affiant was put to a large expense, to wit, hundred and hundreds of dollars, for counsel fees, costs, alimony, for plaintiff's numerous attorneys, and trouble, causing affiant to borrow money and thereby become largely in debt. And thereafter plaintiff returned to affiant's home, but she was wholly ignored by most of the people in society and among acquaintances, whereby affiant and his children were greatly scandalized in said society. That thereafter, on the 12th day of February, 1885, while affiant was away to court at Oakland, plaintiff, unknown to affiant, gathered all the silverware, all the bedclothes (except one blanket and one sheet) in the house, most of the crockery, linen, towels, napkins, curtains, knives, forks, spoons, etc., and, taking affiant's two children, 'ran away,' leaving all the doors, inside and outside, to affiant's house wide open, so any person could enter at liberty, and at the same time there was stolen from affiant's house the sum of $180, which belonged to parties for whom affiant had collected the same, which said sum affiant had to repay to said parties. That thereafter plaintiff commenced another suit for divorce against affiant, similar to the first, but affiant made no opposition whatsoever on the trial thereof, but allowed plaintiff, her mother, and sister to swear to anything and everything they wished, true and false, to procure a decree, whereby affiant might be freed and rid of her. That by the said decree, plaintiff was awarded much more than one half of affiant's property, notwithstanding none of said property was common or community property, affiant having (as plaintiff had not a decent garment to be married in) found the money for plaintiff to buy the dress and clothes plaintiff wore when they were unfortunately married, and the gold watch and chain she wears. Affiant further says that the disgraceful conduct of plaintiff since his said marriage with her has cost him more than $8,000, and affiant now has no home of his own, or but very little property left. Wherefore affiant asks this court, in justice to the future welfare of affiant's child, who is dear to him, and whom affiant wishes yet to bring up in a moral and respectable manner, that he may not become a hoodlum upon the streets of San Francisco, and a disgrace to society, that an order be made herein giving the care, custody, and control of said child Herbert to said affiant. S. J. ROGERS. Subscribed and sworn to before me, this 20th day of August, A. D. 1891. J. S. BELRUDE, Notary Public. [Seal.]"

S. L. Rogers, for appellant. *T. C. Crowley*, for respondent.

SHARPSTEIN, J. On the 4th day of September, 1885, appellant and respondent, formerly husband and wife, were divorced by a decree of the superior court of Marin county. The decree provided, among other things, that respondent should have the custody of the son of said parties, and that appellant should pay her $5 per month for the support and maintenance of said son. On the 24th day of August, 1891, the court, on the application of respondent, made an order that appellant pay to respondent $10 per month for the months of July and August, 1891, and thereafter $20 per month for the support of said child. Respondent filed an affidavit in support of her application, and appellant filed one against it. The court made the order as above stated, and appellant appealed from it to this court. As to the sum necessary for the support of said child, the affidavits are conflicting, and the sum allowed is not so large as to suggest an abuse of discretion by the court. Therefore we cannot interfere with the order. But appellant insists that the court erred in striking out a part of his affidavit. An examination of the part stricken out satisfies us that the matter stricken out was impertinent and scandalous, and that it was properly stricken out.

Order affirmed.

We concur: DE HAVEN, J.; MCFARLAND, J.

(3 Cal. Unrep. 572)

FARLEY v. MORAN et al. (No. 14,868.)

(Supreme Court of California. Oct. 4, 1892.)

CONTRACTS — CONSIDERATION — BOND TO BUILD RAILROAD FENCES—ACTION — PLEADING—SURETIES.

1. In proceedings to condemn land for a railroad the complaint prayed the court to ascertain, in accordance with Code Civil Proc. § 1248, the cost of fences along the line of the road, and of cattle guards where necessary, and a bond for the construction of the fences was given, with the sureties required by section 1251. *Held*, in an action to recover from the sureties for violation of the bond, that, since the prin-

cipals had taken possession of the land and built their railroad, sufficient consideration had passed to support the contract in the bond, even if the bond given was not a statutory one.

2. In an action against sureties for violation of a bond by the principals it is not necessary to allege any violation on the part of the sureties.

3. Where a company violates a bond to construct a fence along its railroad through plaintiff's land, plaintiff need not construct the fences before bringing an action on the bond.

4. In an action for violation of such a bond it need not be alleged or proved that the fences agreed to be built are necessary.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county; W. F. MASTEN, Judge.

Action by Catherine Farley against Moran Bros. and J. W. Doyle and J. C. Wimple for violation of a bond. From a judgment for plaintiff defendants Doyle and Wimple appeal. Affirmed.

Spencer & Raker, for appellants. *Goodwin & Goodwin*, for respondent.

FOOTE, C. This action is on a bond executed by Moran Bros. as principals, and J. W. Doyle and J. C. Wimple as sureties. The principals were never served with summons, and judgment was rendered against the sureties only. From that, and an order refusing a new trial, the defendants bring this appeal.

The bond was given under a proceeding for the condemnation of land for a public use; that is, for the building of a railroad. Those proposing to condemn the land were not associated as a corporation, but as copartners. It is provided in section 1244, Code Civil Proc., what parties may file a complaint in such an action; and the principals of the bond involved here are such parties as are included in the provisions of that statute. In section 1248, among other matters which must be done by the court, jury, or referee in assessing the damages by way of compensation to the owner of the land sought to be taken for a public use, is this: "That, if the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad," must be ascertained and assessed by court, jury, or referee upon the legal testimony offered. The complaint in the action for condemnation proceedings, in which the bond in suit was given, prayed that this statutory provision should be complied with, and, in accordance with that prayer, the provision of the law was complied with. The sureties on the bond given in that proceeding under section 1251, Code Civil Proc., and against whom a judgment for a breach of the conditions of the bond was made and given in this action, now claim that the bond is void, and cannot be the basis of a recovery in the action. Their argument in support of this proposition is that, as to parties such as the principals on the bond and the defendants here, such a bond could, under the statute, only be given as compensation for damages done to the plaintiff's land, or the taking of the same fo a public use; and that such a bond is not the just compensation "first made or paid into court" for the landowner, as is required by section 14 of article 1 of the state constitution; that, therefore, the statute which authorizes such a bond as to the parties here giving it is unconstitutional, and the bond unauthorized by any valid law, and entirely void as a contract. The principals of this bond, however, prayed the court to proceed as it did in the condemnation suit, and have the damages ascertained and assessed for the fences required by the statute. They voluntarily gave the bond, and by virtue of that took possession of the plaintiff's land, and devoted it to a public use; that is, the building of a railroad. They thus received a consideration sufficient to support the contract contained in the bond, even if it be not a statutory bond. Upon a similar question, this court said: "We will not permit a party having complied with the terms proposed, and availed himself of the advantage of the order, to question its correctness." Battelle v. Connor, 6 Cal. 140. And it was said in Hathaway v. Davis, 33 Cal. 169: "Nor is the point that the appeal from the judgment was not taken within time, and that for that reason the undertaking of the sureties was without consideration, available to the defendants. Concede that the undertaking did not operate to legally stay proceedings under the judgment, (a point which we do not decide,) yet it in fact had that effect, and the appellants received all the benefit for which their sureties contracted; and, were they now allowed to say that their undertaking was *nudum pactum*, gross injustice might be done to the plaintiff, because he did not choose to act upon a doubtful right." The cases cited in opposition to this view are not, as we think, in point.

It is further insisted that the complaint fails to state a breach of the contract sued on. It is said in this connection that the bond requires the money to be paid into court, and that the complaint does not allege that it has not been paid into court, and therefore the demurrer should have been sustained. An inspection of the bond shows that the contention is not sound. The money was obligated to be paid to the plaintiff in the event of the failure of the Moran Bros. to build the fence, and the complaint alleges that the Moran Bros. have not paid the plaintiff any portion of the money which the bond obliged them to pay upon their failure to build the fences. It is further alleged that no breach of the bond is alleged as to the sureties; that the breaches alleged are only those of the principals. We do not perceive any force in this argument. The sureties were bound to pay on the failure of the principals to comply with the obligation, and it is alleged that they did not comply with it in a certain respect. The appellants argue further, in support of their position, that the demurrer should have been sustained, because the complaint does not state that the plaintiff had built the fences. We are unable to perceive wherein the law compels her to do this as a condition precedent to being paid the money wherewith to do it, which the defendants obligated themselves to pay. Certainly the case of Butte Co. v. Boydston, 64 Cal. 117, 29 Pac. Rep. 511, cited by appellants in aid of this contention, affords no support therefor. When the railroad or other obligor in the bond fails to build the fences according to the obligation, the case cited, supra, declares that "the landowner may sue upon the bond," just as has here been done. If the landowner obtains the money due upon a bond, and then does not build the fences, it is declared in that case that the landowner is responsible to the railroad company in certain cases; but nowhere is there any intimation in that case that the owner of the land shall build the fences before bringing suit on the bond, when the obligors have failed to build them. The appellants urge further as a reason for the reversal of the judgment and order that there was no allegation in the complaint, proof adduced, or finding made that the fences were necessary. The bond did not contain anything which limited the responsibility of Moran Bros. and their sureties to build necessary fences only. The bond being valid, under the circumstances of this case, a recovery could be had without alleging, proving, or finding anything outside of its terms. We perceive no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 569)

BANK OF YOLO v. WEAVER et al. (No. 14,827.)

(Supreme Court of California. Oct. 1, 1892.)

CORPORATIONS—CONTRACT—AUTHORITY OF OFFICERS—STOCKHOLDERS.

1. A resolution of the board of directors authorizing the secretary to borrow money for the corporation is sufficient, though not entered on the minute book, and, therefore, in an action against stockholders to recover the money so borrowed, the admission in evidence of a resolution adopted by the board and entered on its minutes is immaterial.

2. Evidence that a person subscribed for stock is not sufficient proof that he actually owns the shares, when it does not appear that he bought them on credit, but rather that he was to pay for them at once, and it also appears that he did not pay or offer to pay for them, and that no certificate of them was ever issued to him.

Commissioners' decision. Department 1. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Action by the Bank of Yolo against N. M. Weaver and others to recover from defendants their proportionate share of money borrowed from plaintiff by the Woodland Woolen Manufacturing Company, in which company defendants were stockholders. From a judgment for plaintiff, and an order refusing a new trial, defendants appeal. Affirmed.

F. E. Baker and *Craig & Hawkins*, for appellants. *E. R. Bush*, for respondent.

FOOTE, C. This action was brought to recover of certain stockholders of a corporation designated as the Woodland Woolen Manufacturing Company, their proportionate shares of certain moneys alleged to have been borrowed from the plaintiff, the Bank of Yolo, by the first-mentioned corporation. Judgment was given in favor of the plaintiff, from which, and from an order refusing a new trial, this appeal is taken. The facts surrounding the transaction seem in brief to be that the Woodland Woolen Manufacturing Company was in need of money to get into operation, and by written resolution of its board of directors, spread upon its minute book, ordered that its president and secretary give a note to the Bank of Yolo for $15,000, as "security for overdrafts." At the time this action was instituted the manufacturing corporation owed the Bank of Yolo about $19,214.97, for moneys drawn from bank, a portion of the same in pursuance of the written resolution authorizing the note, and the balance of borrowed money by the vote or resolve of the board of directors, which vote or resolve was not spread in writing upon the minutes in the corporation's book. But the evidence is sufficient, as we think, to show that all of this money was borrowed from the bank by the authority of the board of directors of the manufacturing corporation, and was used by it for its exclusive benefit. Therefore, the objection made by the defendants to the introduction in evidence of a resolution of the board of directors, and entered in the minutes after suit brought, ratifying the acts of the treasurer in borrowing and using for the purposes of the corporation all of the money sued for in this action in excess of what the written resolution called for authorizing the note, is untenable. The right of recovery here did not depend upon this alleged ratification; it depended primarily upon the authorization of the board in writing as to $15,000, and, as to the balance, upon the vote or resolve of the directors not reduced to writing, and upon the fact that this money was borrowed and applied to the uses of the corporation. Such a corporation cannot receive the benefits and uses of an executed contract, and then deny its obligation. Main v. Casserly, 67 Cal. 129, 7 Pac. Rep. 426; Bradley v. Ballard, 55 Ill. 413; Pixley v. Railroad Co., 33 Cal. 198; Foulke v. Railroad Co., 51 Cal. 365. Therefore, whether the resolution of ratification made after suit brought was improperly admitted or not, which we do not decide, is immaterial, as the cause was tried by the court, and the evidence was ample without it to fix the liability of the defendants, and it does not appear that the court rested its decision upon that resolution. Mitchell v. Beckman, 64 Cal. 123, 28 Pac. Rep. 110.

But the appellants further object that the complaint did not state facts sufficient to show a cause of action, in that it does not sufficiently show how many shares were subscribed for, so as that, from such statement and the statement of what number of shares each defendant owned, it can be determined what was their proportionate share of the indebtedness or liability. The allegation objected to runs thus: "That 305 shares of the capital stock of said Woodland Woolen Manufacturing Company, and no more, were taken, subscribed, and fully paid for." This, we think, was sufficient under the demurrer as filed. Bidwell v. Babcock, 87 Cal. 29, 25 Pac. Rep. 752. We perceive nothing of merit in the point raised as to the supplemental complaint; if not good as such a complaint, it stated a good cause of action as an amended complaint.

It is further alleged that Mr. Walker, one of the defendants, owned 20 shares more of stock than it is found by the court that he owned, and that he should have been held for a proportionate share of the indebtedness on those shares of stock. It is true that the evidence is that he subscribed for those shares, but it does not appear that he bought them on a credit, but rather that he was to pay for them at once, and it also appears that he did not pay or offer to pay for them, and that no certificate of them was ever issued to him, and that they were never really sold to him. While the evidence is not so convincing as to render it absolutely certain that such was the state of facts, yet it tends, as we think, to show that he did not own them, and hence we do not feel disposed to recommend the disturbance of the finding as to that matter. Upon the whole record we perceive no prejudicial error, and we therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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96 Cal. 339

MILLER et al. v. COX. (No. 14,309.)

(Supreme Court of California. Oct. 4, 1892.)

SPECIFIC PERFORMANCE—TIME OF ESSENCE OF CONTRACT.

Defendant, on advice of plaintiffs, purchased certain land, which plaintiffs knew was to increase in value, and a contract was entered into by which defendant, on November 1st, was to convey to plaintiffs two thirds of the land on payment of their proportion of the purchase price, taxes, and other expenses. If payment was not made on the date named, plaintiffs were to forfeit all claims to a conveyance of the property. *Held*, that time was not of the essence of the contract, and that a tender of payment on November 26th was good, defendant not having notified plaintiffs of the amount due, or made request for payment.

In bank. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Action by Miller and others against Cox to enforce specific performance of a contract to sell plaintiffs certain lands. From a judgment for defendant, plaintiffs appeal. Reversed.

Wm. A. Purrington and *E. E. Rowell*, for appellants. *E. B. Stanton*, for respondent.

PATERSON, J. In 1884, Mr. Matthew Gage was engaged in the construction of a canal, which was to take water from a station in San Bernardino county, and to conduct the same to lands below the point of diversion, for irrigation. For this purpose he employed Mr. C. C. Miller, a civil engineer, and intrusted to him the sole management of the matter,—full power to locate the line and construct the ditch. The defendant, Cox, knowing that Miller was clothed with the authority to determine where the ditch should be run, visited Miller, and asked him "to give him some points on what land was going to come under the Gage canal." It appears that Miller and his son-in-law, plaintiff Richardson, had previously agreed upon the line on which the ditch was to be constructed, and had taken steps to secure a portion of the lands to be benefited by the water which it would carry. The result of the interview is shown by the testimony of Richardson, which is substantially as follows, and is uncontradicted: "Shortly after Miller came in, and we three talked it over, and agreed to let Mr. Cox in on the purchase of the land, * * * with the understanding that he was to put up all the money, pay the taxes, the twenty per cent., and the insurance, etc. After the final payment we were each to come in and have one third of the land, and pay one third of the cost. * * * He approached us on the subject. We did not ask him to come into the deal. He saw us two or three times. My father-in-law took him over the land and showed him where it was. * * * After talking to us he went and made application to the railroad company for the land, and entered into the agreement with the railroad company. After that he entered into this contract with us. At the time of the agreement there was no water available for the land,—no water anywhere near it. It was not fit for agricultural land. * * * The land, I should think, was worth no more than about eight or ten dollars an acre." The witness further testified that the canal had been completed, and it had made a difference in the value of the land of about $90 per acre. On cross-examination he testified that he demanded of Mr. Cox, on November 22d, an account of the money that was due him under the contract, and on November 26th tendered him $1,200 in gold coin, which tender was refused. Witness also testified, and his statement is not controverted, that there were two contracts drawn up. "The first contract was to the effect that after Mr. Cox had advanced all the money, and made all the payments, we were all to come in and pay one third of the purchase price of the land, and have one third of the lands each. After he had paid twenty per cent. of the purchase money he was dissatisfied with that. They were slow with the canal, and he was fearful that they would not get there. And we agreed to make another agreement with him, as he wished to." The second agreement, referred to in this testimony, is the agreement upon which the plaintiffs rely in this case. By its terms it is provided that Miller and Richardson should each pay Cox "one undivided one third of all money expended by him [Cox] for the purchase of said land, whether principal or interest, and of all taxes and expenses, and ten per cent. per annum interest thereon from the date of such payments. In the event of a failure on the part of the parties of the second part to pay each his one third of all sums advanced by the party of the first part, [Cox,] then due on the first day of September, 1889, together with one third each of the balance due and to become due on the contract above mentioned of party of the first part with the Southern Pacific Railroad Company, the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and said parties of the second part, or either of them, shall forfeit all right thereto." The complaint alleges the execution of the agreement, the condition of the property prior to and at the time of the execution of the agreement, the circumstances under which the latter was made, the construction of the canal, and the effect of its operation upon the value of the land, the tender made on November 26th, and demand for a deed; and as an excuse for their failure to make the tender and demand earlier, the plaintiffs alleged mistake, oversight, and pressure of business affairs; that defendant never demanded any money from them or notified them as to the amount of money he claimed to be due him under the contract; that the lands had not increased in value since the 1st day of November, and that defendant has sustained no loss on account of plaintiffs' delay in tendering the money. They, therefore, pray for a judgment requiring the defendant to convey to them a two-thirds undivided interest in the property. The answer admits the execution and delivery of the agreement, but denies nearly every other material allegation of the complaint. The court found that the allegations of the complaint with respect to the condition of the land, the knowledge of the plaintiffs, and the circumstances under which the defendant procured them to enter into the contract, were true, and "that it was in consideration of the information so furnished as aforesaid, as to the course and location of the said canals, * * * that the defendant entered into and made and executed with the plaintiff the agreement;" that the land had increased in value from eight to one hundred dollars per acre by reason of the construction and operation of the canal; that the defendant took, and has ever since retained, possession of the lands; that the plaintiffs made a tender as alleged on November 26th, but did not tender the amount of any taxes or interest thereon, for the reason that they did not know the amount of the same, but that the plaintiffs offered to pay the defendant any sum which was due to him, and demanded that he should convey to them the interest which he had agreed to sell and convey; that the defendant refused to convey as requested; that the land was of no greater value on the 26th day of November than it was on the 1st day of November, 1889; that the failure of the plaintiffs to make a tender of performance prior to November 26th was the result of oversight and neglect, and was not intentional on the part of either of them; that defendant never demanded any money from either of the plaintiffs, and never notified either of them as to the amount of money due him under the contract. As conclusions of law the court found that "time was of the essence of the agreement. * * * That plaintiffs did not offer performance of the terms of their agreement * * * at the time fixed * * * for such performance, and by such default they have forfeited all right to a conveyance under the said agreement. * * * That an offer of performance on the part of plaintiffs on the 1st day of November, 1889, was a condition precedent on their part. * * * That plaintiffs have failed to account in a reasonable manner for their delay in tendering performance." Judgment was entered in favor of the defendant, and from this judgment, and an order denying their motion for a new trial, the plaintiffs have appealed.

It is claimed by the appellants that under section 1492, Civil Code, time cannot be said to be of the essence of the contract, unless it is expressly declared in the contract that "time is of the essence of the obligation." The section referred to provides that "where delay in performance is capable of exact and entire compensation, and time is not expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due," etc. Prior to the adoption of this provision of the Civil Code our own authorities had left in great doubt the question as to what language was necessary to make time of the essence of a contract. In Steele v. Branch, 40 Cal. 9, the court said: "In construing contracts, it is often one of the most perplexing questions with which courts of equity have to deal, whether the time within which an act is to be performed is of the essence of the agreement. In the very nature of the case it is impossible to prescribe any general and uniform rule on the subject, and each case must necessarily be decided upon its own circumstances." In that case it was held the provision in the contract, to the effect that, if the plaintiffs should fail to comply with the conditions, the land and improvements should revert to the defendant, was inserted merely to induce a prompt performance. In Grey v. Tubbs, decided about a year before the adoption of the Codes, it was held that a provision similar to that under consideration in Steele v. Branch, supra, made time of the essence of the contract, the court saying: "It would be difficult to express with greater clearness and certainty than the parties did in this contract that time is of the essence of the contract, except it were done by the insertion of those very words in the instrument." 43 Cal. 364. In view of the unsettled condition of the law upon this subject at the time of the adoption of section 1492 of the Civil Code, and of the fact that "in constructing contracts it is often one of the most perplexing questions with which courts of equity have to deal, whether the time within which an act to be performed is of the essence of the agreement," it is clear that the legislature intended to obviate all difficulty in that regard, so far as subsequent contracts were concerned. The commissioners make this intention plain in their note to the section, where it is said: "This clause obviates the difficulties which constantly arise in determining whether time is of the essence of a contract or not. The provision that 'an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due,' is also new." We do not think it is necessary, in order to make time of the essence of the obligation, that it should be declared to be so in the words of the statute; but the intent to make it of the essence of the contract must be clearly, unequivocally, and unmistakably shown by an express declaration. Waterman on Specific Performance says that "the parties themselves may stipulate that time shall be of the essence of the contract. This has been done in almost all of the modern cases in which time has been strictly regarded." Section 461. Mr. Pomeroy, in his work on Specific Performance, says that "the prescribing a day at or before which, or a period within which, an act must be done, even with a stipulation that it shall be done at or before the day named, or within the period mentioned, does not render the time essential with respect to such an act." Section 392. See, also, section 374. "In order to render time thus essential, it must be clearly and expressly stipulated that it shall be so; it is not enough that a time is mentioned during which or before which something shall be done." Fry Spec. Perf. § 712; Jones v. Robbins, 29 Me. 351; Barnard v. Lee, 97 Mass. 95. It cannot be said that the language in the contract before us "clearly, unequivocally, and unmistakably" shows an intent to make time of the essence of the contract. It certainly does not expressly declare such to be the intention of the parties. The parties of the second part could not know how much they were to pay until after they had an accounting with the party of the first part. The contract informed them only of the amount they were to pay on account of the purchase price paid to the railroad company. They could not know, until after an accounting with the defendant, what expense he had incurred in making the purchase, or how much he had paid on account of taxes, and could not know how much interest they were required to pay, without being informed as to the date of the payments. The parties of the second part were to pay each "his one third of all sums advanced by party of the first part, and then due on the first day of November, 1889, together with one third each of the balance due and to become due on the contract above mentioned of party of the first part with the Southern Pacific Railroad Company." This provision is somewhat ambiguous. As a matter of fact the last payment was not due from Cox to the railroad company until November 4th, but it was actually paid on October 16th. The parties of the second part were to pay interest on all the payments. They were also to pay one third of the expenses which Cox had incurred in securing the title, one third of the taxes, and one third of the amount to become due on the contract. How could they know what amount they ought to tender Cox? That was a matter within the knowledge of the defendant alone, and it was his duty, we think, to inform them as to the amount he had expended. Peasley v. Hart, 65 Cal. 522, 4 Pac. Rep. 537. Of course the parties of the second part could have inquired of the defendant the amount due on November 1st, and could on that day have tendered the amount named by him; but were they bound to accept as correct the amount claimed by him, and pay the same, or "forfeit all right" to a conveyance? A proper construction of the contract, when all of its provisions are read and considered together, we think simply fixes November 1st as the time of settlement, and gives to the parties of the second part a reasonable time in which to ascertain the amount due. A fair consideration of all the provisions of the contract, and the circumstances under which it was made, precludes the idea that the plaintiffs had to make payment on the 1st of November, or "forfeit all right" to the property. If Cox desired to put the plaintiffs in default for nonpayment, according to the terms of the contract, he ought to have given them a statement of the payments he had made and the dates thereof. On November 26th plaintiffs tendered to Cox the sum of $1,200, which was more than the latter was entitled to receive from them under the contract. Our conclusion is that time is not of the essence of the contract, and that the plaintiffs were not in default at the time they tendered the $1,200 to the defendant.

It may be admitted that there is an apparent conflict of authority upon this subject. In most of the cases cited by respondent, however, time was either declared to be of the essence of the contract, or language was used amounting to an express declaration of such intention. In some of the cases cited there was no part performance by the vendee, and the considerations were mere cash payments. In the case at bar the court expressly finds that it was in consideration of the information which the plaintiffs furnished to the defendant as to the course and location of the canal, and the lands over which it would be constructed, that the defendant entered into the contract. Without this information obtained from the plaintiffs, the defendant could not have known what lands to purchase; and now, after plaintiffs, relying upon defendant's promise to convey, have lost their right to purchase the lands at $8 per acre, it would seem to be unjust and unconscionable to allow the defendant to defeat the plaintiffs in this action because through mistake and inadvertence they allowed 26 days to elapse before making a tender of the amount they were required to pay him. Even if time were declared to be of the essence of the contract, it is doubtful whether under the circumstances shown in this case a court of equity would refuse to enforce specific performance of the contract. Wat. Spec. Perf. § 461. It is claimed that no sufficient excuse is given for the delay. In determining the question whether delay is excusable no general or uniform rule on the subject can be prescribed; each case must necessarily be decided upon its own circumstances. In Hubbell v. Van Schoening, 49 N. Y. 331, the court said: "If the situation of the parties or property is not changed so that injury will result, and the party is reasonably vigilant, the court would relieve him from the consequences of the delay. * * * A party may not trifle with his contracts, and still ask the aid of a court of equity. Neither will the law be administered in a spirit of technicality, and so as to defeat the ends of justice. In this instance there is no vexation, no room for suspicion of any trick on the part of the plaintiffs; at most it was a mistake in depending upon the promise of the defendant's attorney to advise him when the defendants arrived, if they should arrive on the day fixed for the performance of the contract." In the case at bar the court has found that the failure of the plaintiffs to tender performance was the result of oversight and not intentional neglect. It is not pretended that they were trifling with the defendant or his contract, or that they intended to vex him in any manner, and the evidence is uncontradicted that the property was worth no more on the day tender was made than it was on the 1st day of November. We think, therefore, that the delay was excusable. Butler v. Archer, 76 Iowa, 551, 41 N. W. Rep. 309. It was not necessary under the circumstances for the plaintiffs to deposit the money in court to make their tender good. Loughborough v. McNevin, 74 Cal. 256, 14 Pac. Rep. 369. The judgment must be reversed, but there is no necessity for a new trial. The amount that is due from each of the plaintiffs is undisputed. Mr. Cox himself stated that it was $552.10. The judgment is reversed, and the cause is remanded, with directions to the court below to set aside its conclusions of law, and substitute therefor other conclusions in accordance with the views herein expressed, and to enter a decree in favor of the plaintiffs in accordance with the prayer of their complaint.

We concur: McFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; SHARPSTEIN, J.

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96 Cal. 332

MARBLE LIME CO. et al. v. LORDSBURG HOTEL CO. (No. 14,664.)

(Supreme Court of California. Oct. 4, 1892.)

MECHANICS' LIENS — CONSOLIDATED ACTIONS TO ENFORCE—INCONSISTENT FINDINGS — QUESTIONS OF FACT—EVIDENCE.

1. Where several actions against the same defendant to enforce mechanics' liens are consolidated, the fact that the court makes separate findings in each case is not in itself sufficient cause for reversal. Willamette, etc., Manuf'g Co. v. Los Angeles College Co., 29 Pac. Rep. 629, 94 Cal. 229, distinguished.

2. Where the court found in one of such actions that "the building was completed on the 2d day of August, 1889," and in another that it "was never actually completed," the findings are not fatally contradictory when it appears that, though the building was never actually completed, work on it continued until July 2, 1889, from which date there was a cessation for more than 30 days.

3. In an action to enforce mechanics' liens, whether there was a continuance of work during a certain period, or a cessation for 30 days, are questions of fact, and not conclusions of law, where the material point is whether or not the liens were filed in time, and the court need not "find the evidence" that establishes such facts.

4. In consolidated actions to enforce mechanics' liens it appeared that the contractor abandoned the work in July, 1888; that defendant, the owner, continued the construction of the building thereafter; that it employed a man as keeper, and to paint the building, a hotel; that he lived in it until July 3, 1889; that he continued painting until in May, did at least three days work in June, and did his last work on July 3d of the same year; that no work was done thereafter; that the basement was not painted because of a dispute between defendant and the painter; that without such painting the building was not completed; that the painter did not remove his painting material, or any of his implements, prior to July 3, 1889. *Held*, that the finding that work on the building continued until July 3, 1889, without cessation for a period of 30 consecutive days, was not erroneous.

In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Four consolidated actions by the Marble Lime Company and others against the Lordsburg Hotel Company to enforce mechanics' liens. From a judgment for plaintiffs, defendant appeals. Affirmed.

Chas. Cassatt Davis, for appellant. *John W. Mitchell, W. S. Wright, Metcalf & Metcalf, Chas. L. Batcheller*, and *Chapman & Hendrick*, for respondents.

McFARLAND, J. This is a consolidation of four actions brought under the mechanic's lien law to enforce liens against a building and land owned by the Lordsburg Hotel Company, a corporation. Judgment was rendered for the plaintiffs, and the hotel company appeals from the judgment and from an order denying a new trial. There are elaborate briefs on file, those of appellant covering quite a wide range of subjects. Appellant's contention, however, is resolved into two main propositions: *First*, that the findings are defective; and, *second*, that the chief finding of fact is not warranted by the evidence. But the real point aimed at is that plaintiffs' liens were filed too late.

1. The court below put its findings in the form of separate findings in each of the four cases. Such action was hostilely criticised in Willamette, etc., Manuf'g Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. Rep. 629; but in that case there were also separate judgments, while in the case at bar there is only one judgment. It is, no doubt, much better to have only one set of findings. Such a course avoids needless repetitions of facts common to all the cases, prevents possible complications and inconsistencies, and is altogether the clearer and more orderly method. But the question is one mainly of good taste and correct method; and the mere fact that a court adopts the course pursued in the case at bar is not in itself a sufficient cause for reversal. It is contended that the findings in two of the cases are fatally contradictory, because it is found in one place that "the building was completed

on the 2d day of August, 1889," and in another that it "was never actually completed." It is clear, however, that the real facts found were that, although the building was never actually completed, work on it continued until the 2d day of July, 1889, on which day work ceased, and the cessation of work thence continued for more than 30 days. These facts constituted a "completion," under section 1187 of the Code of Civil Procedure, and we do not see that any harm was done by putting the finding in both forms, although one, perhaps, would have been sufficient.

Appellant's counsel contend very strenuously that the court did not find enough of facts. The pivotal point in the case is, as before stated, whether or not plaintiffs' liens were filed in time. Upon this point the court found that work continued, without a cessation of 30 days, until July 2, 1889; that it then ceased for more than 30 days; and that within 30 days thereafter the liens were filed. If these facts were truly found, then the liens were filed in time. But counsel contend that the two findings first named are not findings of fact, but were conclusions, (of law, we suppose,) based on facts not found. Certain witnesses gave certain testimony; and, as we understand counsel, that testimony should be considered as establishing certain facts which should have been found, so that it could be seen whether these facts justified the findings above noticed. But this method of converting testimony into facts might be applied to any case, and would lead inevitably to this result: that the court should find evidence. It would also lead to such complications and refinements on the already much vexed subject of findings as would bewilder justice. It was stated in Willamette, etc., Manuf'g Co. v. Los Angeles College Co., supra, that whether there was a "completion," and whether there was a "trivial imperfection," were questions of fact; and it is quite clear that whether there was a continuance of work during a certain period, or a "cessation" for 30 days, are also questions of fact. We think, therefore, that the court in the case at bar found the facts, and the only facts necessary to be found. Appellant's claim for a reversal must rest, therefore, upon the contention that the evidence does not support the findings.

2. Appellant contends that the evidence does not warrant the finding that the building was never actually completed, or the finding that work "was continued to the 2d day of July, 1889, without cessation for a period of thirty consecutive days intervening at any time," and that "on July 2, 1889, labor on said building was done." (It is not disputed that work was begun in Sepember, 1887, or that there was no work done after July 2, 1889, or that the liens were filed within 30 days after August 2, 1889.) It appears from the evidence and pleadings, and is not disputed, that in August, 1887, the appellant made a written contract with one Boggs for the building of the hotel, not including, however, the painting; that neither said contract nor any memorandum thereof was recorded as required by the Code; that Boggs commenced work on the hotel early in September, 1887, and continued work under the contract until July, 1888, when he abandoned it; and that thereupon the appellant continued the construction of the building. It is also clear and undisputed that, at the time Boggs quit, B. J. Davis was engaged in painting the hotel under the employment of the appellant; that about that time, or shortly afterwards, Davis was also employed by appellant as keeper, to take charge of the building, and that he did take charge of it, and lived in it until July 3, 1889; that he continued his work of painting—taking charge of the house, also, and living in it—until some time in May, 1889, (except as to an asserted former cessation;) that he did his last work on July 3, 1889; that no other work was done on the building thereafter; and that the first story or basement of the hotel has never been painted at all. There was also evidence tending to show, and from which the court below might well conclude, that it was the intention of appellant to paint the basement; that it was not painted because there was a misunderstanding between appellant and said Davis about the latter's duty under his contract to paint said basement; and without the painting of said basement the said building was not completed. Davis himself swore that "when I quit work (July 3, 1889) the building was not completed." It is contended by appellant that it should have been found from the evidence that Davis substantially ceased to work in the spring of 1889, because the work done by him afterwards was trivial in character, consisting mostly of improving or "touching up" some of his former work, and painting a tin waterspout. It is also contended that as, under the evidence, it was possible for a prior period of 30 days to have elapsed before July in which Davis did not actually do any work, therefore the court ought to have found that there was a prior period of "cessation of labor" for 30 days. It is admitted, however, that work was done in May, 1889. It also clearly appears in the evidence that at least three days' work was done in June, and that work was done on July 2d or 3d. It is true that it does not appear positively on what days in May the work in that month was done, or on what days it was done in June; and it is no doubt possible that the former was done in the early part of May and the latter in the latter part of June, in which event there might have been no actual work for a period of 30 days commencing in May and ending in June. But, if such had been the fact, the burden was on appellant to show it, and at all events it was not the duty of the court to find such fact from the evidence before it.

As to the work being trivial, that was a question for the court below, even if that question could be considered as material when the issue is as to cessation of work. "Trivial imperfection," as used in the Code, relates to the question whether or not there has been an actual completion of the building. Neither do we think it material that Davis was not paid for the work done in June, or that appellant had not expressly ordered it to be done. It was work which it was his duty to do in order to complete what he had before done imperfectly. But the peculiar circumstances in this case suggest the question: What evidence is necessary to show such a "cessation from labor for 30 days," within the meaning of section 1187 of Code Civil Proc., as will bar a lien if not filed within 30 days thereafter? Those words certainly do not mean a mere clandestine stopping of actual work for 30 days, and then beginning it again, without any *indicia* to the world that it had been stopped for 30 days. They were not contrived as a means of defrauding lienholders. The cessation should certainly be of such character as to carry some charge of notice to a careful person. In Lumber Co. v. Olmstead, 85 Cal. 80, 24 Pac. Rep. 648, cited by appellant, the point involved, and the only point decided, was that a lien claimant must file his lien within 30 days after a cessation of labor for 30 days; and that the provision of the Code on that subject was not, as contended, a mere privilege to the claimant, but also a limitation. But there was no question in that case as to the actual "cessation of labor for thirty days," or as to the meaning of those words. Moreover, the plaintiffs there had knowledge of the cessation. The court, in its opinion, says: "On the 9th day of April, 1887, the contractor quit work on the building, and refused to finish it, and no work or labor was done thereon for more than thirty days thereafter. The plaintiff had notice of this cessation of labor upon the building for thirty days at the time thereof." It is quite evident that the contractor publicly quit work and left the premises, and that the plaintiff actually knew of this fact, and of the fact that no more work had been done by any one for more than 30 days thereafter. But in the case at bar, when Boggs abandoned his contract for his part of the work, Davis was engaged in doing the painting; and, so far as appearances indicated to respondents or to the world, he remained in that same situation until July, 1889. He stopped at the building all the time. There is no pretense that he removed his painting material, or his brushes, or any of the implements by which he carried on his trade. He did work on the building at intervals, at least, until July 3d, and the painting was then still unfinished; and there is no pretense that respondents knew, or had any reasonable grounds for suspecting, that he had let 30 days go by at any one time without doing some work. Under these circumstances, we do not think that the court erred in finding that work had continued until July. Whatever may be thought of the hardships which the present lien law sometimes imposes upon the owners of buildings, still courts cannot undertake to break its force by refusing to apply to the rights of lien claimants the ordinary rules of evidence and the common principles of fair dealing. These views apply also to the contention of appellant that there was still another cessation of labor for 30 days prior to May, 1889.

The contention that the time for filing liens expired when Boggs quit is not tenable. In the first place, there was no "occupation" or "acceptance" of the building within the meaning of section 1187; and, in the second place, the provision about "occupation," etc., applies only "in case of contracts." In the findings in one of the cases (the Smilie Case) it is made to appear—incorrectly, of course, and no doubt inadvertently—that Boggs continued his work until August 2, 1889, and completed his contract on that day. Appellant makes some criticism of this finding, although we do not understand it to be seriously contended that the finding constitutes material error. The finding, taken as true, does not substantially change the positions or rights of the parties. The learned arguments of counsel for appellant run into many ramifications and bypaths, but we think that we have sufficiently noticed their main contentions. We see no good reason for disturbing the judgment. The judgment and order appealed from are affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; DE HAVEN, J.

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96 Cal. 298

WARNOCK v. HARLOW et al. (No. 14,778.)

(Supreme Court of California. Oct. 4, 1892.)

TRUSTS—CONVEYANCE BY TRUSTEE—BONA FIDE PURCHASER—UNRECORDED DEED—LIS PENDENS.

1. Where a trust does not appear in the deed by which the trustee derives title, a purchaser in good faith for a valuable consideration from the trustee takes the property discharged of the trust.

2. Civil Code, § 2243, provides that "every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith for a valuable consideration." *Held*, that this section does not cast on a purchaser from a trustee the burden of alleging and proving that he was a bona fide purchaser when he was not a party to an action in which the trust was established.

3. Civil Code, § 1213, provides that every duly-recorded conveyance is constructive notice of the contents thereof to subsequent purchasers; section 1214 declares that every conveyance of real property is void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first recorded; and section 1217 provides that an unrecorded instrument is valid as between the parties thereto and those who have notice thereof. *Held*, that an unrecorded deed by a trustee to a bona fide purchaser in possession in violation of the trust was not void as to all persons except the parties to it.

4. Where a cestui que trust brings an action to compel his trustee to reconvey to him the trust property after the trustee has conveyed it to a bona fide purchaser, and the clerk executes a conveyance to plaintiff therein, pursuant to the decree, such cestui que trust is not a "subsequent purchaser," within the meaning of Civil Code, § 1214, providing that every conveyance of real property is void as against any subsequent purchaser in good faith whose conveyance is first recorded.

5. In an action by a tenant against two persons, each claiming to be the owner of the demised land, to determine which defendant was entitled to the rents, it appeared from the find-

ings that the wife of one B. held the legal title to the land; that he brought an action against her to establish a trust, and compel her to reconvey the land to him, and filed a lis pendens; that there was a decree in his favor; that the clerk afterwards executed a deed to B. in pursuance of the decree, and the latter conveyed to defendant C.; that five hours before the commencement of the suit by B. his wife conveyed the land to defendant H., who was in possession, and did not record his deed until a year afterwards. There was no fact alleged or proved which would invalidate the deed to H. *Held*, that a judgment in favor of defendant C. was not sustained by the findings.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Action by W. E. Warnock against W. P. Harlow and A. P. Catlin to determine which of the defendants is entitled to receive from plaintiff, as tenant, the rents of certain lands, of which each defendant claims to be the owner. From a judgment for defendant Catlin, defendant Harlow appeals. Reversed.

A. L. Hart, for appellant. *A. J. & Elwood Bruner, Add C. Hinkson*, and *John W. Armstrong*, for respondents.

HAYNES, C. On May 4, 1881, W. W. Brison was the owner of the lands described in the complaint, and on that day conveyed the same to his wife, Carrie M. Brison. On September 15, 1886, W. W. Brison commenced an action against his wife, the object of which was to obtain a decree declaring that she held the title to said lands in trust for himself, and to compel a reconveyance; and at the same time filed[1] a *lis pendens* in the recorder's office. On November 22, 1888, a decree was entered in said cause requiring Mrs. Brison to execute such conveyance within 10 days, and, in default thereof, directing the clerk of the court to execute such deed in her name, and such deed was made and delivered by the clerk on December 5, 1888, and recorded on the same day. On November 29, 1888, after the entry of said decree, and before the execution of the deed by the clerk, W. W. Brison conveyed the land mentioned to the defendant Catlin, one of the respondents herein. On September 15, 1886, some four or five hours before the suit of Brison vs. Brison was commenced, and before the *lis pendens* was filed, Mrs. Brison conveyed the same land to appellant W. P. Harlow, but which deed was not recorded until August 15, 1887. The plaintiff in this action, W. E. Warnock, was the lessee of the same land from Mrs. Brison from October 1, 1885, for one year, and again for a second year, ending October 1, 1887, and paid the rent to her. From October 1, 1887, up to October 1, 1890, Warnock was tenant of the same land under a lease from Harlow, and for the first year paid the rent to Harlow. The rent for the second and third years is the subject of this controversy.

It is further contended on behalf of respondent Catlin that, as Mrs. Brison held the land in trust, the beneficial estate being in her husband, Harlow acquired no larger estate than she held; and that, if he took any title under her conveyance, it was as trustee for W. W. Brison. Assuming that Mrs. Brison was a trustee for the benefit of her husband, that trust not appearing upon the deed, which conveyed to her the legal title, it does not follow that her grantee did not take the property discharged of the trust. Civil Code, §§ 856, 2243. It is assumed and asserted by counsel for respondent Catlin that Harlow must aver and prove that he was a purchaser in good faith and for a valuable consideration, and that, unless he does so, he is a mere volunteer; and in support of this proposition section 2243 of the Civil Code is cited. That section provides: "Every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration." If the appellant were bound by the judgment against his grantor in the case of Brison vs. Brison, the burden would be upon him to show that he "purchased in good faith, and paid a valuable consideration." But appellant was not a party to that proceeding, and is not bound by the judgment. As to him, it has not been adjudged that his grantor was a trustee. That judgment is conclusive only "between the parties and their successors in interest by title subsequent to the commencement of the action." Code Civil Proc. § 1908, subd. 2; Hall v. Boyd, 60 Cal. 443. There is, therefore, no ground to justify the assertion that appellant was a volunteer, or not a purchaser in good faith, unless it appears that that question was litigated and adjudicated in this case; and that does not appear. The complaint of Warnock, the tenant, recites the ground upon which appellant and respondent Catlin, respectively, claimed to be entitled to the rents, and in this recital disclosed that appellant claimed under a deed from Mrs. Brison, but did not disclose or allege that it was made prior to the commencement of the action of Brison vs. Brison; and, as to respondent's claim, alleged that it was under a deed from Brison, executed after the judgment in his favor. There was no allegation in the complaint that appellant purchased with notice of the trust, or that he was not a purchaser in good faith and for a valuable consideration. Respondent Catlin filed his answer first, and admitted "the several averments of fact in said complaint contained," and made no other allegations of fact. He therefore stood directly upon the judgment and the deed made in pursuance of it, and the argument of his counsel is directed almost wholly to the proposition that appellant was bound by that judgment, notwithstanding the finding of the court that appellant's deed was made and delivered before the commencement of the action, as alleged in his answer. As we have seen, appellant claimed under a prior deed, and that it was first recorded. The presumption was that appellant acquired thereby the estate which his deed purported to convey, and he was in possession by his tenant.

Respondent further contends that, as

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[1] Brison v. Brison, 17 Pac. Rep. 689, 27 Pac. Rep. 186.

against W. W. Brison, (under whom respondent claims, and whose *lis pendens* was first recorded,) the unrecorded deed from Mrs. Brison to appellant was void, and cites section 1217 of the Civil Code in support. This section is as follows: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." This section, counsel say, is the same as though it said: "An unrecorded instrument is invalid except as between the parties thereto," etc. If it were clear that section 1217 of the Civil Code means what counsel claims, it would not be necessary to make the paraphrase. If, however, counsel are right in their construction, Smith v. Hodsdon, 78 Me. 180, 3 Atl. Rep. 276; Collingwood v. Brown, 106 N. C. 362, 10 S. E. Rep. 868; and Utley v. Fee, 33 Kan. 683, 7 Pac. Rep. 555,—cited by them, are in point; otherwise they are not. The Maine section is: "No conveyance * * * is effectual against any person except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded," etc. In North Carolina a deed only becomes effective by filing for record; and in neither of these states is notice of the pendency of an action required to be filed or recorded; and the Kansas statute is the same as that of Maine. Our Code provisions touching the recording of deeds must be construed together. At common law, recording was not necessary to the validity of the deed, or to make it effective against all subsequent conveyances; and such is the law now, except so far as our recording acts have expressly, or by necessary implication, limited their effect and operation. The object of these recording acts is to give "constructive notice of the contents thereof to subsequent purchasers and mortgagees," (Civil Code, § 1213,) and to declare the effect of the failure to record a prior conveyance as against a subsequent purchaser or mortgagee of the same property whose conveyance is first recorded, (Civil Code, § 1214;) and, if that section stood alone, a subsequent grantee, whose deed was first recorded, would have taken the title, even though he had actual notice of the prior unrecorded deed. To prevent this, or at least to place the matter beyond question, section 1217 of the Civil Code declared that "an unrecorded instrument is valid as between the parties thereto and those who have notice thereof." It will be seen that this section, at least as to the last clause, is a necessary qualification of section 1214, and must therefore be taken in connection with it; and it should also be noticed that the only persons as to whom the failure to record a deed makes it void are subsequent purchasers and mortgagees in good faith and for a valuable consideration, while the construction contended for by counsel would make it void as to all persons, (except the parties and those who had notice,) including heirs and devisees and purchasers or grantees in bad faith and without consideration. Nor could the filing of the *lis pendens*, as contended by counsel, operate as a prior recording of a subsequent conveyance, so as to make the deed executed by the clerk to Brison relate back to the commencement of the action, as against the deed to Harlow, which was executed before the suit was begun, and recorded before the deed made by the clerk to Brison was executed; for Brison was not a subsequent purchaser, within the meaning of the statute. If he acquired title either under the decree or deed, it must have been upon other grounds. Nor was the *lis pendens* such an "instrument" as the statute contemplates. The word "conveyance," as used in sections 1213 and 1214 of the Civil Code, is defined by section 1215; and the word "instrument" as used in the recording acts, was construed in Hoag v. Howard, 55 Cal. 564, where it was held to mean "some written paper or instrument, signed and delivered by one person to another, transferring the title to or giving a lien upon property, or giving a right to a debt or duty," and that it did not include a writ of attachment. The deed made in 1881 by W. W. Brison to his wife undoubtedly vested in her the legal title to the land; and, as between those parties, the judgment finally rendered in the case of Brison vs. Brison, November 22, 1888, is conclusive of the fact that said deed, though purporting to convey an unqualified ownership and title, vested in Mrs. Brison the title in trust for her husband.

It is contended by respondent Catlin that Harlow, the grantee of Mrs. Brison, though the deed under which he claims was executed and delivered to him before suit was commenced against her, and before the notice of the pendency of the action was filed, is nevertheless bound by that judgment, for the reason that his deed was not recorded until after the *lis pendens* was filed and recorded; in other words, that the holder of a prior unrecorded deed is to be regarded as a purchaser *pendente lite*, and therefore bound by the judgment. This question, as thus presented, is *res nova* in this state, and a full discussion of it would involve an examination of several provisions of the statutes, and the construction heretofore given to each. Certainly this contention of counsel for respondent cannot be sustained upon any reasonable construction of section 409 of the Code of Civil Procedure, which provides for filing and recording a notice of the pendency of the action in the cases there mentioned. That section provides: "* * * From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names." The mere pendency of a suit does not, as at common law, charge the subsequent purchaser. A notice of *lis pendens* must appear of record. Head v. Fordyce, 17 Cal. 149. This statute does not give new rights to the plaintiff, but limits rights which he had before by requiring, for the purpose of giving constructive notice, not only a suit, but the filing of a notice of it. Richardson v. White, 18 Cal. 102. If, therefore, the filing of the *lis pendens* is the only constructive notice which can be given of the pendency of the suit, it is clear that the operation of the *lis pendens*, as constructive notice, cannot be made to depend upon the fact that the deed of a prior purchaser remained unrecorded, for that would be to import into the statute a term or condition not named in it. Several cases are cited by counsel for respondent Catlin from the reports of other states in support of their contention, and among them the case of Hoyt v. Jones, 31 Wis. 389, which seems to have been decided under a *lis pendens* statute essentially the same as ours. While this case supports respondent's contention, I cannot approve the conclusion reached by the court, nor the reasoning upon which it is based; reasoning which would be much more cogent if addressed to the question as to what the law should be. It is a significant fact, however, that after the decision of Hoyt v. Jones, supra, the Wisconsin statute, under which that case was decided, was amended so as to provide in terms that a party holding an unrecorded deed should be deemed a purchaser *pendente lite*. The other cases cited by counsel for respondent upon this point were decided under statutes essentially different from ours, and upon provisions directly relating to the effect of a failure to record deeds. These cases, so far as appears necessary, will be noticed in another connection.

The respondent Catlin, after the said deed from W. W. Brison was executed to him, notified plaintiff thereof, and demanded the rent, whereupon the plaintiff commenced this action against Harlow and Catlin, setting out the claim and source of title of each; that each of the defendants claimed to be entitled to the rent due from him, and paid the money into court; and required that they interplead, and that the money be paid to whichever party the court should direct. Defendant Catlin answered, admitting the facts alleged in the complaint; denied that Harlow was entitled to receive the rents; and alleged that he, Catlin, was entitled thereto. Defendant Harlow, in his answer, among other allegations, not necessary to be noticed at present, alleged that the title which he has, and had at the time he leased to the plaintiff, was derived by him under a deed from said Carrie M. Brison, dated September 15, 1886, but which was executed and delivered to him before the action of Brison vs. Brison was commenced, and before the filing of the *lis pendens;* "and that at the time of the commencement of said action of Brison vs. Brison, and at the time of the filing and recording of the said notice of the pendency of the action, he was the owner, in the possession, and entitled to the possession, of said land." The cause was tried by the court, and findings and judgment passed in favor of defendant Catlin, and defendant Harlow appealed upon the judgment roll. Appellant contends that respondent Catlin, not being a party to the lease under which the rent accrued, cannot recover rent, as such, unless he has in some way succeeded to the legal title held by appellant at the time the lease was given, or that in some way the conventional relation of landlord and tenant is shown to exist between Catlin and Warnock. It is undoubtedly true that Catlin could not maintain an action against Warnock for the rent, *eo nomine*, unless such relation existed. Emerson v. Weeks, 58 Cal. 439; Ramirez v. Murray, 5 Cal. 222. Whether he could recover the money voluntarily paid into court by the tenant as the rent stipulated in the lease executed by appellant, without being required to establish by proof the existence of such relation; or whether, such relation not existing, he would be required to resort to an action to recover the value of the use and occupation of the premises, if he were entitled thereto as between himself and appellant,—is a different question. Assuming that respondent Catlin is entitled to the value of the use and occupation of the premises, and that Warnock is, as to him, a trespasser, yet I see no reason why he may not avail himself of Warnock's admission that he owes the money to whichever of the claimants may be entitled to it, and, if entitled, recover it, as against Harlow, even though the actual value of the use and occupation may be more or less than the amount deposited; for, if appellant be not entitled to the money, it cannot concern him whether Catlin is receiving, and Warnock paying, more or less than the true value. It is obvious, however, that the decisive point in the case lies beyond the question above considered, and must first be determined. If the deeds of the respective parties were put in evidence, without anything more, appellant's title must have prevailed; and hence the burden was upon respondent to allege and prove some fact that would qualify or invalidate appellant's title. For this purpose respondent relied upon the plaintiff's averment of the judgment, erroneously supposing that appellant was bound thereby; while appellant could safely stand upon his deed, unaffected by the judgment against his grantor, until the good faith of his purchase should be attacked by averment and proof. Inasmuch as the findings expressly show that appellant's deed was acknowledged and delivered between 10 and 11 o'clock A. M., on September 15, 1886, and that the suit of Brison vs. Brison was commenced and the *lis pendens* filed about 4 o'clock P. M. of the same day, and no fact being alleged or found which would invalidate appellant's deed, or show that he held the property in trust for respondent Catlin, the judgment is not sustained by the findings. If anything were needed to confirm the correctness of this conclusion, it will be found in the conclusion of law drawn by the court from the findings of fact, viz., "that the defendant Harlow is concluded herein by said decree in the action of Brison vs. Brison."

Some other questions have been made in the very able and exhaustive briefs of counsel for each party, but which, in view of the conclusion reached, it is not necessary to consider. I advise that the judgment be reversed, and a new trial ordered, with leave to the parties to amend their pleadings if so advised.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and a new trial ordered, with leave to the parties to amend their pleadings if so advised.

96 Cal. 269

LONG v. CORONADO R. CO. (No. 14,738.)

(Supreme Court of California. Oct. 1, 1892.)

INJURIES TO BRAKEMAN—CONTRIBUTORY NEGLIGENCE.

1. Where a train man continues in the employ of the railroad company after full knowledge that the cars were defective in construction and the train force deficient in number, he assumes the risk arising therefrom, and cannot recover in an action for personal injuries caused thereby.

2. In an action by a brakeman for injuries received while coupling cars it appeared that it was dangerous to go between the cars because they had short drawheads and no bumpers, which was known to plaintiff, and that it was usual to make couplings by so placing the pin that it would fall into place when the cars came together, or by using a stick. At the time of the accident plaintiff went between the cars to be coupled, which were one foot apart, and at a point from which he could not see the engineer, and while adjusting the coupling pin the cars came together, and caught him between them. *Held*, that the injury resulted solely from plaintiff's carelessness.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

An action by Edgar E. Long against the Coronado Railroad Company to recover for personal injuries caused by defective cars and insufficient train force. From a judgment for plaintiff the defendant appealed. Reversed.

Works, Gibson & Titus, for appellant. *Sprigg & Barber*, for respondent.

TEMPLE, C. Defendant appeals from the judgment and from an order refusing a new trial. The action is to recover damages for personal injuries received while in defendant's employ as conductor and brakeman. The defendant owned what is called the "Belt Road," at San Diego, which included a short line from the Coronado Hotel to the ferry, a distance of about 1½ miles. The plaintiff had been in defendant's employ as conductor for several months. At first a brakeman had been employed. The brakeman was taken off the belt line—around the bay to Fifth street, San Diego—in July; and from the avenue line—from the hotel to the ferry—long before; when, it does not appear. Plaintiff left the employment in June, but returned in September. When he re-entered the employ he knew there was no brakeman, and that he was to be both conductor and brakeman. He was told that defendant would employ a brakeman "when times got better." The road did both a passenger and freight business, plaintiff acting as conductor and brakeman for both species of trains. The freight cars used by the defendant were short, four-wheeled cars, with no bumpers, and with stake staples projecting from the ends. The drawheads were scarcely longer than the depth of the staples. It was impossible to couple them by going between the cars. To do this they raised the link, and kept it in place by a block, and fixed the pin up so that it would easily drop into place, or, if it failed to do so from the jar, it could be touched with a stick and made to fall in. Plaintiff testified that he was perfectly familiar with all this; had frequently coupled the cars during his first employment, and was well aware of the danger. At the time of the accident there was occasion for haste. The engine, with two flat cars attached, loaded with railroad ties, stood on a curve, and was to be attached to a third car further back on the curve. Plaintiff, having adjusted the link and pin, stepped to the outside of the curve, and gave the signal to back, which was done. Plaintiff, seeing that the pin had fallen too soon, gave the signal to stop, and the cars were stopped, as he says, when about one foot from the third car. Plaintiff testified, however, that from this point he could not see the engineer. It would have been necessary to go around the car to do that, but he supposed the engineer would see him. At all events, the car stopped, and, being in a hurry, he jumped in to readjust the pin. As he did so the car moved again, and he was caught and injured. A jury was waived and the court found for plaintiff, and judgment was entered accordingly.

I do not see how this judgment can be maintained. Respondent's counsel admits that to go between these cars for the purpose of coupling them would be equivalent to an attempt to commit suicide. But he contends that plaintiff went there when the car was at rest, and there was an implied promise on the part of the engineer that the car would not be moved until he gave the signal. Even on this theory plaintiff could not recover, for then the cars must have been moved either through the carelessness or incompetency of a fellow servant. At the trial he withdrew the charge of incompetency. For injuries resulting from the carelessness of a fellow servant in the same general business, he cannot recover against the employer. Civil Code, § 1970. Plaintiff, however, contends that, since defendant was negligent in not providing suitable cars or a sufficient complement of men, it is responsible, although the negligence of a fellow servant contributed to the injury. The rule on this subject is announced in Martin v. Railroad Co., 94 Cal. 326, 29 Pac. Rep. 645. The question is, had defendant a right to believe, and did it believe, that plaintiff had waived his objections to the defects in the cars? His own testimony shows that he was thoroughly acquainted with the defects, and knew the extent of the danger, and that he contracted to do the work under these conditions. This is not a case where danger accrued or was increased after the employment. There was no conflict in the evidence, and no other conclusion can be drawn from it than that he knowingly assumed these risks by his contract. If he could not recover against the company because of the defective cars or insufficient complement of men, on the ground that he assumed the risk, nor because of the negligence of a fellow servant, it would necessarily follow that he cannot recover where both combine.

The cases cited by respondent are where injury resulted from some act or omission of the master, and it was sought to defend the master on the ground that the negligence of a fellow servant contributed to the injury. It is held that the fault of the master is not excused by the act of the fellow servant. But I think it plain that the accident resulted solely from plaintiff's carelessness. How he could assume that the engineer could see him when he could not see the engineer without going quite around the car, is not made manifest by the evidence. But, conceding the engineer did see his signal to stop, it is not explained how the engineer would understand anything else than that he had backed far enough to accomplish the coupling. How could the engineer know that it would make any difference if the car did move still further back? The presumption is that the engineer did not see the signal. As he could not, it was natural that he should move very slowly, and even stop occasionally; and, not feeling or hearing the shock of the cars meeting, or any word from plaintiff, that he should continue the movement. I think the judgment and order should be reversed, and a new trial had.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

96 Cal. 365

WELCH v. WILLIAMS, County Clerk.

(No. 15,195.)

(Supreme Court of California. Oct. 14, 1892.)

Voters—Registration.

The Political Code provides that the qualified electors of counties may have their names registered at any time, and describes with great care and particularity the duties of electors and officers in relation thereto, and further provides (section 1094) that a great register shall be kept. Section 1094, as amended by Laws 1889, provides that upon the order of the board of supervisors a new registration may be made, and that such registration shall commence 100 days before a general election, and continue 85 days, when it shall cease. *Held*, that the board of supervisors may cancel the existing register, and order a new one, more than 100 days before a general election, and that the registry of a name in the new register, made at any time after the old register is canceled, and more than 15 days prior to the election, is lawful and valid.

In bank.

Petition for *mandamus* by H. H. Welch against A. C. Williams, clerk of Fresno county, to compel the clerk to enter the petitioner's name anew in the new register of county electors. Writ denied.

W. D. Tupper, for petitioner.

Beatty, C. J. The petitioner possesses all the qualifications of a voter of Fresno county, and prior to the 16th day of January, 1892, his name was enrolled upon the great register. At said date the board of supervisors made an order canceling the great register, and providing for a new and complete registration of the voters of said county, and the respondent immediately thereafter commenced making a new register. On the 17th of March following, the petitioner, upon his own application, and upon proper affidavit, had his name entered thereon. His attention having been subsequently called to the language of section 1094 of the Political Code, as amended in 1889, he concluded that such registration of his name—made, as it was, more than 100 days prior to the ensuing general election—was invalid, and therefore, within such 100 days, he applied to the respondent to register his name anew. This demand having been refused, he asks a peremptory mandate to enforce compliance.

The amended section, 1094, reads as follows: "A register, in which shall be entered the names of the qualified electors of each of the counties in the state, shall be kept at the office of the county clerk of such county, and in each of the cities and counties of the state such a register shall be kept in the office of the person charged with the registration of voters in such city or county. There shall be in each of the counties and cities and counties in the state (when required by the board of supervisors) a new and complete registration of the voters of such counties and cities and counties who are entitled thereto, and who apply with the proper proof. Such registration shall commence one hundred days before a general election, and shall continue for eighty-five days thence next ensuing, when such registration shall cease: provided, that nothing in this section shall be held to repeal any election or registration law applicable to or in force in the city and county of San Francisco." If our attention were confined exclusively to the language of this section, it might seem to require the construction for which the petitioner contends, viz., that when a new registry is ordered the work cannot lawfully be commenced more than 100 days prior to the ensuing general election. But for the purpose of construing a statute all its provisions must be considered together; they must be reconciled as far as possible, and particular provisions must be so construed as to promote, and not to defeat, the general purposes and policy of the law. The object of the registration law is to prevent illegal voting by providing in advance of election an authentic list of the qualified electors. Necessarily any efficient system of registration must involve a certain amount of inconvenience to voters, and probably, under the best system that could be devised, some qualified electors would lose their votes through inability to avail themselves of the opportunities, or to comply with the conditions of registration. The law should be so framed therefore, and, when its terms are doubtful, should be so construed, as to give the fullest opportunity to voters to procure the entry of their names upon the register that is consistent with reasonable precautions against fraudulent registration. The necessity of closing the registry some days prior to the election, and the danger involved in the registration of large numbers of persons during a short period immediately preceding its close, are apparent. But there does not seem to be any very weighty reason for narrowly limiting the beginning of the registry. On the contrary, it would seem to be better in every respect, not only with a view to the convenience and security of honest electors, but more especially for the purpose of challenging the right of such persons as may fraudulently procure their enrollment, to commence the registration as soon as practicable. The registry law seems to have been framed in conformity with these views. By its provisions the clerks and assessors of the respective counties were authorized to receive applications for registry, not at particular times, or during restricted periods, but at all times; and the names of such applicants as appeared to be entitled to vote were entered on the register as received by the clerk, or as returned from month to month by the assessor. At the same time that the register was being gradually completed by this process it was undergoing revision and correction by the cancellation of entries fraudulently procured, and of names of persons dying, removing from the county, convicted of crime, etc. By this means it was, or at least could be, constantly brought nearer and nearer a state of perfection, so that a copy of its uncanceled entries, made prior to any election, would furnish an accurate list of the persons entitled to vote thereat. But although the law, faithfully administered, would have produced this result, it is equally true that inattention or neglect on the part of electors and of the officers charged with the duty of purging the register might, and no doubt frequently did, leave it largely incumbered with names of persons who had ceased to be voters. To remedy this evil the supervisors were empowered, when necessary, to order a complete registration of the voters of the county. Such order, when made, was necessarily an abrogation or cancellation of the existing register, and rendered re-registration an essential condition of voting at the ensuing and all future elections. But such re-registration was conducted in precisely the same manner as the original registration. Application for registry could be made at any time, either to the clerk or to the assessor. Voters were not required to wait till any particular date after an order for re-registration before they could make their applications. The only limitation as to time was that imposed upon the board of supervisors by the provision requiring them to publish their order for re-registration not less than six months preceding the next ensuing general election.

Such was the general scheme of the registry law prior to the amendment of section 1094 of the Political Code, made in 1889, and certainly the system was far more convenient to the electors and far less expensive to the counties than it would be if registration were limited to a short period preceding each election. It also afforded a much better opportunity to investigate the right to vote of the persons enrolled, and to secure the cancellation of their registry where it could be shown that they were not entitled to the suffrage. Such, we repeat, was the registry law prior to the amendment of 1889, and the question is whether it was by that slovenly amendment to a single section completely changed in its whole tenor and texture. We do not think it was. The section, as amended, does not require the construction contended for, but, on the contrary, is easily susceptible of a construction which harmonizes with the unamended sections and the system of which they are a part. The requirement that registration, when a new registry is ordered, must commence 100 days before a general election, means that it must commence at least that soon, and the effect of the requirement is that the board of supervisors cannot cancel the old registry and order a new one less than 100 days before a general election. They cannot, in other words, deprive the voters of that period of time within which to secure registration. But there is nothing in this provision to prevent them from giving a longer time, which, by various other sections, they are directly and impliedly authorized to do. The only words of the amendment which seem to conflict with this construction are the following: "And shall continue for eighty-five days thence next ensuing, when such registration shall cease." It is very clear from this language that the legislature intended that registration should continue down to within 15 days of the election, and then (for the purposes of that election) cease; and it is argued that if registration commences more than 100 days before the election, and continues only 85 days thence (*i. e.*, from the date of commencement) next ensuing, it will cease sooner than was intended. But this difficulty disappears if the statute is read as it must be read to get its true sense. If, instead of saying "such registration shall commence one hundred days," etc., it had said "such registration shall commence at least one hundred days before a general election, and continue for eighty-five days thence next ensuing," we should have seen at a glance that the 85 days during which registration must continue would commence, not necessarily with the commencement of the registration, but with the hundredth day before the election. This, although awkwardly expressed, is undoubtedly the meaning of the amendment; for otherwise the section as amended conflicts with and repeals numerous other sections, which it is impossible to suppose the legislature intended to sweep away without even mentioning them.

Our conclusion upon the whole matter is that the board of supervisors are prohibited by the amendment from canceling the existing register, and ordering a new registration less than 100 days preceding a general election. They cannot allow less, but they may allow more, than 100 days for re-registration, and it must cease 15 days before the election, (for the purposes of that election.) The registry of a name in the new register made at any time after the old register is canceled, and more than 15 days prior to the election, is lawful and valid. It is perhaps unnecessary to add that this opinion has no application to the special law governing the city and county of San Francisco. The writ of mandate is denied.

We concur: DE HAVEN, J.; GAROUTTE, J.; PATERSON, J.; SHARPSTEIN, J.

96 Cal. 360

Ex parte FELCHIN. (No. 20,933.)

(Supreme Court of California. Oct. 6, 1892.)

Municipal Ordinances—Reasonableness—Constitutional Law.

1. An ordinance of the city of Stockton, providing that the license for keeping a bar, saloon, or other place where intoxicating liquors are sold shall be $30 per quarter, except that when in such places a female acts as bartender, actress, dancer, singer, etc., the license shall be $150 per month, is not unfair or unreasonable.

2. Such an ordinance does not violate Const. art. 20, § 18, providing that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business vocation or profession."

In bank.

Habeas corpus for the release of M. Felchin, imprisoned on a charge of violating an ordinance of the city of Stockton. Petition denied, and prisoner remanded.

Nutter & De Vries, for petitioner. *Atty. Gen. Hart*, for respondent.

Beatty, C. J. The petitioner was convicted of violating an ordinance of the city of Stockton, and sentenced to pay a fine, or, in default of payment, to be imprisoned in satisfaction thereof. He claims that his imprisonment is unlawful because the part of the ordinance which he is accused of violating is unreasonable, partial, unjust, and oppressive, and because it is in violation of section 18 of article 20 of the constitution, which reads as follows: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." The clauses of the ordinance in question are the following: "Sec. 7. License is required, and a rate of license is fixed and charged, for conducting, maintaining, engaging in, or carrying on any business, trade, calling, or profession, game, entertainment, or show, in this section hereinafter mentioned or specified, as follows: * * * Subd. 15. For each saloon, bar, barroom, dramshop, tippling house, or other place (except as in subdivision sixteen of this section mentioned) where intoxicating liquors, wines, ales, or beer are bought or sold, or sold in less quantities than one quart, or to be served, distributed, given away, drank, or used on the premises where sold, the sum of thirty dollars per quarter. Subd. 16. For each saloon, bar, barroom, dramshop, tippling house, or place where intoxicating liquors, wines, ale, or beer are bought or sold in less quantities than one quart, or to be served, distributed, given away, drank, or used on the premises where sold, in which any female acts in the capacity of a bartender, waiter, actress, dancer, singer, solicitor of custom, or servant, or plays upon any musical instrument, or is employed in any capacity whatever, either with or without compensation, the sum of one hundred and fifty dollars per month." The offense charged against the petitioner, and of which he was convicted, was the employing of females in a saloon where intoxicating liquors were sold in less quantities than one quart without the necessary license. There is nothing unfair, unreasonable, or arbitrary in the provisions of this ordinance. It is not open to any of the objections stated by Mr. Justice McKinstry to a similar ordinance of the city of San Francisco in his opinion in the Case of Maguire, 57 Cal. 610. If it is invalid for any reason, it is because the constitution means what it was held to mean in the opinion of Mr. Justice Thornton in the same case. The petitioner's argument, indeed, is substantially taken from that opinion, and the answer on the part of the city is, in sustance, the same as the view expressed by Justice McKinstry as to the power remaining in the legislature to regulate the employment of women. We are of the opinion that this view is a sound one, and that it subserves a wholesome public policy. The ordinance is a valid exercise of the police power vested in the municipal authorities.

The prisoner is remanded.

We concur: De Haven, J.; Garoutte, J.; Sharpstein, J.; Paterson, J.

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96 Cal. 362

Ex parte NOBLE. (No. 20,931.)

(Supreme Court of California. Oct. 6, 1892.)

Fines—Imprisonment until Payment—Jurisdiction of Justice.

1. Where one is convicted of selling liquor in violation of a county ordinance, a judgment that he pay a fine, and, if the fine is not paid "forthwith," that he be imprisoned in the county jail until the same be paid, in proportion of one day's imprisonment for every two dollars of the fine, is within Pen. Code, § 1446, providing that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in proportion of one day's imprisonment for every dollar of the fine. De Haven, J., dissenting.

2. The judgment is not made void by the use of the word "forthwith."

3. On a petition for a writ of habeas corpus, the return of the sheriff need not show that the ordinance was properly published.

4. A justice of the peace has jurisdiction to try such misdemeanors under Code Civil Proc. § 115, providing that justices' courts shall have jurisdiction of all misdemeanors punishable by fine not exceeding $500, or imprisonment not exceeding six months, or both.

In bank.

Petition for *habeas corpus* by Noble. Petition denied.

R. Clough, for petitioner. *Atty. Gen. Hart*, for respondent.

McFarland, J. The petitioner was convicted in a justice's court of a misdemeanor in maintaining a place where intoxicating liquors were sold, in violation of an ordinance of Sutter county, and sentenced to pay a fine of $25, and to be imprisoned until it was paid, at the rate of $2 a day. An appeal was taken by petitioner to the superior court of said Sutter county, and the judgment was affirmed. The point, elaborately argued by counsel for petitioner, that the ordinance in question is "in conflict with general laws," and therefore void, was decided by this court adversely to petitioner's contention in Ex parte Campbell, 74 Cal. 20, 15 Pac. Rep. 318. There is nothing in the point that the judgment is void because it provides for the payment of the fine "forthwith." Such a judgment would necessarily take effect forthwith, even though the latter word were not used. The judgment that petitioner pay a fine of $25, and, in case said fine is not paid forthwith, that he "be imprisoned in the county jail of Sutter county until the fine be paid in proportion of one day's imprisonment for every two dollars of the fine," is clearly within the provision of section 1446 of the Penal Code. The judgment is not invalid because it requires the peitioner to be imprisoned only at the rate of one day for every two dollars of the fine, while it might have made the rate one day for every dollar. Ex parte Soto, 88 Cal. 624, 26 Pac. Rep. 530. The point that petitioner should be discharged because the return of the sheriff does not show that the ordinance was properly published, etc., is not tenable. The sheriff was only required to return the commitment, which was a copy of the judgment. Whether the ordinance was published, whether there was proof of publication, and whether the ordinance was properly passed, etc., were mere questions of fact to be passed upon by the trial court; and the writ of *habeas corpus* is not intended as a means of retrying issues of fact, or of reviewing errors alleged to have been committed in the course of a legal trial. Ex parte Cottrell, 59 Cal. 420. If there were any such errors, petitioner had a remedy by appeal to the superior court; and as he did take such appeal, and the judgment was affirmed, it might be at least plausibly argued that we are now dealing with the judgment of a superior court. But, apart from that consideration, a justice's court has power to pass upon and conclusively determine facts upon which its jurisdiction, in part, depends. In re Grove Street, 61 Cal. 453; Ex parte Sternes, 77 Cal. 162, 163, 19 Pac. Rep. 275. There is nothing in Ex parte Kearny, 55 Cal. 212, to help petitioner's contention. It was merely held there that the court, on *habeas corpus*, could look into the complaint to see if it charged an offense under the ordinance there in question; but the court said: "We have assumed that the existence of the ordinances which, as claimed, gave the police court the appropriate jurisdiction, and the publication thereof, supposing the publication to be inquirable into by the court, were matters to be ascertained by the police court, and that on *habeas corpus* we ought not to go behind the finding of the police court with respect to such matters." Justices of the peace have jurisdiction to try misdemeanors such as that of which petitioner was convicted. Code Civil Proc. § 115. The prayer of the petition is denied, and the petitioner is remanded to the custody of the officer.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; PATERSON, J.

DE HAVEN, J. I concur in the judgment. Under section 1446 of the Penal Code, the justice of the peace, if he desired to enforce the collection of the fine imposed upon the petitioner by imprisonment, should have directed, in his judgment, that he be imprisoned in the county jail "until the fine be satisfied in the proportion of one day's imprisonment for every dollar of the fine," instead of one day for "every two dollars of the fine." But this error of the justice in favor of the petitioner did not make the judgment which he gave wholly void. I concur in the opinion of Mr. Justice McFARLAND upon the other points therein discussed.

96 Cal. 354

RYAN v. ROGERS et al. (No. 14,679.)

(Supreme Court of California. Oct. 6, 1892.)

ACTION FOR BREACH OF CONTRACT — PLEADING AND PROOF—EXCUSE FOR NONPERFORMANCE.

1. In an action for breach of contract, defendants cannot introduce evidence of an extension of the time within which the contract was to be performed, or of a change in the place of performance, where their answer admits their nonperformance under the alleged modifications.

2. The fact that an unbridged river between defendants' residence and the place of performance was swollen by recent rains, and impassable at the time set for the performance of the contract, will not bring defendants' nonperformance within Civil Code, § 1511, providing that performance of an obligation will be excused "when it is prevented or delayed by an irresistible and superhuman cause," where it is not shown that such a condition of the river was unusual at that season of the year, and could not have been anticipated by ordinary prudence.

In bank. Appeal from superior court, city and county of San Francisco; R. M. DILLARD, Judge.

Action by Ryan against Rogers and others to recover damages for breach of contract. Judgment for plaintiff. Defendants appeal. Affirmed.

Putnam & Nichols and *John J. Boyce*, for appellants. *Reinstein & Eisner* and *B. F. Thomas*, for respondent.

DE HAVEN, J. On June 4, 1889, the defendants entered into a written contract with Erlanger & Galinger, whereby they agreed to deliver to the latter, on or before November 30, 1889, at San Buenaventura, five car loads of choice lima beans of the crop of 1889, for the price of $2.70 per 100 pounds. The plaintiff is the assignee of Erlanger & Galinger. It is alleged in the complaint that defendants failed and refused to deliver the beans called for in the contract, or any part thereof, and this action is brought to recover damages alleged to have been sustained by reason of this breach of the contract.

As one defense to the action, the defendants, in their answer, allege that the contract referred to in the complaint was afterwards modified in writing by changing the place for the delivery of said beans to Hueneme, and extending the time for such delivery until and including December 17, 1889; and in this connection the answer alleges that the defendants reside and do business in Santa Barbara, and that there is a regular daily communication between that place and Hueneme,—a portion of the way by stage, which crosses the Santa Clara river, an unbridged stream; and that on the 16th, 17th, and 18th days of December this river "was swollen by recent rains so that its passage was impossible; that said stream was unbridged, and at seasons of heavy rains it becomes for days wholly impassable;" and on the 16th day of December "the agent of defendants, thereunto duly authorized to deliver said beans in accordance with the terms of said contract, attempted to cross said stream, and reach said port of Hueneme, but was prevented from reaching the same upon that day or the following day by an irresistible and superhuman cause, and defendants sent another agent by sea to said port of Hueneme, who reached there at noon of December 18, 1889," and upon that day they offered to deliver the beans called for by contract, but the assignors of plaintiff refused to accept them. The case was tried by the court without a jury, and the court found the terms of the contract to be as stated in the complaint, and that the time for the performance thereof had not been modified or extended as alleged in the answer; that defendants had failed to perform the contract, and plaintiff had thereby sustained damage in the sum of $900. Judgment was given for plaintiff upon the findings, and the defendants appeal.

1. Upon the trial the defendants offered to introduce in evidence certain telegrams and letters which passed between themselves and the assignors of plaintiff relative to an extension of time within which the defendants might deliver the beans referred to in the original contract. The first one necessary to notice bears date December 7, 1889, and is as follows: "To Rogers Bros.: If beans answering our contract are delivered according to its terms on December seventeenth at Ventura, we will accept them. ERLANGER & GALINGER." In answer to this, defendants wrote a letter to the attorneys of Erlanger & Galinger, in which they said they would deliver at Ventura if insisted upon, but wished that they might be allowed to make a delivery of the beans at Hueneme. In reply to this the defendants received the following telegram, dated at San Francisco, December 10, 1889: "To Rogers Bros.: A. Levy, of Hueneme, will accept the beans for us on December seventeenth, if in all respects according to contract. ERLANGER & GALINGER." On December 16th the defendants made reply to this as follows: "To Erlanger & Galinger: Our man goes to Hueneme, to deliver your beans, to-morrow." The court, upon the objection of plaintiff, excluded all this offered evidence, the objection being that the letters and telegrams were all dated after the time fixed for the per-

formance of the original contract, "and the new proposition and extension * * * was without any consideration, and no rights could accrue thereunder to the defendants." The court did not, in view of the answer of the defendants, which admits their nonperformance of the new agreement, err in excluding this evidence. These telegrams were sufficient to show an agreement upon the part of the assignors of plaintiff to accept a delivery of the beans at another place and at a later date than that named in the original agreement, and, if the defendants had performed the new agreement, such performance would undoubtedly have operated as a satisfaction of the original contract, and thus have constituted a defense to an action for damages on account of the failure to perform it within the time limited by its terms. But, as there was no performance of the later agreement, the plaintiff was free to insist upon the damages which he had already sustained by the breach of the original contract before consenting to give the further time named in the telegrams.

2. It is claimed by defendants that they were prevented from performing the last contract within the time therein fixed by an irresistible and superhuman cause, and the alleged facts constituting such defense are set out in the answer, and the substance of which, so far as relates to this point, is given in the former part of this opinion. It is provided by section 1511 of the Civil Code that performance of an obligation is excused "when it is prevented or delayed by an irresistible and superhuman cause, * * * unless the parties have expressly agreed to the contrary." But the facts, as alleged in the answer, are not sufficient to show that defendants were prevented by an irresistible and superhuman cause from performing their contract, within the meaning of this section of the Civil Code. This court, in Fay v. Improvement Co., 93 Cal. 2̄5, 26 Pac. Rep. 1099, and 28 Pac. Rep. 943, said: "The words 'irresistible and superhuman cause' are equivalent in meaning to the phrase 'the act of God,' and refer to those natural causes, the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ." And in the case of Dorman v. Ames, 12 Minn. 451, (Gil. 347,) the supreme court of that state say: "But an 'act of God,' in legal phraseology, means an accident against which ordinary skill and foresight is not expected to provide. This, applied to water courses, would include only floods or extraordinary freshets, and not such rises or high water in a stream as is usual and ordinary, and reasonably anticipated at particular periods of the year." It is apparent that the matters stated in the answer are not such as to bring the failure of the defendants to perform their contract within the protection of this rule. It does not appear that there was anything unusual for that season of the year in the rise of the waters referred to, and therefore that such rise was something which ordinary prudence might not have anticipated, and at the same time have taken proper steps to guard against any delay by reason thereof; nor is it alleged that defendants could not have reached Hueneme by another route, or that it was impossible for them to communicate with Hueneme, and direct the delivery to be made by some other agent; and without such averments the other facts alleged are not sufficient to show that performance of their contract was prevented by the "act of God." Williams v. Vanderbilt, 28 N. Y. 217; Eugster v. West, 35 La. Ann. 119. We find no error in the record.

Judgment and order are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; GAROUTTE, J.

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96 Cal. 354

Ex parte SING LEE. (No. 20,930.)

(Supreme Court of California. Oct. 6, 1892.)

CONSTITUTIONAL LAW — POLICE REGULATIONS — CARRYING ON LAUNDRY BUSINESS.

Section 1 of a certain ordinance of the town of Chico provides that no person can carry on a laundry business in such town, except in certain blocks therein named, without obtaining a written permit from the board of trustees. Section 2 provides that the board of trustees shall grant no permit unless the person applying shall have obtained the written consent of a majority of the real property owners within the block wherein it is proposed to carry on such laundry business, and also of the four blocks immediately surrounding such block. *Held*, that such provisions were not police regulations, within Const. art. 11, § 11, providing that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," and were unconstitutional.

In bank.

Petition by Sing Lee for writ of *habeas corpus*. Writ granted.

F. C. Lusk, for petitioner. *Wm. H. Schooler* and *Atty. Gen. Hart*, for respondent.

DE HAVEN, J. The petitioner was, at the date of the issuance and service of the writ of *habeas corpus* herein, restrained of his liberty by the marshal of the town of Chico, upon a charge of having violated section 1 of a certain ordinance of that town, "in that he did * * * unlawfully establish, maintain, and carry on the business of a public laundry * * * without having first obtained a written permit from the board of trustees of said town to establish, maintain, and carry on such public laundry." It is claimed by the petitioner that the section of the ordinance which he is charged with violating is unconstitutional, and that, therefore, his imprisonment is illegal. For the purpose of passing upon the question thus presented, it is only necessary to consider sections 1 and 2 of the ordinance referred to. They are as follows: "Section 1. On and after the passage of this ordinance it shall be unlawful for any person or persons to establish, maintain, or carry on the business of a public laundry or public washhouse, where clothes or other articles are cleansed for hire, within the corporate limits of the town of Chico, except in block No. twenty-four (24) and block No. ninety-six (96) of said town, according to the official map thereof on file in the recorder's office of Butte county, Cal., without first having obtained a written permit from the board of trustees to establish, maintain, or carry on such public laundry or public washhouse. Sec. 2. No permit shall be granted by said board of trustees, unless the person or persons so applying for the same shall have first obtained the written consent of a majority of the real property owners within the block in which it is proposed to establish, maintain, or carry on such public laundry or public washhouse, and also of the four blocks immediately surrounding the block in which it is proposed to establish, maintain, or carry on such public laundry or public washhouse."

It is provided by section 11 of article 11 of the constitution of this state that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws;" and it is argued here in behalf of respondent that the ordinance in question is a police regulation, and therefore one which the town of Chico was authorized to enact by this section of the constitution. The power conferred upon cities and towns by the section just quoted is undoubtedly a very broad and comprehensive one, and would sustain the enactment of any ordinance having a reasonable tendency to promote the health, the comfort, safety, and welfare of the municipality, and which would not be in conflict with some general law of the state. But, broad as is this power, the ordinance before us cannot be considered as falling within the limits of its proper exercise.

The business of conducting a laundry is a lawful occupation, precisely as much so as is that of the carpenter, blacksmith, or merchant, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity; and no municipal corporation has the power to make the right of a person to follow this business at any place he may select for that purpose dependent upon the will of any number of citizens or property owners within its limits, as is attempted in the ordinance under review. A town or city may, when deemed necessary for the public health or safety, adopt reasonable regulations as to the manner in which such a business shall be conducted, and for this purpose may, in the exercise of its police power, impose reasonable restrictions as to the kind of building which may be used for such purposes, as, for instance, that it shall be of brick or stone in large and closely-built cities, and that it shall have sufficient drainage, and may prescribe within reasonable limits the hours during which the work of the laundry shall be suspended. Ex parte Moynier, 65 Cal. 36, 2 Pac. Rep. 728; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730. Regulations such as these were held in the cases above cited to be merely police regulations, which any municipality possessed of the ordinary powers of such corporations may exercise with a view to promote the health and safety of the community. But the ordinance which the petitioner here is charged with violating is not of this character, and the restrictions which it imposes upon the right to carry on a public laundry have no tendency to promote the public health, or in any way to secure the public comfort or safety. The sections of the ordinance above quoted bear no kind of relation to such objects, and do not attempt to regulate the business mentioned with the view of accomplishing such ends, but they commit the right to carry on such business at all, in all but two blocks of the town, to the unrestricted will and caprice of a majority of the real property owners within the block within which it is proposed to establish such laundry, and of the four blocks immediately surrounding such block. Such a condition imposed upon the right of a person to maintain a public laundry is not only an unauthorized interference with the inalienable right of such person to engage in a lawful occupation, but also with the right of the owner of property to devote it to a lawful purpose. The personal liberty of the citizen and his rights of property cannot be thus invaded under the disguise of a police regulation. In re Jacobs, 98 N. Y. 98. In the case of Yick Wo v. Hopkins, 118 U. S. 373, 6 Sup. Ct. Rep. 1064, the supreme court of the United States had before it the question of the validity of an ordinance of the city and county of San Francisco, which made it unlawful for any person to "carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." This provision of the ordinance was in that case held void, as conferring upon the municipal authorities an arbitrary power to give or withhold consent to the carrying on of such business in buildings not made of brick or stone. In passing upon that question, the court, speaking by Mr. Justice MATTHEWS, said: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom this consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living."

The ordinance now before us is not less illegal and arbitrary in its provisions, as it makes the right of the trustees to grant permission to carry on a laundry outside of the two blocks dependent entirely upon the consent of a certain number of property owners who are not accountable to any one for their action, and who are not required to give or have any other reason for their refusal to give such consent than their mere will. It is very clear to us that the right of an owner to use his property in the prosecution of a lawful business, and one that is recognized as necessary in all civilized communities, cannot be thus made to rest upon the caprice of a majority or any number of those owning property surrounding that which he desires to use. An ordinance in all respects similar to this was held unconstitutional in the Laundry Ordinance Case, 7 Sawy. 528, 13 Fed. Rep. 229, and it was there said by the court: "In the business of a laundry there is nothing objectionable that may not be urged against all occupations in the city and county. If, therefore, the supervisors can make its prosecution depend upon the approval of others in its neighborhood, they may require a similar approval for the prosecution of other business equally inoffensive. * * * Such a restriction upon the freedom of the pursuit of a lawful occupation is not authorized by any power vested in the board of supervisors, and it may be doubted whether it could be authorized by any legislative body under our form of government." There is a wide distinction between the ordinance in this case and that which was upheld by this court in Ex parte Christensen, 85 Cal. 213, 24 Pac. Rep. 747. This ordinance deals with an occupation which is harmless in itself and useful to the community, while the other was sustained as a police regulation of a business in which the citizen has no inherent right to engage, but which may be prohibited altogether, or only permitted under such conditions and restrictions as will, in the judgment of the lawmaking power, limit to the utmost the evils which often attend it. Petitioner discharged.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; GAROUTTE, J.; PATERSON, J.

MCFARLAND, J. I concur in the judgment.

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96 Cal. 376

MILLER et al. v. MILLER et al. (No. 14,109.)

(Supreme Court of California. Oct. 19, 1892.)

TAX DEEDS—CONCLUSIVENESS—NOTICE TO OWNER.

Pol. Code, § 3786, provides that the matters recited in the certificate of tax sale shall be recited in the tax deed, and that such deed shall be prima facie evidence of certain matters specially named therein. Section 3787 provides that such deed, duly acknowledged, is conclusive evidence of the regularity of all other proceedings from the assessment, inclusive, up to the execution of the deed. Section 3785 provides that the purchaser of land sold for delinquent taxes must serve a certain notice on the owner 30 days before the expiration of the time for redemption, or 30 days before he applies for a deed, and that the owner, until such notice is given, shall have the right of redemption indefinitely. *Held*, that such a deed is not prima facie evidence that such notice has been served.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

An action by R. S. Miller and Carrie Miller against W. A. L. Miller and another to quiet plaintiffs' title to a certain lot of land acquired by a tax deed. From a judgment for defendants, plaintiffs appealed. Judgment affirmed.

Chas. F. Burton and *A. C. Freeman*, for appellants. *W. A. S. Nicholson*, for respondents.

GAROUTTE, J. This is an action to quiet title, and an appeal is before us from the judgment upon a bill of exceptions. Appellants introduced their tax deed in evidence and rested, insisting that such deed established a *prima facie* title in them. We are unable to see that respondents' evidence was material to the case in any degree, and consequently we have nothing before us for consideration upon the question of title save the tax deed of appellants. In viewing a tax deed from a common-law standpoint, the author of Blackwell on Tax Titles, at section 845, says: "This deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner as in grants from the government, or in deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises, upon the mere production of the deed, that the facts upon which it is based had any existence." Such being the *status* of a tax deed at the common law, it is apparent that whatever dignity and value is attached to this deed, as evidence of title, is granted it by the statutory provisions of this state. Section 3786 of the Political Code declares that the matters recited in the certificate of sale must be recited in the deed, and that such deed, duly acknowledged or proved, is primary evidence (*prima facie*) of certain matters and proceedings, specially naming them. Section 3787 provides that "such deed, duly acknowledged or proved, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed." These provisions of the statute are plain and explicit, and, in the absence of other and additional legislation, there would seem to be no question but that the production of a tax deed in evidence established a *prima facie* title. But several years subsequent to the foregoing legislation a statute was enacted, providing that "the purchaser of property sold for delinquent taxes, or his assignee, must, 30 days previous to the expiration of the time for redemption, or 30 days before he applies for a deed, serve a notice upon the owner, stating certain matters, and further providing that the owner of the property shall have the right of redemption indefinitely, until such notice shall have been given," etc. It is now insisted by respondents that the service of this notice is a condition precedent to the execution of the deed, and, appellants having failed to prove such service, the deed was issued without authority, and therefore passed no title. An enactment, similar in principle to the one under investigation, is found in the statutes of New York, and also in the constitution of Illinois; and it has been uniformly held in those states that, in the absence of such notice, the deed was no evidence of title. Holbrook v. Fellows, 38 Ill. 440; Wilson v. McKenna, 52 Ill. 43; Williams v. Underhill, 58 Ill. 137; Blackw. Tax Titles, § 699. The service of this notice is not one of those matters established *prima facie* by the deed, under section 3786, supra, but it is insisted that under section 3787, supra, the deed *ipso facto* is made conclusive evidence of such service. If the authority of the officer to make the deed depends upon the service of a certain notice, it is very questionable whether the legislature has the power to declare that the deed shall be conclusive evidence that such notice was served, but we do not find it necessary to enter into a discussion of that question.

As already suggested, this enactment of the legislature, requiring this notice to be served, etc., is of much more recent date than section 3787 of the Political Code; and it is very apparent, upon an inspection of these provisions, that the legislature never intended that it should come within the purview of that section. It certainly should not be held by this court to be embraced within the rules of evidence there provided, in the absence of an express declaration to that effect, for the section is severe and rigid in its operation. The words "conclusive evidence of the regularity of all other proceedings," as used in the section, refer, and were intended by the framers of the provision to refer, to the acts and proceedings required to be done and had at the hands of the public officials intrusted with the various steps leading up to the execution of a tax deed, and not, as in this case, to something required to be done by the applicant for the deed. This is the construction placed upon a very similar provision by the supreme court of Iowa, and is undoubtedly the true one: "But it is said that the same section provides that the deed shall be conclusive evidence 'that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser, were done, except in regard to the points named in this section wherein the deed shall be presumptive evidence only;' and that the deed is not made presumptive evidence of the notice of expiration of the time of redemption, and, as that is necessary to vest title in the purchaser, the deed must, under the provision, be regarded as conclusive evidence of it. This provision is found in subdivision 3 of the section in question, which purports to treat of the prerequisites to be complied with by the officers having any part in the transaction relating to or effecting the title conveyed. We think it does not extend further. The giving of notice of the expiration of the time of redemption is something to be done by the holder of the tax certificate. The statute went very far in making the deed conclusive evidence that the prerequisites to be complied with by the officers had been complied with; yet the officers were elected for the purpose of doing the things constituting the prerequisites, and are wholly disinterested. We cannot think that the statute designed to allow the holder of the tax deed to rely upon it as conclusive evidence of the things to be done by himself. The effect of the statute requiring notice to be given of the expiration of the time of redemption is to lull property owners into security. If a tax deed is conclusive evidence of notice, where there is no notice, the provision constitutes a most dangerous trap, instead of a protection to property owners." Reed v. Thompson, 56 Iowa, 455, 9 N. W. Rep. 331, approved in Wilson v. Crafts, 56 Iowa, 450, 9 N. W. Rep. 333.

The authorities in this state, indirectly at least, hold that the tax deed is not conclusive evidence as to these matters. In Landregan v. Peppin, 86 Cal. 126, 24 Pac. Rep. 859, the deed was declared void because the recitals, upon this question of notice therein contained, showed that the law had not been followed in that regard. Now, if the deed *ipso facto* was conclusive evidence that the proper notice was given, any recitals therein showing to the contrary were of no avail, for, if conclusive, the matter was foreclosed from investigation; and it follows that the court, in order to give weight to these recitals of the deed, necessarily held that the statute did not conclude and bar an investigation as to the merits of the notice. In Hughes v. Cannedy, 92 Cal. 386, 28 Pac. Rep. 573, the deed was declared void because the notice posted upon the land was fatally defective. If the deed was conclusive as to the sufficiency of the notice, this decision of the court could not be supported. It is also intimated, in Rollins v. Wright, 93 Cal. 399, 29 Pac. Rep. 58, that section 3787 of the Political Code has no reference to this matter. Let the judgment be affirmed.

We concur: Paterson, J.; Harrison, J.

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96 Cal. 384

SLIGHT v. PATTON et al. (No. 14,909.)

(Supreme Court of California. Oct. 21, 1892.)

Enforcement of Mechanic's Lien—Pleading—Notice of Claim.

1. Under Code Civil Proc. § 1187, prescribing what a notice of claim of mechanic's lien shall contain, a statement of the date of completion of the work not being required, a mistake in stating such date will not affect the lien where the complaint in an action to enforce such a lien alleges that the notice was, in fact, filed within 30 days after the completion of the work.

2. Where a notice of claim of mechanic's lien by a subcontractor is made a part of the complaint, it is not open to a general demurrer on the ground that such notice fails to set out the plans and specifications of the original contract.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by George Slight against G. S. Patton and others to enforce a mechanic's lien. A general demurrer to the complaint was sustained, and judgment entered for defendant. Plaintiff appeals. Reversed.

Daggett, Brown & Adams, for appellant. *N. O. Bradley*, for respondents.

VANCLIEF, C. Action to enforce a mechanic's lien. A general demurrer to the complaint was sustained, and plaintiff having declined to amend his complaint, judgment was rendered in favor of defendants. The plaintiff brings this appeal from the judgment on the judgment roll, and contends that the court erred in sustaining the demurrer to his complaint. The complaint shows that plaintiff was a subcontractor with Thompson & Gamble, who were the original contractors with the defendant Patton, to build and paint for the latter on his land a house and barn and certain other structures, and to furnish all the materials therefor, for the gross sum of $5,775, payable on the completion and acceptance of said buildings and structures, or within 10 days thereafter; that no part of this original contract price was made payable 35 days after the completion of the contract; that the work was commenced by the original contractors on or about the 20th day of July, 1889, and completed November 20, 1889, and that neither said original contract, nor any note or memorandum thereof, was ever filed in the office of the county recorder in the county in which said structures were to be built. And further avers that after the original contractors had commenced the erection of said buildings, to wit, on or about August 30, 1889, plaintiff entered into a contract with them whereby it was agreed that he should do all the painting of said buildings and furnish all the materials therefor, according to the plans and specifications of said buildings, for the sum of $541.70, to be paid within a reasonable time after the completion of such painting; and that plaintiff duly performed his contract with the original contractors to paint said buildings, and completed the same on the 20th day of November, 1889, on which day said buildings and structures were finished and completed. The complaint then proceeds to state the filing and recording of plaintiff's notice of lien within 30 days after the completion of said buildings and structures, a copy of which notice is exhibited as a part of the complaint. In considering the objections to the complaint, a more particular statement of those portions of it alleged to be insufficient will be made.

1. The notice of plaintiff's claim of lien, which was filed on December 18, 1889, contains the following statement: "Said contract [subcontract] has been fully performed on the part of said George Slight, and the same was completed and the work and materials furnished for said buildings or structures, finished on the 20th day of August, 1889, and thirty days have not elapsed since the same was completed, and said buildings or structures finished." Counsel for respondents contends that this statement shows that the notice of lien was not filed within 30 days after the buildings were completed, and, therefore, that no lien was created. It is true that if the buildings were completed on August 20th, the filing of the notice of lien, on the 18th day of December following, was too late; but the notice also states that at the time it was filed 30 days had not elapsed since the buildings were completed; and further states, that plaintiff's subcontract to do the painting was made on or about August 30, 1889. As both of these statements are utterly inconsistent with the statement that the buildings were completed on August 20, 1889, and since the official date of the filing of the notice is December 18th, it is quite apparent that the statement that the buildings were completed on August 20th was a clerical mistake of writing the word "August" instead of "November;" and so it is alleged in the complaint. Phil. Mech. Liens, 331. But whether the mistake sufficiently appears on the face of the notice or not, plaintiff's lien, as against defendant Patton, is not affected thereby, if in fact the notice of lien was filed within 30 days after the buildings were completed, as alleged in the complaint; for it was not necessary that the notice of lien should have stated the date of the completion of the buildings. Section 1187, Code Civil Proc., prescribes what the notice shall state, and does not require that it shall state the date of the completion of the work or structures, nor even that the filing of the notice is within 30 days after the completion of the work. Harmon v. Ashmead, 68 Cal. 325, 9 Pac. Rep. 183; Jewell v. McKay, 82 Cal. 146, 23 Pac. Rep. 139. No record, evidence, or notice of these facts is necessary to create the lien, although it is necessary that plaintiff allege and prove that the notice of lien was filed within 30 days after the completion of the building. It is so alleged in this case, and the defendants should have been required to answer the allegation. The complaint is also sufficient as against the defendant Hutchinson, who was joined as a party defendant by the usual allegations that "he has or claims to have some claim or lien upon said buildings and the land upon which they are situated, but such claim or lien is subsequent to and subject to the lien of plaintiff hereinbefore set out." By his demurrer, Hutchinson admits these allegations of the complaint to be true. If, therefore, the complaint is good as against Patton, it is necessarily good against Hutchinson.

2. That the notice of lien states the names of the persons by whom plaintiff was employed, and to whom he furnished materials, is too clear to admit of argument.

3. The only other objection urged against the complaint is that "the notice does not contain a sufficient statement of the terms, time given, and conditions of his contract." As to this, the notice states that on or about the 30th of August, 1889, the plaintiff entered into a contract with Thompson & Gamble, the original contractors, under and by virtue of which he "was to perform certain labor and furnish certain materials therefor, and the following is a statement of the terms, time given, and conditions of said contract, to wit: To do all painting, staining, varnishing, and tinting, and all neces-

sary materials to be furnished by said Slight, [plaintiff,] as specified in the plans and specifications of said buildings or structures, at and for the sum of $541.70 gold coin of the United States, no time specified for payments." The only specified objection to this is that it does not set forth the plans and specifications of the original contract in regard to the painting. It is not necessary to determine whether a special demurrer on this ground should have been sustained, as there was no such demurrer; but, as against a general demurrer, I think the complaint was sufficient in this respect. Jewell v. McKay, 82 Cal. 150, 23 Pac. Rep. 139. I think the judgment should be reversed, and the cause remanded, with instructions to the lower court to overrule the demurrer, and proceed in the cause.

We concur: HAYNES, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with instructions to the court below to overrule the demurrer, and proceed with the cause.

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96 Cal. 371

EATON v. BROWN et al., Election Commissioners. (No. 15,194.)

(Supreme Court of California. Oct. 15, 1892.)

CONSTITUTIONAL LAW—ELECTIONS—MARKING BALLOT WITH CROSS — PARTY DESIGNATIONS ON TICKET.

1. Pol. Code, §§ 1197, 1205, as amended by St. 1891, c. 130, provide that the names of all political parties which have filed certificates of nomination of candidates in accordance with the statutory requirements shall be printed, in separate lines, at the head of the official ballot, and that an elector who desires to vote any such party ticket straight may do so by putting a cross opposite the name of such party; but a ballot so marked shall not be counted, if marked in any other place, except to indicate a vote on a constitutional amendment or other question. *Held*, that such sections were unconstitutional, as resulting in the partial or total disenfranchisement of any elector so voting unless his party had a full state and local ticket.

2. There should be no party designation printed at the head of the official ballots.

3. Voters can only express their choice by placing a cross opposite each name or proposition voted for, except, in voting for presidential electors, the mark may be placed opposite the party group.

In bank.

Application by F. W. Eaton for a writ of *mandamus* to compel William A. Brown and others, board of election commissioners, to have the words "Citizens' Nonpartisan Ticket" printed at the top or head of the municipal ballots to be used at the coming election. Writ denied.

Charles J. Swift, for petitioner. *H. L. Gear*, for registrar. *Dorn & Dorn* and *Maxwell & McEnerney*, for respondent.

BEATTY, C. J. At its last session the legislature, by a series of amendments to the Political Code, ingrafted upon our election law the system of voting by means of what is popularly known as the "Reformed" or "Australian" ballot.[1] The main feature of the system is a uniform official ballot, printed and supplied by the proper public officers, containing the names of all candidates to be voted for, upon which the voter designates his choice by stamping a cross. In all cases this may be done by stamping the cross opposite the name of each candidate for whom the elector desires to cast his vote. But by a clause at the end of section 1197 it is provided as follows: "At the head of each ballot shall be printed, in separate lines, the names of all political parties which have filed certificates of nomination of candidates in accordance with sections one thousand one hundred and eighty-six and one thousand one hundred and eighty-seven of this Code, thus: 'Regular Republican Ticket,' (straight.) Opposite the name of each party, and on the same line therewith, there shall be a margin similar to that therein required to be left opposite the name of each candidate, in which the voter may place the mark in the manner specified in section one thousand two hundred and five of this Code,[2] if he desire to vote for all of the candidates of such party; but a ballot so marked shall not be counted, if it be stamped in any other place, except to indicate a vote or votes upon a constitutional amendment or other question." The petitioner in this case is one of the candidates of a party calling itself the "Citizens' Nonpartisan Party," which has nominated a list of candidates for county and local offices in the city and county of San Francisco. He claims that said party has complied with all the conditions entitling it to have printed at the head of the municipal ballots to be used at the approaching election in the city and county of San Francisco the words, "Citizens' Nonpartisan Ticket," as a party designation, by which it may be voted straight by stamping a cross opposite such heading. He has demanded of the defendants, who are respectively the registrar and the members of the board of election commissioners of the city and county of San Francisco, that they cause the ballots to be used at said election to be so printed, and they have refused. He therefore seeks by this original proceeding to compel the defendants by *mandamus* to comply with his demand.

The argument of counsel has been principally devoted to the question whether or not the party by which the petitioner was nominated has shown that its proceedings bring it within the terms, or entitle it to the privilege conferred by, the provision above quoted. But the conclusion at which we have arrived renders a decision of these questions entirely unnecessary. We are of the opinion that this provision of the law is unconstitutional, and wholly void. It is an attempt to discriminate against classes of voters, and its effect, if allowed to be valid, would be to subject such classes to the alternative of partial disfranchisement, or to the casting of their votes upon more burdensome conditions than others, no better entitled under the fundamental law to the free and untrammeled exercise of the right of suffrage. The vital importance of the question involved would justify an extended and elaborate discussion of the grounds of our conclusion, but the extreme necessity of a speedy decision, in order to afford a sufficient opportunity to print the ballots, and to inform the electors of the proper mode of expressing their choice, compels us to rest content with the briefest statement of our views. It is a well-known fact, illustrated by the history of the party which the petitioner represents, that there are parties having merely local existence,—parties, that is to say, which, upon some local issue affecting a single county or a few counties, poll in such county or counties at least 3 per cent. of the votes cast at a given election, or can secure the signatures of 5 per cent. to a petition, but have no existence elsewhere in the state. There are other parties, perhaps, which at an election will cast 3 per cent. of all the votes cast in the entire state, but in many counties will cast a smaller percentage of the votes. In the case first supposed, the party casting 3 per cent. of the vote in a county at one election could at the next election, upon any construction of the law, nominate by a convention a full county ticket, could certify it, and secure a ballot heading by party designation, but such designation would not apply to any candidate for a state or district office, such as presidential electors or members of congress. The result of having a party designation at the head of the ticket would be, therefore, to disfranchise every voter who made use of it as to all state and district officers, or, if he attempted to supplement his straight ticket by stamping his choice for individual candidates for such offices, he would be disfranchised altogether, for, under the law, his ballot could not be counted. The ticket heading in such case could do the voters of a party no possible good, but would simply be a lure by which they could be, and in many instances would be, entrapped into a loss of their votes. In the second case supposed, all the ballots used in the state would have a party heading, but in many of the counties the party would have no local ticket, and in all such counties the voter stamping the heading would vote for state officers only, and would be disfranchised as to all district and county offices, or, if he attempted specially to designate his choice for such offices, his vote would be wholly lost. Such being the results inevitably flowing from the operation of this provision of the law, if allowed to be operative, it can readily be seen that it would be no benefit to any party to allow it a ticket heading unless it had a full state and local ticket, for no voter of the party could express his choice by stamping the party designation without partial or total disfranchisement. His supposed advantage would be but a delusion and a snare. Even in San Francisco, at the approaching election, if, as is said to be the case, the Nonpartisans have nominated candidates for the legislature, and if, according to the official opinion of the attorney general, the names of such candidates are to be printed on the general or state ticket along with the names of candidates for congress and for presidential electors, it would be just as much the duty of the defendants to put the party designation on the general as on the local ticket; and the necessary result would be that every supporter of the party who should thus be misled into voting a straight ticket would lose his vote for member of congress and for presidential electors. I imagine the supporters of the movement would scarcely desire the privilege of a party heading at such a price.

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[1] St. 1891, c. 130.

[2] Pol. Code, § 1205, as amended by St. 1891, c. 130, provides that "any elector who desires to vote for an entire party ticket may mark a cross * * * against the political designation of such party, and shall then be deemed to have voted for all persons nominated by such party."

Upon these grounds we hold that this provision destroys the just and equal and uniform operation which in an election law, of all others, is demanded, no less by the express terms of our fundamental law than by the genius and spirit of our institutions. It is therefore void and inoperative. There should be no party designations printed at the head of the tickets, because there can be no voting by stamping such designation. Voters can only express their choice by placing a stamp opposite the name of their candidate for each office, or by writing the name of a candidate in the blank space left therefor, or their answer to each question or proposition or proposed amendment to the constitution, except only in case of presidential electors, who may, under the law, be voted for in groups by a single impression of the stamp. Since this is the only mode by which a voter can express his choice, the printing of a party designation at the head of the ticket could do no good, but only harm, by misleading some voters, and causing them to lose their votes. The officers charged with the preparation of the official ballots should therefore be careful to omit the printing of such headings, and the voters should be thoroughly instructed to express their choice in the manner herein indicated. It will be understood, of course, that we do not hold the new law unconstitutional, except as to the single provision under discussion. In other respects, so far as we are at present advised, it may be fully carried out.

The writ of mandate is denied.

We concur: HARRISON, J.; PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.

GAROUTTE, J., (*concurring*.) It is very apparent from the reading of section 1197 of the act under consideration, in connection with the sections to which it refers, that in both spirit and letter it was intended that only parties polling 3 per cent. of the entire vote cast at the last general election should have a heading upon the ticket. Such being the fact, to my mind the law is clearly unconstitutional, in this: that it discriminates in favor of certain parties, and is therefore lacking in that uniformity of operation demanded by the constitution of this state. I concur in the judgment.

DE HAVEN, J. I concur in the foregoing opinion of Mr. Justice GAROUTTE.

(3 Cal. Unrep. 584)

GEORGESON v. CONSUMERS' LUMBER CO., (BUHNE, Intervener.) (No. 14,649.)

(Supreme Court of California. Nov. 1, 1892.)

SHERIFF'S SALE—WHEN SET ASIDE.

In a proceeding by a judgment defendant to set aside a sheriff's sale it appeared that 600,000 feet of lumber belonging to the execution defendant were sold to claimant for $700, and that the sale was made in lump for a grossly inadequate sum. *Held*, that the sale was properly set aside.

Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

(Not to be published in California Reports.)

Proceeding by the Consumers' Lumber Company to set aside a sheriff's sale on execution issued on a judgment in favor of Georgeson against said company, in which proceeding Buhne, Jr., intervened, and claimed the property as purchaser under the sale. From an order setting the sale aside, plaintiff, Georgeson, appeals. Affirmed.

Ernest Sevier and *Coonan & Sevier*, (*Horace L. Smith*, of counsel,) for appellant. *J. W. Turner*, for respondent.

PATERSON, J. Plaintiff recovered judgment against the defendant in the court below for the sum of $1,034.58. Thereafter an execution was regularly issued on the judgment, and levied upon 600,000 feet of lumber belonging to the defendant. The lumber was sold by the sheriff to the intervener, Buhne, Jr., on May 20, 1891, for the sum of $700. This is an appeal from an order vacating and setting aside the sale referred to. The court below evidently believed that the sale was improperly made in lump and for a grossly inadequate sum, and there is abundant evidence to show that such were the facts. Indeed, the court would have abused its discretion, we think, if upon the evidence before it the motion to vacate the sale had been denied. Hudepohl v. Mining Co., 94 Cal. 588, 29 Pac. Rep. 1025, cited by appellant, is not in point. That was an action in equity to set aside a sale of several disconnected parcels of land which had been sold *en masse*. The defendant therein was a vendee of the original purchaser without notice of any irregularity. There was nothing to show that a larger sum would have been realized from the sale if the property had been sold in parcels, or that a sale of less than the whole tract would have brought sufficient to satisfy the writ. A number of technical objections were made in the court below, and the rulings of the court thereon are urged here as error. It is sufficient to say that there is no merit in any of the objections.

The order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(3 Cal. Unrep. 585)

JONES v. CHALFANT et al. (No. 14,290.)

(Supreme Court of California. Nov. 1, 1892.)

EJECTMENT—INSTRUCTION ON EVIDENCE—DISMISSAL OF VERDICT FOR WANT OF JUDGMENT.

1. In ejectment, plaintiff showed title by patent from the government, and defendant's title was a sheriff's deed on foreclosure of a mortgage given by plaintiff prior to receiving his patent. Plaintiff did not attack the foreclosure proceedings, nor object to their admission in evidence. In instructing the jury, after stating the evidence, the court directed a verdict for defendant, "if these facts all appear" as stated. *Held*, that by thus instructing the jury there was no violation of Const. art. 6, § 19, which provides that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

2. Code Civil Proc. § 581, provides that an action may be dismissed, or judgment of nonsuit entered, "when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months." *Held*, that where defendant, on receiving a verdict, prepared a draft of judgment, and requested the clerk to make the entry, the verdict should not be dismissed, though the clerk neglected for more than six months to enter the same.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

Ejectment by David Jones against John E. Chalfant and others. Defendants had judgment, and plaintiff appeals. Affirmed.

Thomas H. Bond, for appellant. *T. L. Carothers*, for respondents.

BELCHER, C. This is an action of ejectment to recover possession of 160 acres of land in Mendocino county. The case was tried before a jury on June 15, 1889, and on that day a verdict was returned and entered in favor of the defendants. Immediately after the entry of the verdict, the defendants' attorney prepared the draft of a judgment, and handed it to the clerk of the court, with a request that he enter the same. The court did not order the case to be reserved for argument or further consideration, or grant a stay of proceedings, but the clerk failed to enter the judgment until September 12, 1890. The plaintiff moved for a new trial on a prepared statement of the case, and his motion was denied on April 26, 1890. On September 3, 1890, the plaintiff gave notice to defendants that he would move the court to set aside the verdict and decision on the ground that no judgment had been entered in the case, and defendants had neglected to demand and have judgment entered therein for more than six months after they were entitled thereto. This motion was heard by the court, and denied, on September 12, 1890, and an order was then made directing the clerk to enter the judgment, and he accordingly did enter it on the same day; to all of which the plaintiff duly excepted. The plaintiff appeals from the judgment and from the order denying his motion to set aside the verdict.

The facts shown by the bill of exceptions are, in substance, as follows: The plaintiff, to show title in himself, introduced in evidence a patent from the United States, granting to him the demanded premises, dated April 9, 1881. The defendants then, to show that the title had passed from the plaintiff, and was vested in one of themselves, introduced evidence showing that the plaintiff and his wife mortgaged the land described in the patent to one Aaron Chalfant, to secure payment of a promissory note, on July 23, 1874; that the mortgage contained the words "grant, bargain, and sell;" that the note and the mortgage were duly assigned by Aaron Chalfant to John E. Chalfant, one of the defendants; that afterwards the mortgage was duly foreclosed by John E. Chalfant, and, under an order of sale issued in pursuance of the decree, the property was sold to him by the sheriff of the county; that there was no redemption from the sale, and afterwards, on March 20, 1883, the sheriff executed and delivered to the purchaser his deed of the property; and it was admitted that under a writ of assistance issued in the foreclosure case the plaintiff was ejected from the land by the sheriff. Upon these facts the case was submitted. The plaintiff requested the court to give to the jury a certain instruction, which it refused, and said: "I shall instruct this jury to find for the defendants." The court then stated the evidence to the jury, and concluded by saying: "If these facts all appear to your minds as I have stated them, then your verdict will be for the defendants in this case. Swear an officer. You need not retire unless you want to appoint one of your members foreman."

1. Appellant contends that the court, by its instructions, violated section 19 of article 6 of the constitution, and for that reason the judgment should be reversed. The section referred to provides: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." There is nothing in the record to show that the plaintiff in the court below objected to the foreclosure proceedings, or in any way attacked their regularity, or asserted their insufficiency to pass the title to the property to the purchaser. Nor is there here any such objection. It is true that the mortgage antedated the patent, but it purported to mortgage the property in fee, and in such case it is well settled that the after-acquired title inures to the benefit of the mortgagee. Civil Code, § 2930; Clark v. Baker, 14 Cal. 612; Kirkaldie v. Larrabee, 31 Cal. 455; Christy v. Dana, 42 Cal. 174; Association v. Viera, 48 Cal. 572; Camp v. Grider, 62 Cal. 20; Orr v. Stewart, 67 Cal. 275, 7 Pac. Rep. 693. Under these circumstances, there was nothing to be determined in the case except a question of law, and the court was justified in telling the jury what the verdict should be.

2. The appellant also contends that the court erred in not granting his motion to set aside the verdict. Section 581 of the Code of Civil Procedure provides: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * * (6) By the court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months." The plaintiff's motion was not a motion to dismiss the action, but, in effect, was a second motion for new trial. But, conceding that the motion might be made under the provision of the Code above quoted and relied upon, still that provision is not mandatory, and does not confer an absolute right to the dismissal. Rosenthal v. McMann, 93 Cal. 505, 29 Pac. Rep. 121. The defendants did not neglect to demand that the judgment be entered in proper time; and, while it does not appear that they paid or tendered to the clerk the fee for the entry, it does not appear that they did not do so. In view of the action of the court, it will be presumed, therefore, that the failure to enter the judgment was the result of the negligence of the clerk, and not of the defendants. It follows that the judgment and order should be affirmed, and we so advise.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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3 Cal. Unrep. 576

WADE v. WADE. (No. 13,814.)

(Supreme Court of California. Oct. 20, 1892.)

HUSBAND AND WIFE—DESERTION—RIGHT TO MAINTENANCE—CONDONATION.

The act of a wife, in allowing the husband to return and cohabit with her, after she has obtained a decree for separate maintenance

on the ground of desertion, amounts to condonation, although done under the impression that her refusal would furnish ground for divorce; and the maintenance, therefore, must be discontinued.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; E. R. GARBER, Judge.

Application by Annie Wade against John C. Wade, her husband, for an order requiring defendant to show cause why a separate maintenance obtained by her should not be increased. Defendant asked that the maintenance be discontinued altogether, and appealed from an order refusing such discontinuance. Reversed.

W. R. Daingerfield, for appellant. *J. D. Sullivan*, for respondent.

TEMPLE, C. The parties are husband and wife. In 1884 plaintiff brought suit under section 137 of the Civil Code to obtain a decree for a separate maintenance, charging the defendant with desertion. She obtained a decree March 5, 1885, requiring defendant to permit her to continue to occupy her then residence, which was a house belonging to defendant, and awarding her $27.50 per month for her support. A few days after the decree was entered, to wit, as early as March 20, 1885, defendant returned to plaintiff, since which time the parties have cohabited together as husband and wife. August 14, 1889, upon the application of plaintiff, an order was obtained from the superior court of the city and county of San Francisco, requiring defendant to show cause why the allowance should not be increased. The defendant appeared and made his showing in answer to the order, and, among his reasons why the allowance should not be increased, alleged "that ever since the month of September, 1885, said plaintiff and this defendant have lived together, occupying the same house and cohabiting together as husband and wife," and asks that the decree be vacated and set aside. It is claimed that the act alleged amounts to condonation. The parties seem agreed that, if there has been a condonation, the allowance should be discontinued. Whether the facts show a condonation is the point to be determined. It is claimed that she consented to matrimonial intercourse through a misapprehension of the law. She has a horror of divorce, and feared he would have a cause of action against her to obtain one, unless she consented. It is also claimed that, admittting that the acts of the plaintiff amount to condonation, still such condonation has been revoked, under section 121 of the Civil Code, by conjugal unkindness on the part of the defendant, which, though not amounting to a cause for divorce, is sufficiently habitual and gross to show the conditions were not accepted in good faith. Neither party seems to have had the slightest suspicion that the resumption of marital relations would have any effect upon the right of the wife to her monthly allowance, for the husband faithfully paid it month by month. If this constituted a mistake of law, it was mutual. But I think it did not amount to that. Plaintiff says she did not wish her husband to get a divorce, and consented to marital intercourse to prevent his having a good ground for a divorce. In this case she was not at all in error. It did have that effect, and it would seem from this that she at least fully understood the consequence of the act. But her willingness to restore conjugal relations resulted from the false impression that her refusal would furnish a ground for a divorce. Forgiveness is an amiable trait, and it is a pity that she simulated a virtue for a personal end, but the effect must be the same. Why she did not wish her husband to get a divorce is utterly immaterial. Suppose she had condoned her husband's offense under the mistaken impression that by so doing she could control his testamentary power over his property. It would have been a mistake, but not a mistake as to the effect of the act in restoring conjugal relations. In fact, as in this case, the mistaken policy itself would make more evident the intent to rehabilitate the marital relation. She exacted no conditions for the condonation, and, if she had, I think there was no evidence of habitual gross unkindness sufficient to show that the condonation had not been accepted in good faith. It was rude to call her a "judicial pauper," but the language imputed nothing beyond the fact that he was paying a forced allowance for her support. That he was not sociable, and did not always eat with her, cannot, under the circumstances, be called gross unkindness. I think the order should be reversed, and the court directed to enter an order discontinuing the separate maintenance.

We concur: FOOTE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed, and the court below is directed to enter an order discontinuing the separate allowance.

(96 Cal. 400)

STARK v. WELLMAN. (No. 14,896.)

(Supreme Court of California. Oct. 29, 1892.)

CAUSES OF ACTION—MISJOINDER—PREJUDICIAL ERROR.

1. A complaint in the first count stated that plaintiff delivered to defendant, at his special instance and request, a package containing $650 in coin, in consideration of which defendant agreed to take due and proper care of it, and to redeliver the same to plaintiff on demand, which he had failed to do, through his gross carelessness and misconduct. In the second count it stated that on a day named plaintiff was the owner and entitled to the possession of a certain package of coin worth $650, which, being in defendant's possession, he converted to his own use. *Held*, that the cause of action in the first count was for a breach of contract, and therefore improperly joined with the cause of action founded on a tort in the second count, under Code Civil Proc. § 427, providing that causes of action so united must all belong to one only of these classes.

2. In such case prejudice will be presumed, since such joinder is expressly forbidden by statute, and it does not affirmatively appear that no injury was done thereby.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by Herman Stark against Charles Wellman on contract and for the conversion of money. From a judgment for plaintiff, defendant appeals. Reversed.

E. W. Wilson, for appellant. *J. F. Coonan* and *D. Sevier*, for respondent.

TEMPLE, C. This case presents only the question whether different causes of action have been improperly united in a complaint. It consists of two counts or separate statements of two causes of action. The first charges that plaintiff delivered to defendant, at his special instance and request, a package containing $650 in coin, in consideration of which defendant undertook and agreed to take due and proper care of it, and to redeliver the same to plaintiff on demand; that defendant did not take due and proper care of said package, but so carelessly conducted himself with respect thereto that it was lost through his gross carelessness, negligence, and improper conduct, and that he failed to redeliver the same on demand; wherefore plaintiff demanded judgment for damages. In the second cause of action it is averred that on a day named plaintiff was the owner and entitled to the possession of a certain package of coin, worth $650, which, being in the possession of defendant, he converted to his own use, etc. A special demurrer was interposed to this complaint, specifically objecting to the joinder, on the ground that the first is a cause of action for the breach of a contract, and the second is founded upon a tort. Respondent contends that both sound in tort; that the first is for a breach of a duty imposed by law, and not for the violation of a contract obligation. This contention cannot be sustained. It is true, the owner of property injured by the tortious act of another may sue for the injury in tort, without noticing a contract with the wrongdoer, of which the wrongful act is a violation. Shear. & R. Neg. § 22. But there can be no question that he may sue for the breach of his contract, as was done in this case. The duty which the defendant is charged with having violated is expressly derived from the contract. The cause of action averred in the second count is a conversion of personal property. These two causes of action cannot be joined, under section 427, Code Civil Proc.,[1] and it was error for the court to overrule the demurrer interposed on that ground. Whether the error was prejudicial is the only question remaining.

It would be going a great way for this court to say that one is not injured by being sued in a mode not only not authorized, but, if he object, expressly forbidden, by the statute. How can we say that he may not be able more conveniently and successfully to defend a single action than two,—one for breach of contract, and the other for injuries resulting from a tort? The issues would be more simple. He would have fewer questions to try, and would know exactly what was required. The rule here, of course, is that the court must be able to see that injury has not resulted, not that we cannot see that injury has resulted. And, again, how can we know that defendant had no counterclaim arising upon some other contract? If he had, the count upon the tort would prevent its being set up. It does not appear that there was any such claim; but, as it could not be set up, it could not appear. And, as already said, the rule does not require that injury should be shown. That is presumed from error, unless the court can see that it could not have been injurious. It is suggested here that a set-off might have been set up against the count on the breach of contract. If it could be, necessarily complications would arise from the diversity of claims; and, in case of a verdict for a lump sum, it could not be known what cause of action was considered well founded or whether defendant would be entitled to set off his claim. The classification of causes of action which may be united under section 427, Code Civil Proc., while intended to be founded upon manifest reason, is nevertheless to some extent arbitrary, and differs materially from that which prevails in most states. In nearly all, for instance, causes of action arising out of the same transaction, or transactions connected with the same subject of action, may be united. Had this been in our Code, it would have authorized the joinder of the causes of action in this case. It was in the Code from which it is supposed ours was copied, and, if so, was, of course, designedly omitted. This court may possibly think the rule which prevails elsewhere preferable, and that, if the lower courts follow such rule, no one would be injured; and thus section 427, Code Civil Proc., might be practically repealed under section 475. At the trial, plaintiff was permitted to amend the statement of his second cause of action by adding that the $650 claimed in that count was the identical $650 claimed in the first count. Although plaintiff announced that the amendment would be made, the amendment was not actually made until after the verdict and the entry of judgment. This is assigned as error, and the ruling is brought here by a bill of exceptions. But here, I think, we can plainly see that the defendant was not injured, and the difference between this case and the one first stated happily illustrates the rule by which to determine whether an error was prejudicial. In regard to the first, there may be matters of which we are unadvised, and it may have affected the policy of the defense. Here we know that the proposed amendment did not and could not have benefited the plaintiff or injured the defendant. It did not change the character of the complaint in any respect. But, if its effect had been to help the complaint, the defendant still was not injured, for he tried his case with reference to it, and was not prejudiced by the fact that it was not reduced to writing until afterwards. I think the judgment should be reversed, and the court below directed to sustain the demurrer.

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[1] Code Civil Proc. § 427: "The plaintiff may unite several causes of action in the same complaint, where they all arise out of (1) contracts, express or implied; (2) claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; (3) claims to recover specific personal property, with or without damages for the withholding thereof; (4) claims against a trustee by virtue of a contract, or by operation of law; (5) injuries to character; (6) injuries to person; (7) injuries to property. The causes of action so united must all belong to one only of these classes. * * *"

We concur HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to sustain the demurrer to the complaint.

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96 Cal. 397

GOODSELL v. ASHWORTH et al. (No. 14,477.)

(Supreme Court of California. Oct. 29, 1892.)

STREET IMPROVEMENTS—IMPROPER CONSTRUCTION OF SEWER — ACTION ON BOND OF STREET SUPERINTENDENT.

Under Street Law, § 22, (St. 1885, p. 160,) providing that the superintendent of streets shall give bonds, on which, if he fails to see the laws, ordinances, orders, and regulations relative to streets or highways executed, after notice of violation thereof, he shall be liable to any one injured in person or property in consequence of his official neglect; and section 11, providing that all persons directly interested in any work provided for in the act, feeling aggrieved by any act or determination of the superintendent relative thereto, shall appeal to the city council, and further providing that all the decisions of the city council shall in certain respects be final,—the remedy of one complaining of the superintendent's neglect in not seeing that a sewer was properly constructed in accordance with specifications is not confined to appeal, and, there having been none, he can sue on the bond.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by one Goodsell against one Ashworth and others. Judgment for defendants. Plaintiff appeals. Reversed.

Edward R. Taylor, for appellant. *John H. Durst*, (*Humphreys & Welch*, of counsel,) for respondents.

SHARPSTEIN, J. This action was brought on the official bond of defendant Ashworth, as superintendent of streets of San Francisco, for the purpose of recovering from him and his sureties damages alleged to have resulted to plaintiff by reason of the neglect of duty of said Ashworth in not seeing that a certain sewer was properly constructed in accordance with the specifications, and in making an assessment for the work, when he knew that the specifications under which the sewer was built had been violated in material respects. The bond, street contract, and specifications are all set out at length in the complaint, and the particular violations of duty specifically alleged, together with the manner in which the damage resulted to plaintiff. To the complaint a general demurrer was interposed, which was sustained by the court. Plaintiff declining to amend, a judgment was entered against him for costs, from which this appeal is taken.

The action is based upon section 22 of the street law, (St. 1885, p. 160,) which provides that the superintendent of streets "shall, before entering upon the duties of his office, give bonds to the municipality, with such sureties, and file such bonds, as may be required by the city council, and, should he fail to see the laws, ordinances, orders, and regulations relative to the public streets or highways carried into execution after notice from any citizen of a violation thereof, he and his sureties shall be liable upon his official bond to any person injured in his person or property in consequence of said official neglect." Counsel for respondents contend that the demurrer was properly sustained on the ground that, if the work was not done according to the contract and specifications, the remedy of appellant was an appeal to the board of supervisors, (and the complaint fails to allege such appeal,) which remedy is given by section 11 of the act above cited. That section does provide that all persons directly interested in any work provided for in that act or in the assessment, feeling aggrieved by any act or determination of the superintendent in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent, shall, within a specified time, appeal to the city council, which, on such appeal, may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the superintendent of streets relative to said work. It is further provided that "all the decisions and determinations of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have remedied and avoided." Appellant might have appealed to the board of supervisors, but did not; nor does it appear that any appeal was taken to said board by any one. Therefore there were no decisions and determinations of said board upon notice and hearing which could be final or conclusive upon all parties entitled to appeal. It is only where an appeal is taken that the decisions and determinations of the board are final and conclusive. Here there was no appeal, and no decisions or determinations of the board. The contention of respondents' counsel is that the remedy by appeal to the board of supervisors is exclusive, and that by failing to avail himself of that remedy appellant is without any remedy. The law does not say so. On the other hand, the same act that provides for an appeal to the board of supervisors gives the appellant a remedy by action upon the bond of the superintendent and his sureties. We must give, if we consistently can, force and effect to every clause of the act of the legislature;

and, if the legislature has provided two remedies, and made neither of them exclusive, we know of no reason for holding that a party entitled to one or the other may not select either. Judgment reversed, and cause remanded, with directions to the court below to overrule the demurrer to plaintiff's complaint, and allow defendants to file an answer thereto within 10 days after being notified that said demurrer has been overruled.

We concur: De Haven, J.; McFarland, J.

(3 Cal. Unrep. 578)

RICKS et al. v. LINDSAY. (No. 14,856.)

(Supreme Court of California. Oct. 29, 1892.)

Findings by Court.

It being the duty of the court to find on all issues without any request, refusal to adopt a requested finding prepared by counsel is not error, the only thing necessary being that the findings cover all the issues and be sufficient.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by A. A. F. Ricks and others against N. G. Lindsay. Judgment for defendant. Plaintiffs appeal. Affirmed.

Weaver & Crowe, for appellants. *J. N. Gillett*, for respondent.

Belcher, C. It is alleged in the complaint in this case that the plaintiffs were the owners, as tenants in common, of a strip of land in the city of Eureka, described as a strip 15 feet wide, and extending from the southeast corner of Tenth and H streets southerly along the east side of H street 1,081 feet, and that on the 13th day of May, 1890, the defendant unlawfully entered upon the said strip, and took down and removed therefrom a fence placed thereon by plaintiffs, to their damage in the sum of $250, for which they prayed judgment. The answer of the defendant alleged that the said strip of land was and is a part of H street, an open public highway within the corporate limits of the city of Eureka, and that the plaintiffs had no right to the use, occupation, or possession of said strip, or any part thereof; that during all the times mentioned in the complaint defendant was the city marshal of said city, and that the common council thereof had power to regulate all streets in the city, of which H street was one; that on or about the 1st day of May, 1890, the plaintiffs unlawfully encroached upon and obstructed the said street by building the said fence thereon; that on the 6th day of May, 1890, the corporate authorities of the city passed an order or resolution directing defendant, as city marshal, to remove all obstructions on H street; and that defendant thereafter, acting under said order, and not otherwise, removed said fence from said strip quietly and peaceably, the same being a public nuisance. The case was tried by the court, without a jury, and, after finding sundry probative facts, the court found as follows: "That the land described in plaintiffs' complaint is a portion of that part of H street lying between said Tenth and Fourteenth streets, and is a strip on the east side thereof, fifteen feet wide and 1,081.8 feet long. That in the month of April, 1890, plaintiffs inclosed said strip of land with a fence. But subsequently, and prior to the bringing of the action, the plaintiffs themselves tore down that portion of said fence erected between Tenth and Eleventh streets, leaving involved in this action only the fifteen feet extending from Eleventh to Fourteenth streets. That the defendant, acting as marshal of the city of Eureka and under the direction of the common council thereof, removed said fence from said strip of land lying between Eleventh and Thirteenth streets and from said H street. That defendant removed the same quietly and peaceably, and that said act of defendant in so removing the same is the alleged act of trespass complained of by the plaintiffs herein, and none other." And the court further found, as conclusions of law, as follows: "(1) That H street, from Tenth to Fourteenth streets as above set forth, is a public street for travel, seventy-five feet wide, for all persons having occasion to go that way on foot or with teams; (2) that the fence removed by defendant was an encroachment upon and an obstruction to said H street, and the defendant had the right to remove the same therefrom, and is entitled to a judgment for his costs herein expended." Judgment was accordingly entered that the plaintiffs take nothing by their action, and from that judgment and an order denying their motion for a new trial they have appealed. The motion for new trial was made upon a bill of exceptions, which contains numerous specifications of errors in law committed by the court, but no specifications, or attempted specifications, of the particulars in which the evidence is alleged to be insufficient to justify the decision. Only one error in law is referred to in the brief of appellants, and we may assume, therefore, that the other alleged errors are waived. But, whether waived or not, it is enough to say of them that we think the rulings of the court were proper. The error relied upon is that the court refused to adopt a certain finding of facts which plaintiffs prepared and requested the court to make. It does not appear that any exception was taken to this refusal, but, conceding that the point can be made without an exception, still we see no error in the action of the court. Under our present system of practice, the court is bound to find upon all the issues without any request to do so, and the parties here have no right to dictate as to what findings shall be adopted. Requests for findings are therefore unnecessary, and it is not error to disregard them.

The only question is, do the findings cover all the issues, and are they sufficient? Pereira v. Smith, 79 Cal. 232, 21 Pac. Rep. 739. The only other point made for a reversal of the judgment and order is that the conclusions of law were not justified by the facts found. The point is argued upon the theory that it does not necessarily result, from the probative facts found, that the strip of land in controversy was a part of H street, and so dedicated to public use. We do not think this point can be sustained. The probative facts found do, in our opinion, plainly tend to show that the strip was a part of the street, and was dedicated to the use of the public. It is not, however, necessary to determine whether the conclusions drawn by the court necessarily result from these facts or not. The court, as we have seen, also found, as an ultimate fact, "that the land described in plaintiffs' complaint is a portion of that part of H street lying," etc. That finding evidently justifies the conclusions of the court, and, as it is not assailed, it must be accepted as true. It follows that the judgment cannot be reversed upon any of the grounds urged, and we therefore advise that it and the order denying a new trial be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(3 Cal. Unrep. 581)

DARDEN v. CALLAGHAN. (No. 14,862.)

(Supreme Court of California. Oct. 29, 1892.)

ACTION FOR CONVERSION—EVIDENCE—AGREEMENT TO SELL.

Where suit was brought for the conversion of goods sold to defendant, but which plaintiff claimed had previously been sold to him, and the evidence, instead of showing a sale to plaintiff, tended only to show an agreement to sell, and that the goods should remain with the seller until a certain time, and be paid for on or before delivery, an instruction giving the essentials of a contract of sale is improper, as the belief might thus be induced that, under such a contract, plaintiff would have sufficient title to maintain the suit.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by Daniel Boone Darden against Bartholomew Callaghan. From the judgment, and order denying a new trial, defendant appeals. Reversed.

Ford & Burnell, for appellant. *J. W. Turner*, for respondent.

TEMPLE, C. This appeal is from the judgment and order denying a new trial. The action was to recover damages for the conversion of personal property, and was tried with the aid of a jury. Both parties claim to have purchased from one Dolly Edwards, who first sold or agreed to sell to plaintiff, and then to defendant. Whether the transaction with plaintiff was a sale or only an agreement to sell was an important issue in the case, for, if it were the latter only, he had not such a title as would enable him to maintain this action. The only evidence upon that subject is the testimony of the plaintiff himself. He says, in substance, that he deals in second-hand goods; that the vendor came to his place of business on January 2, 1891, and asked if he would buy her furniture. The same day (Friday) he called and made an inventory, and the next morning offered her $290 for it. She said she would let him know whether she would accept or not, and shortly after came, as he says, "and told me I could have the goods; that they were mine. I paid her $50 on the goods, and told her I would pay the balance that evening." He took a receipt for the money as follows: "Eureka, Cal., January 3, 1891. Received from D. S. Darden, on furniture, fifty dollars. Miss D. EDWARDS." She was going away, and wanted him to leave the goods there until Monday, so she could use the house, and save the expense of an hotel, and plaintiff consented. He testified: "Everything was placed as it would be fixed up in a house. The carpets were tacked down. The house was a two-story house, and both floors were furnished, including the halls. In the afternoon she came back to the store, and offered to return the $50. I was not present, and my clerk would not take it." On cross-examination he testified: "Question. The question I asked you was this: Are you positive that, according to your agreement, you were to pay her the balance of the money that evening, and leave the goods there until Monday? Answer. Yes, sir; I was." On the same day that the contract was made with the plaintiff, and before he had tendered the balance of the purchase money, defendant bought the goods, paid for them, and they were delivered to him.

It seems evident from plaintiff's testimony that the goods were not to be delivered to plaintiff until paid for. If defendant had not purchased, plaintiff would not have been entitled to demand the goods on Monday without having paid or offered to pay for them; and had they been destroyed by fire in the mean time, it seems equally plain that the loss would not have been his. If the price is to be paid before or on delivery, the title does not pass until payment is made. There was here neither delivery nor payment of the price. Blackwood v. Packing Co., 76 Cal. 212, 18 Pac. Rep. 248, and authorities there cited. There being no conflict in the evidence upon this subject, and no chance for construction, and both parties accepting the evidence as true, its effect, as constituting a sale or an agreement to sell, was a question of law for the court. The evidence did not tend to prove more than an agreement to sell. That would not confer title, without which plaintiff cannot maintain this suit. At the request of plaintiff, and over the objections of defendant, the court instructed the jury as to what was essential to a valid contract of sale, under the statute of frauds. Such an instruction was not pertinent to any issue in this case, and may have been prejudicial, as calculated to induce the jury to believe that a valid agreement for the purchase of the property would confer upon plaintiff sufficient title to maintain the action. Indeed, it is difficult to imagine any other purpose in giving it. I can imagine no circumstance which can justify such an instruction in a case of this character. I cannot see how the rule found in section 3294 of the Civil Code could be made applicable to this case, even had there been evidence tending to establish a sale to plaintiff, rather than a mere agreement to sell.

I think the verdict is against the evidence, and that the court erred in the respects mentioned, and that the judgment and order should be reversed, and a new trial had.

We concur: **Belcher, C.**; **Vanclief, C.**

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

(96 Cal. 388)

PAIGE et al. v. ROEDING et al. (No. 13,738.)

(Supreme Court of California. Oct. 25, 1892.)

APPEAL—JUDGMENT ROLL—REVIEW—AGENCY—WHEN EXISTS.

1. Where a court, after having rendered judgment in a certain cause, sets it aside and renders another judgment, both of which are presented on appeal by the opposing counsel as constituting the judgment roll, but without any showing by bill of exceptions or otherwise as to why the first judgment should not have been set aside, the second is the only one which can be considered as forming the roll.

2. The fact that a packing company designates, in a contract with certain parties to manufacture and ship to them certain canned goods, the particular person whom it intends putting in charge of its business as superintendent, does not relieve it from liability for the neglect or incompetency of such person, on the theory that he has thus become the agent of both parties.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Timothy Paige and others against Frederick Roeding and others. From a judgment rendered by the trial court, plaintiffs appeal. Reversed.

Pillsbury, Blanding & Hayne, for appellants. *Rosenbaum & Scheeline*, for respondents.

Garoutte, J. This was an action to recover certain sums of money from the defendants, Roeding, Perkins, and Richardson, as stockholders of the Wheeler Fruit Packing Company, a corporation. Plaintiffs appealed from the judgment rendered by the trial court, and the case is now before us, upon a judgment roll containing no bill of exceptions, but consisting simply of the pleadings, findings, and judgment. Subsequent to the filing of the transcript, respondents brought to this court another set of findings, and another judgment made and entered in the same cause several months prior to the filing of the findings and entry of the judgment found in the transcript, and now assert them to be the true findings and judgment, and ask that they be inserted in the transcript, as part of the judgment roll and in lieu of the judgment and findings now therein contained. Plaintiffs have appealed from the judgment set out in the transcript; and if that judgment constitutes no part of the judgment roll, but is to be displaced by this prior judgment, then this appeal must fail, for it will have no foundation upon which to rest.

This brings us to the question, what constitutes the judgment roll in this case? In other words, which one of the set of findings, and which one of these judgments, forms part of the judgment roll? for the statute clearly contemplates that there shall be but one judgment and one set of findings incorporated therein. Upon an appeal from a judgment, this court is not bound by the papers found in the transcript, which counsel claim constitute the judgment roll; neither is it foreclosed by the certificate of the clerk of the trial court that certain papers therein enumerated form the judgment roll. If opposing counsel contend that the judgment roll presented to this court is defective or lacking in material parts, he is entitled to bring such omitted documents, properly certified, before this court; and it then becomes the duty of the court to determine from all the record before it what constitutes the judgment roll in the case. The matter here to be determined presents but little difficulty,—we have nothing before us but the two judgments of the court, and the later, in point of time, must prevail, and, in the absence of some further showing by bill of exceptions or otherwise, must be deemed the true and final judgment in the case. As was said in Caruthers v. Hensley, 90 Cal. 560, 27 Pac. Rep. 411: "If any matters could have been presented to the court below which would have authorized the entry of this judgment, it will be presumed on this appeal in support of the judgment that such matters were so presented, and that the judgment was entered in accordance therewith." In Parker v. Altschul, 60 Cal. 380, it is said: "All presumptions are in favor of the correctness of the proceedings of courts of general jurisdiction, and, as the consent of the defendants would have justified the order of the court, we must presume that such consent was given, there being nothing in the record to show that it was not." Circumstances may have arisen wherein the trial court would have been justified under the law in setting aside the first findings and judgment, and in filing the second findings and judgment, and with no showing to the contrary we must assume that such circumstances did arise. Under the present showing, the judgment in the transcript is as much a part of the judgment roll as the last amended complaint or answer would be a part of the judgment roll. This court would assume, in the absence of something to the contrary, that the last pleading filed was regularly filed, and should be the pleading incorporated as a part of the record. Upon an examination of the findings and conclusions of law set out in the transcript, it is apparent that they form the foundation for the judgment therein contained, and, such being the fact, they also are a part of the judgment roll. As already suggested, we find no bill of exceptions in the record, and it is only upon a bill of exceptions that we would be allowed to examine into the sufficiency of the reasons which moved the court to set aside and declare void its first judgment rendered in the case. Its order may have been erroneous, or it may have been entirely void, but the matter is not a proper subject of inquiry before us, not having been presented for review in any form authorized by the statute. See Ingerman v. Moore, 90 Cal. 426, 27 Pac. Rep. 306.

This was an action for damages, brought by the parties of the second part to a certain contract, against the stockholders of the Wheeler Fruit Packing Company, the party of the first part, and is based upon the alleged violation by said packing company of some of the covenants in the contract contained. One of the covenants entered into by said packing company was as follows: "The party of the first part agrees to furnish a superintendent in the person of Mr. Richard Wheeler, whose duty it will be to supervise the packing, preparing, cooking, and putting up the fruit preparatory to shipment, according to the Wheeler process." From the foregoing provision of the contract the court concluded, as matter of law, "that the effect of said contract was to make the said Wheeler the agent of plaintiffs as well as of said corporation, and that, therefore, plaintiffs are not entitled to recover of defendants the damage sustained by them by reason of the said carelessness and negligence of said Wheeler." The findings of fact and conclusions of law clearly indicate that Wheeler was incompetent and negligent in the conduct of the business, and that heavy losses were sustained to plaintiffs by reason thereof. We are satisfied that the conclusion of law by the court that Wheeler was the agent of both parties is erroneous, and it necessarily follows that its judgment upon the merits of the cause cannot be supported. Wheeler was not the agent of the plaintiffs, but he was the moving spirit, —the president of the corporation,—and was placed in charge of the business of the corporation under its covenant in the contract. It was the duty of the corporation, through Wheeler, under the contract, to superintend the cooking, and otherwise preparing, of this fruit for shipment, a duty which it failed to perform. Owing to the negligence and incompetency of Wheeler, the fruit was never in a condition for shipment. The court finds that it was spoiled. And the fact that the corporation designated in the contract the particular party whom it was intending to place in charge of the business of preparing this fruit is entirely immaterial. As counsel for appellants aptly suggest: "Let us suppose that Wheeler himself was the party to this contract, instead of the corporation, and covenanted that he would supervise the preparing of this fruit for shipment." Upon principle, the case would be identical with that at bar, yet such conditions would in no sense make him an agent for the other parties to the contract, and thus relieve him from all responsibility to them for neglect and incompetency in the performance of the duties which he agreed under the terms of the contract to perform. Again, if the corporation had agreed to furnish a superintendent, but had not named him in the contract, it was bound to furnish a competent superintendent; in other words, the negligence of the superintendent would be its negligence, and the responsibility for his acts would in no degree attach to the other parties to the contract. While the findings are probably sufficient to justify a judgment for appellants, yet the proceeding of the trial court took a somewhat novel course, and we think the interests of justice would be best subserved by simply reversing the judgment, and ordering a new trial of the cause. It is so ordered.

We concur: Beatty, C. J.; Harrison, J.; Paterson, J., De Haven, J., Sharpstein, J.

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96 Cal. 394

NICHOLSON v. GETCHELL. (No. 14,764.)

(Supreme Court of California. Oct. 29, 1892.)

Nuisance—Bill for Injunction—Sufficiency.

A complaint to abate a nuisance, which alleges that defendant has constructed a breakwater in a stream which forms the common boundary between the parties, so that in time of freshets, which frequently occur, it throws the water with great force against plaintiff's land, and thus greatly damages it, is good on demurrer for want of equity.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Complaint for injunction by William Nicholson against Samuel Getchell. Defendant had judgment on demurrer to the complaint, and plaintiff appeals. Reversed.

T. H. Salvage and *Denver Sevier*, for appellant. *E. W. Wilson*, for respondent.

Temple, C. This appeal is from a judgment entered upon demurrer to the complaint, the plaintiff having declined to amend. The action is for a mandatory injunction to prevent defendant from maintaining a certain breakwater, which had already been built. Practically the action is to abate the breakwater as a nuisance. The demurrer is general, on the ground that the complaint does not state a cause of action. It is claimed that the complaint does not state facts which show probable damage, but only an opinion of the pleader that damage will ensue. It is averred that the parties own land on opposite sides of Jacoby creek, which is their common boundary; that the channel of the stream is about 60 feet wide, and makes a sharp curve into the land of plaintiff, and away from the land of defendant. On plaintiff's side of the stream, at the curve, the bank is abrupt, and the soil loose; while on the other side the bank slopes gently. The breakwater, or bulkhead, it is averred, consists of posts driven firmly into the ground 3 feet apart, and planked to the height of about 4 feet from the ground; the upper end resting against defendant's land, and extending down stream and out towards the center towards plaintiff's land, a distance of 100 feet, and is continued down the creek by a fence in the bed of the creek for about 10 rods, so that in the event of a rise in the waters of the creek the water will necessarily be turned against plaintiff's land. Jacoby creek is a mountain stream, carrying little water in the summer, but subject to sudden freshets, when it rises in a short time to a great height, falling rapidly when the storm abates. The breakwater is located on the inside of the sharp curve, and will inevitably throw the water, in case of freshet, with great force to the concave bank, and damage will inevitably ensue. The universal tendency is for a stream to wash from the bank on the outside of a curve, and to fill in the inside: and the effect of the breakwater described in the complaint must inevitably be greatly to increase this natural tendency. The facts being as alleged, there was no excuse for a bulkhead on defendant's bank. I think the complaint states facts showing that danger was probable and imminent, and therefore the demurrer should have been overruled.

A preventive injunction was not asked, and perhaps, as to some extent the effect of the breakwater must be matter of opinion, and the necessity for immediate relief not urgent, the facts would not have justified such interposition. The court would not interfere until after trial, but it is not necessary to show that injury is inevitable to enable the plaintiff to maintain an action. Such a rule as that proposed would prevent relief in a large class of cases where the interposition of a court is absolutely necessary to prevent great and irreparable injury. Even in plain cases it would seldom be possible to know that the injury was certain to occur. That it is very probable should be made to appear by the statement of facts from which the court will be able to conclude the injury probable. It seems to me that was done in this case. I think, therefore, the judgment should be reversed, and the cause remanded, with directions to the lower court to overrule the demurrer.

We concur: Vanclief, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to overrule the demurrer.

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96 Cal. 404

ANDERSON v. DE URIOSTE. (No. 14,717.)

(Supreme Court of California. Oct. 29, 1892.)

Sewer Contracts—Notice—Extension—Assignment.

1. Act March 18, 1885, being a general street law, and therefore, as to all matters provided, superseding the consolidation act, notice of intention to do work on the streets of San Francisco should be given according to the provisions of the former act, as amended by Act March 14, 1889.

2. Under the provision of section 6 of the street law, authorizing the superintendent of public streets to extend, "under the direction of the city council," the time fixed in a contract entered into by him, a resolution directing the extension of time to construct a brick sewer on a certain street, between certain other streets, warrants an extension by the superintendent of a contract for such work, though the resolution refers to the contract as made with a certain person other than the one with whom it was made.

3. Civil Code, § 1457, providing that the burden of an obligation may be transferred with the consent of the party entitled to its benefits, but not otherwise, does not prevent a contractor with a city assigning his contract so that the assignee, on completing it, may enforce it against the city; it merely prevents the contractor being relieved from his obligations without the consent of the city.

Commissioners' decision. Department 2.

Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by C. L. Anderson against Adolph De Urioste. Judgment for plaintiff. Defendant appeals. Affirmed.

Sullivan & Sullivan, for appellant. *J. C. Bates*, for respondent.

Belcher, C. This is an action to foreclose the lien of a street assessment upon a lot on Oak street, in the city of San Francisco. The assessment was for the construction of a brick sewer with manholes, on Oak street, from the westerly line of Cole street to Baker street; and the complaint alleges that all the proceedings leading up to the assessment were duly had and taken under and in pursuance of an act of the legislature entitled "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers, within municipalities," approved March 18, 1885, and an act amendatory thereof and supplementary thereto, approved March 14, 1889. The defendant, by his answer, denied all the averments of the complaint, except that he was the owner of the lot assessed at all the times mentioned in the complaint.

The court below found all the averments of the complaint to be true, and gave judgment for the plaintiff. The defendant appealed from the judgment, and has brought the case here on a bill of exceptions.

1. It is claimed by the appellant that the resolution of intention to do the work, passed by the board of supervisors, was not published for five successive days, as required by the consolidation act, before the final order was made, and hence that the board never acquired jurisdiction to make the order. The answer is that the act of March 18, 1885, was a general street law, and was in force in the city and county of San Francisco from the date of its passage. Thomason v. Ashworth, 73 Cal. 74, 14 Pac. Rep. 615. It, therefore, as to all matters provided for, superseded the consolidation act, and became the governing law of the city. As amended in 1889, it authorized, among other things, steps to be taken for the construction of sewers in streets, and required that the resolution of intention to order the work to be done should be published and posted for two days only. This proceeding was commenced and carried on under the provisions of that act, and it is alleged and found that the resolution of intention was published and posted as required by it. The board acquired jurisdiction, therefore, to make the order that the work be done.

2. It is also claimed that the work was not completed within the time limited in the contract, and that the assessment was therefore void. The contract to construct the sewer was awarded to one J. J. O'Connor, and was executed by him and the superintendent of streets on April 14, 1890. It was indorsed, "Street contract

No. 756," and required that the work be commenced within 14 days, and completed within 90 days, after its date. On June 9, 1890, the board of supervisors passed a resolution numbered 3557, directing the superintendent of streets to grant "the following extensions of time on contracts for the performance of street work: * * * To O'Brien and Belser or assigns, ninety days on their contract to construct a brick sewer," etc., "in Oak street, from Baker to Cole street." On the next day the superintendent of streets attached to the contract an extension, as follows: "In accordance with resolution No. 3557, third series, passed the 9th day of June, 1980, I hereby grant and attach to street contract No. 756, for sewering," etc., "Oak street, from Cole to Baker street, ninety (90) days' additional time for the completion of said work, this 10th day of June, 1890. THOMAS ASHWORTH, Superintendent of Public Streets, Highways, and Squares." The street law authorized the superintendent to fix the time for the commencement and completion of the work under all contracts entered into by him, and to extend the time so fixed, "under the direction of the city council." Section 6. It is objected that the superintendent was not authorized to make the extension here, because in the resolution of the board O'Brien and Belser were named as the contractors, and not O'Connor. But the direction was to extend the time "to construct a brick sewer," etc., "on Oak street from Baker to Cole street," and the extension granted was to complete the contract to do that particular work. There was an error in the name of the contractor, but we do not think the error such a material one as would render the extension ineffectual. One of the maxims of the law is that "an error in the name is nothing when there is certainty as to the thing." Broome, Leg. Max. "*Nihil facit error nominis*," etc. In Gillis v. Cleveland, 87 Cal. 214, 25 Pac. Rep. 351, it was held that, under the statute, a warrant signed by the superintendent of streets and countersigned by the mayor of the city must be attached to the assessment, and that the warrant and assessment must, in order to create a lien upon the property charged, be recorded, but that the omission in the record of "the name of the mayor and the designation of his office" was immaterial. And in Ede v. Knight, 93 Cal. 159, 28 Pac. Rep. 860, where the certificate of extension stated that the additional time was granted in accordance with a resolution passed on a certain day, giving it a wrong number, it was held that the error was immaterial.

3. On May 2, 1890, O'Connor assigned his contract to the plaintiff, and the latter proceeded to fully complete the work to be done under it within the time allowed therefor. It is claimed by appellant that the contract was not legally assigned, and hence that the plaintiff never acquired any rights under it. In support of this position, section 1457 of the Civil Code is cited. That section is as follows: "The burden of an obligation may be transferred with the consent of the party entitled to its benefits, but not otherwise, except as provided by section 1466." We find nothing in the record showing that the assignment was not consented to by the proper officers of the muncipality and by the defendant, but, assuming that it was not, the question is, was it inhibited and rendered void by the section cited?

In a note to the section, found in the annotated edition of the Code, by the Code commissioners, it is said: "It is not meant by this section to imply that a third person cannot assume the obligations of a contract between other parties, but only that he cannot relieve a party thereto from his obligations without the consent of the creditor." We think this the correct construction of the section, and it was in effect so held by this court in Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 Pac. Rep. 52. In Taylor v. Palmer, 31 Cal. 241, the question was raised whether a contract to perform work on a street in San Francisco could be assigned, and it was held that it could, and that the assignee, if he fulfilled the conditions of the contract, could enforce it. That decision is, in our opinion, applicable to the facts of this case, and should be followed.

No other points are made in the case, and it follows from what has been said that the judgment should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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96 Cal. 408

EDWARDS v. ROLLEY. (No. 13,812.)

(Supreme Court of California. Oct. 29, 1892.)

SWAMP LANDS—PATENT—COLLATERAL ATTACK.

1. The bed of what was once a navigable stream, but which had never been acquired as "swamp and overflowed" land from the United States, under Act Cong. Sept. 28, 1850, is not included under that designation in the statutes authorizing the sale of state lands.

2. A patent for land, the sale of which is unauthorized, may always be shown invalid by one holding adversely, although the title be that merely of naked possession. Fruit Land Co. v. Moir, 22 Pac. Rep. 55, and 23 Pac. Rep. 359, 83 Cal. 101, and Steel v. Smelting Co., 1 Sup. Ct. Rep. 389, 106 U. S. 447, followed.

Commissioners' decision. In bank. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by Carrie N. Edwards against Joseph Rolley. Judgment for defendant. Plaintiff appeals. Affirmed.

J. D. H. Chamberlin and *Ernest Sevier*, for appellant. *S. M. Buck* and *H. L. Smith*, for respondent.

TEMPLE, C. Plaintiff appeals from the judgment upon the judgment roll alone. The action is brought to quiet title, and, the defendant being in possession, is therefore virtually an action to recover possession, sometimes called an action of ejectment. The defendant denied plaintiff's title, pleaded a former judgment as a bar, set up title in himself, and also claimed that the plaintiff's right of action was barred by the statute of limitations. The action was tried without a jury, and the findings seem to state the facts quite fully. The court found that neither plaintiff nor defendant had title to the demanded premises, and that plaintiff's right was not barred by the judgment pleaded, or by the statute of limitations, and defendant had judgment. The findings show that on the 28th of September, 1850, and prior thereto, the demanded premises were in the bed of Eel river, a navigable stream; that the land in that township was public land of the United States, and was surveyed by the land department by meandering both banks of the river, thus excluding the bed of the river from the survey. Defendant was the owner of a tract of land purchased from the state as lieu land, the application to purchase which was made November 22, 1858, at which time Eel river bounded it on the south and west; the land described in the complaint then being the bed of the stream bordering upon these lands. During the winter of 1861-62 the river suddenly changed its course, forming a new channel, and the water ceased to flow in the old channel. Each succeeding freshet brought down sediment, which filled up somewhat the original channel, forming the land in controversy. One John L. Pixley made application to purchase these lands from the state, as swamp and overflowed lands, June 14, 1886, upon which application a patent was issued October 17, 1888. Under this patent plaintiff claims title. The land in controversy then was the bed of a navigable stream until 1861. It was not acquired from the United States as swamp and overflowed land, under the act of September 28, 1850. Many sections of the Political Code show plainly that no other lands are included under the designation "swamp and overflowed" in the statutes authorizing the sale of state lands. This land was not swamp and overflowed land, within the meaning of those laws. Nor is there any other statute authorizing the sale of land of this character by the state officers.

It is said, however, that, admitting that the patent was issued in a case not authorized, still it is *prima facie* valid, and raises a presumption that the land had been properly segregated and listed to the state as swamp and overflowed land, and that all necessary steps had been taken to authorize the issuance of the patent. Easton v. O'Reilly, 63 Cal. 309.

It is further claimed that the defendant cannot attack the patent, unless he connects himself in some way with the original source of title. This last proposition unquestionably finds some support among the earlier decisions of this court, particularly in Doll v. Meador, 16 Cal. 295, in which the proposition is broadly asserted. On this point, however, that case has not been followed in the later cases. In Fruit Land Co. v. Moir, 83 Cal. 101, 22 Pac. Rep. 55, and 23 Pac. Rep. 359, the plaintiff claimed under a patent from the United States, and also a certificate of purchase from the state. The defendant had made application to purchase from the state, but it was contended that his application was void, because the land at the time was held adversely by another. This point was not deemed material, as the court found that plaintiff's patent and certificate were both issued without authority of law, and concluded as follows: "Each document was issued without authority of law, and is void against defendant, conceding that he showed no title except naked possession." Some members of the court doubted whether it was a proper case in which to apply this principle, but, so far as it holds that a patent may always be shown to be void by evidence that it was issued in a case not authorized by law, it is in exact accord with the cases in the federal courts. In Smelting Co. v. Kemp, 104 U. S. 636, the true rule is declared in an opinion written by Judge FIELD. He says: "On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others." And in Steel v. Smelting Co., 106 U. S. 447, 1 Sup. Ct. Rep. 389, after declaring the conclusiveness of the patent as to all matters which the department officers were required to pass upon, the same judge says: "It need hardly be said that we are here speaking of a patent issued in a case where the land department had jurisdiction to act, the lands forming part of the public domain, and the law having provided for their sale. If they never were the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time, and in any form of action." Many other cases in the supreme court of the United States are to the same effect. I think, therefore, the judgment should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(96 Cal. 417)

DIGGINS v. THORNTON. (No. 14,631.)

(Supreme Court of California. Nov. 4, 1892.)

DISMISSAL OF ACTION—GROSS LACHES.

1. Where a summons is served nine years after the complaint is filed, the delay is grossly unreasonable, and, in the absence of a showing of the proper exercise of diligence, a motion to quash and dismiss the action should be granted.

2. Where, in such case, to defeat the motion an affidavit is offered, which shows that affiant made, at a time not mentioned, unsuccessful efforts to locate defendant, and about nine years after filing the complaint certain other efforts, which were successful, it will be assumed, in the absence of a showing to the contrary, that both efforts were made at about the same time, and such affidavit will be held insufficient.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. SANDERSON, Judge.

Action by Thomas D. Thornton against A. C. Diggins. From an order refusing to quash a summons and dismiss an action for unreasonable delay in serving the summons, defendant appealed. Reversed.

J. K. Johnson, for appellant. *J. M. Wood*, for respondent.

PER CURIAM. This appeal is taken from an order of the court refusing to quash a summons and dismiss an action by reason of unreasonable delay in the serving of defendant. The complaint had been filed some nine years when the summons was served. In the absence of a showing of the proper exercise of diligence in the service of the summons, the motion to quash and dismiss the action should have been granted, for the delay, of itself, was grossly unreasonable. To defeat the motion, respondent offered an affidavit of the clerk of his attorney, but we think it entirely insufficient to accomplish such result. While the affidavit sets out certain steps that he took in attempting to locate the residence of appellant, it entirely fails, and, it would seem, intentionally fails, to state at what time affiant was engaged in taking these steps. We are unable to say but that he was guilty of gross laches by not beginning his search for appellant sooner than he actually did. He does allege that early in December, 1890, in pursuance of his search for appellant, he examined the index to deeds in the recorder's office, and there his search came to a successful end. If his previous efforts in prosecuting the matter were carried on at about that date, (and, in the absence of a showing to the contrary, we assume that to be the fact,) then respondent was guilty of such negligence as to entitle appellant to a dismissal of the action. Let the judgment be reversed, and cause remanded, with directions to the trial court to quash the summons, and dismiss the action.

(96 Cal. 275)

DELANO v. JACOBY et al. (No. 10,111.)

JACOBY et al. v. DELANO et al. (No. 10,712.)

(No. 14,697.)

(Supreme Court of California. Oct. 3, 1892.)

Action on Promissory Notes—Parties—Power of Attorney—Power to Convey—Mortgage—Fraud — Rescission of Contract of Sale of Land.

1. Where, in an action on notes, by one of two payees, the verified complaint states that the other payee transferred all his title and interest in the notes to plaintiff for a valuable consideration, and plaintiff is now the holder and sole owner thereof, a general denial in the answer raises no issue as to plaintiff's title requiring proof to entitle him to recover.

2. An action may be maintained in the name of one of two payees of notes, since payment to either extinguishes the debt.

3. Where such action is consolidated with an action by defendants against both payees to cancel the notes on the ground of fraud and want of consideration, both payees are bound by the judgment therein.

4. A power of attorney, given by the owner of a half interest in certain land to the owner of the other half interest, provided that the attorney had "full power and authority to sell my interest when he sells his own" in the land described; "as full power and authority to sell said premises as I myself have; and do ratify and confirm all that he may lawfully do in the premises." The attorney lived in the state where the land was situate, while the grantor lived in another state. The attorney sold the lands, and executed a conveyance as such attorney in fact, and within a month visited the grantor of the power, reported the sale, and turned over the proceeds, which were accepted by such grantor, who brought this suit on the notes received in consideration of the conveyance. *Held*, in such action, that the attorney was authorized to execute the conveyance.

5. In such case the grantees in the deed cannot set up as a defense want of authority by the attorney to convey, even if the power is defective, since the vendors would be estopped from claiming such want of authority.

6. It is immaterial in such case that the certificate of acknowledgment to the power of attorney is defective.

7. A contention that a finding of fact is against the evidence will not be sustained where it cannot be done without discrediting a witness, since the credibility of witnesses is for the determination of the trial court.

8. In an action by a grantor against the grantees on notes and a mortgage executed by the latter in consideration of the conveyance of certain land, it appeared that defendants went into possession immediately after the purchase, surveyed and divided it into lots and blocks, laid out streets, recorded maps, and sold lots in accordance therewith. Nearly a year afterwards they paid several thousand dollars on the mortgage, and more than a year afterwards asked for an extension of three months' time on the balance, and no action was brought until four months after such request. Two months thereafter defendants served plaintiff with notice of rescission on account of the fraudulent representations of the grantors, and their failure to perform certain acts which were required to be done before the partial payment and request for time were made by defendants. *Held*, that defendants had recognized the validity of the notes and mortgage, and waived the right to rescind.

9. In such action it appeared that the grantors agreed to release from the mortgage any particular lots sold by defendants on payment to the former of a specified proportion of the consideration received therefor. Plaintiff was not tendered any sum on account of the sale of such lots. *Held*, that defendants were not entitled to rescind the contract on account of a failure to release such lots, especially as it appeared that the other grantor, acting for himself, and as the agent of plaintiff, released them.

Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Actions by C. Delano against Jacoby and others to foreclose a mortgage, and by Jacoby and others against C. Delano and C. J. Culver to cancel the notes and mortgage in suit on the ground of fraud and want of consideration. From a judgment in favor of Delano and Culver, Jacoby and others appeal. Affirmed.

Chapman & Hendricks and *Henry Bleecker*, for appellants. *Anderson, Fitzgerald & Anderson*, *Victor Montgomery*, and *F. W. Sanborn*, for respondents.

Paterson, J. On September 12, 1887, Culver, claiming to act under a power of attorney from Delano, sold and conveyed a tract of land owned by himself and Delano to Jacoby et al. By the terms of the agreement the purchasers were to pay off a prior mortgage of $5,000, and the sum of $13,000, $6,000 of which was paid in cash. Of the remaining $7,000, $3,500 was to be paid in one year, and the remainder in two years, with interest at 10 per cent. Two notes were given by the purchasers for $3,500 each, one payable in one year and the other in two years, and payment thereof was secured by a mortgage on the lands sold. The case No. 10,111 is an action for the recovery of the amount due on these two notes, and to foreclose the mortgage given as security for the payment thereof. The answer in that case consists—*First*. Of a general denial. *Second*. Allegations that Delano and Culver never had title to the lands, or any portion of the same; and as soon as they discovered this fact, and before the commencement of this action, they rescinded the contract, and offered to restore to the plaintiff and Culver everything of value they had received under the contract. *Third*. That the defendants were induced to enter into the agreement by false and fraudulent representations, (which are specifically set forth,) and that within a reasonable time after they discovered the facts the defendants rescinded the contract, and offered to restore to plaintiff and Culver everything of value they had received under the contract. *Fourth*. That the defendants were induced to enter into the agreement by reason of the promise of plaintiff and Culver that said Culver would immediately "commence to erect five cottages on the tract of land known as the 'Culver Hotel Tract,' being lands adjoining the lands above mentioned," water and light the streets, and keep them watered and lighted, open and maintain an hotel on said hotel tract, etc.; that they have kept and performed all the conditions on their part, but none of the promises made by plaintiff and Culver has been fulfilled, and by reason thereof the consideration for the note has wholly failed; that within a reasonable time after the nonfulfillment of the conditions of the contract they demanded the return of the notes, and offered to return to plaintiff and Culver everything of value they had received from them under the contract. Case No. 10,712 is an action brought by Jacoby et al., the purchasers referred to, for an accounting of all moneys paid by the plaintiffs on account of the purchase money of the lands, and for the delivery and cancellation of the notes and mortgages. The complaint consists of allegations essentially the same as those made in the answer above referred to. The court, in its findings, negatived all of the allegations made by Jacoby et al., and judgment in each case was rendered in favor of Delano in accordance with his prayer.

It is claimed by appellants that there is no evidence to support the finding of the court that Delano is the owner and holder of the notes and mortgage. But the complaint alleged that "on or about the 24th day of September, 1887, the said C. Z. Culver transferred and assigned for a valuable consideration all his right, title, and interest in said two promissory notes to plaintiff, and plaintiff is now the holder and sole owner thereof;" and there is no denial of this allegation in the answer. There is, it is true, a general denial, but as the complaint was verified, the general denial raised no issue. Furthermore, plaintiff and Culver are named in the notes as payees. Payment to either, therefore, with or without suit, will extinguish the debt. Section 1475, Civil Code; Lyman v. Gedney, 114 Ill. 388, 29 N. E. Rep. 282; Henry v. Mt. Pleasant, 70 Mo. 500. Culver was made a party defendant in the second action, and will be bound by the judgment.

Appellants contend that the power of attorney from Delano to Culver was wholly insufficient to authorize the latter to execute a deed. It reads as follows: "I do hereby appoint C. J. Culver my agent and attorney in fact, with full power and authority to sell my interest when he sells his own in that lot or parcel of land situate in the county of Los Angeles. [Here follows particular description of the property to be sold.] I hereby give my said agent and attorney as full power and authority to sell said premises as I myself have; and do ratify and confirm all that he may lawfully do in the premises. Given under my hand and seal this 23d day of July, 1887. [Seal.] C. DELANO." Following the signature is a certificate of acknowledgment in these words: "State of Ohio, Knox county—ss.: Personally appeared before me C. Delano, and acknowledged signing and sealing of this power of attorney to be his voluntary act and deed. Given under my hand and official seal this 23d day of July, A. D. 1887. [Seal.] JOHN S. BRADDOCK, Notary Public." This power of attorney was recorded in the office of the county recorder of Los Angeles county, August 2, 1887. It is said that, as the acknowledgment was insufficient to prove the power of attorney, or entitle it to record, it was not constructive notice to anybody. We do not understand the intended force of this suggestion. If the power of attorney was otherwise valid, it was good as between the parties to the transaction, whether recorded or not.

There is an apparent conflict of authority on the question as to what is necessary in a power of attorney for the sale of land to authorize the attorney to execute and deliver a deed to the purchaser. Each case must be decided upon its own peculiar circumstances. McNiel v. Shirley, 33 Cal. 206; Rutenberg v. Main, 47 Cal. 220; Hemstreet v. Burdick, 90 Ill. 444. As between the parties to the transaction, it is proper to consider their situation at the time of the execution of the letter, and their intention is to be gathered from the words of the instrument, and all the circumstances under which it was written and acted upon. "The vendor may be unwilling to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract, even if the title prove satisfactory; and he may decline to bind himself to convey to such a purchaser at the end of the time necessary to examine the title, because he might thereby in the mean time lose an opportunity to sell to some other person, who might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence." Duffy v. Hobson, 40 Cal. 245. So the general rule is that a mere authority "to sell," in the absence of any other words or circumstances qualifying the language, would not confer upon the agent the power to determine these matters for his principal. There are some exceptions to the rule. 1 Amer. & Eng. Enc. Law, p. 360, and cases there cited. In this case, Delano and Culver were joint owners of the property. Culver lived in this state, Delano in Ohio; and the latter had the utmost confidence in the former. The language of the letter is emphatic, and carries with it the conviction that Delano intended that Culver should do something more than merely find a purchaser for him. Culver was intending to sell and convey his interest in the land, and Delano evidently intended at the same time to dispose of and convey his own interest through Culver. Within a month after the sale Culver visited Delano at Mt. Pleasant, Ohio, and there made a report of their joint transactions in land in California, including the transaction under consideration. Delano does not appear to have been at all surprised to find that Culver had taken the notes and mortgage, and must have known from this fact that he had given a deed to the purchasers. It is contended by the appellants that Delano denied that he had given Culver authority to act for him, but an examination of his testimony reveals the fact that he repudiated merely the right to Culver to make any representations as to what would be done in or about the premises. He never repudiated his right to sell, nor has he ever expressed any dissatisfaction with the terms of the sale, or the execution and delivery of the deed. His denial of the right of Culver to make the representations alleged becomes immaterial in view of the finding of the court that the representations made by Culver were neither fraudulent nor false. We find nothing in the authorities upon which appellants rely that is opposed to the views we have expressed.

But, if it be conceded that the power of attorney was defective or insufficient to authorize a conveyance, the vendors, under the facts shown, would be estopped from claiming that Culver's acts were without authority. The latter claimed the right to convey, and acted upon such claim. Delano ratified his acts by approving the report which he made, by accepting the notes and mortgage, and by insisting upon payment of the balance of the purchase price. 2 Herm. Estop. §§ 792, 793; Simson v. Eckstein, 22 Cal. 595; Borel v. Rollins, 30 Cal. 413. Equitable estoppels must be mutual, and, if the vendor cannot refuse to convey after receiving and accepting the benefit of the act done by the agent, it would be inequitable to permit the vendee, after taking and holding possession for several years, making payments, and otherwise treating the contract as valid, to take advantage of the defect in the agent's original grant of authority. If the vendor cannot repudiate the ratified act of his agent after the property has increased in value, the vendee should not be permitted to escape from the effect of the act so ratified after the property has decreased in value. A similar question was passed upon in a recent and well-considered case, where Mr. Justice McFarland, expressing the views of the court, said: "The court does not find whether or not Meux signed the contract, or was a party to it; but the evidence clearly shows that he ratified it as soon as his covendor informed him of it, and soon afterwards, when he came to Fresno, 'again ratified the sale between the parties, and talked with the purchasers about it.' Again, when the deferred payments became due, he asked the vendees for the money, and they, making no objection of any kind, simply asked for some delay until they could make arrangements to pay. They proposed at one time to give a mortgage, and then concluded not to do so; and finally Meux united with Glenn in executing and tendering a deed. This was a complete ratification, and he would have been estopped from making a defense for himself which plaintiff seeks to suggest for him." 23 Pac. Rep. 406. There is no conflict between the decision in the case just referred to and the one rendered in Salfield v. Reclamation Co., (Cal.) 29 Pac. Rep. 1105, and the facts in the latter case were entirely different from those shown by the record herein.

The contention that the court's finding that Culver made no false or fraudulent representations is against the evidence cannot be sustained unless we discredit and discard the testimony of Culver, and this we have no right to do. The credibility of the witness is always a matter for determination in the court below. It is not clear that the alleged representations, if proved, would constitute a defense to the action, (Kerr, Fraud & M. p. 89; Jefferson v. Hewitt, [Cal.] 30 Pac. Rep. 772;) but, if conceded to be true, and sufficient to avoid the sale, appellants are not entitled to a rescission. The representations alleged were made in July, 1887. The deed was executed and delivered in September of the same year. Immediately thereafter the purchasers went into possession of the land, surveyed and divided it into lots and blocks, laid out streets and alleys. Maps thereof were recorded in the office of the county recorder, and several lots were sold in accordance therewith. Within two weeks after the transaction was closed, Culver ceased sprinkling the streets, and within two months thereafter ceased lighting the streets. He made no attempt to proceed with the improvements he said he would make, and in May, 1888, he made an assignment for the benefit of his creditors, thus acknowledging his inability to carry out his promises. In March, 1888, the purchasers paid $3,000 on the $5,000 mortgage, and in September, 1888, they asked for an extension of three months' additional time in which to pay the $3,500 notes. Whether this request was granted does not appear in the testimony, but we think the court was justified in finding it was, because it does appear that no action was brought to enforce payment of the same until March 27, 1889. No complaint whatever was made by the purchasers until January 22, 1889, when Mr. Thorne, manager for the syndicate purchasers, wrote to Mr. Delano, inquiring whether the promises made by Culver were to be fulfilled. The notice of rescission was not served upon Delano until March 26, 1889. By these acts and omissions the purchasers recognized the validity of the notes and mortgages in suit, (Grymes v. Sanders, 93 U. S. 55,) and waive their right of rescission of the contract, (section 1691, Civil Code; Marston v. Simpson, 54 Cal. 189; Bailey v. Fox, 78 Cal. 389, 20 Pac. Rep. 868; Schiffer v. Dietz, 83 N. Y. 300.)

The failure of Delano to execute a release of the mortgage, so far as it affected the lots sold, did not warrant a rescission of the contract. By the terms of the mortgage the vendors were to "release any particular lot or lots of such subdivision from the lien of this mortgage upon payment to them of such amount for each and every lot so to be released, as is expressed by the quotient, taken in dollars, obtained by dividing the entire sum due upon said promissory notes at the date of executing such release by the entire number of lots into which said mortgaged premises shall have been so subdivided according to said map or plat so filed." Delano was not told into how many lots the tract had been divided, nor was any offer made to pay him at any place or time any sum of money whatever. The number of lots into which the tract was to be divided was a matter entirely within the discretion of the purchasers, and it is their duty to tender the amount due on account of the release requested. Furthermore, it appears in the record that the bank release the lots from the lien of the mortgage, and that Culver, acting for himself, and as agent for Delano, did the same thing. The judgments and the orders are affirmed.

We concur: GAROUTTE, J.; MCFARLAND, J.

(96 Cal. 283)

CLARKE et al. v. AUSTIN et al. (No. 14,891.)

(Supreme Court of California. Oct. 3, 1892.)

CONTRIBUTION — PAYMENT OF JUDGMENT BY ONE OF SEVERAL DEFENDANTS—NOTICE OF CLAIM.

Code Civil Proc. § 709, provides that where one of several persons liable on a judgment pays more than his proportion he may compel contribution from the others, and shall be entitled to the benefit of the judgment to enforce contribution if within 10 days after his payment he file with the clerk notice of his payment and claim to contribution, and that on filing such notice the clerk must make an entry thereof in the margin of the docket. *Held*, that the notice is required to be filed with the clerk merely to enable him to make the entry on the docket, and notice to the other defendant of a motion for execution on the judgment to enforce contribution, though necessary, need not be served within 10 days.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by A. M. Clarke and W. H. McKenzie against Paul P. Austin and another to foreclose a mortgage. After judgment one of the defendants, E. K. Clarke, filed the statutory notice for contribution, and prayed that execution issue on the judgment in his favor and against his codefendant. From an order denying the motion, E. K. Clarke appealed. Reversed.

Craig & Meredith, for appellants. *Richards & Welch*, for respondents.

VANCLIEF, C. Action to foreclose a mortgage. The defendants, Austin, E. K. Clarke, and Bruce Cavitt were jointly liable to the plaintiffs for the mortgage debt, but, as between each other, Austin was bound to pay only one half, Clarke one third, and Cavitt one sixth. Before judgment Clarke paid his portion, one third of the debt, viz., $4,065; and a decree of foreclosure passed for the unpaid portion of the debt, ordering a sale of the mortgaged premises, and that a joint judgment be docketed against Austin, Clarke, and Cavitt, for any deficiency of proceeds of sale to pay the debt. The sheriff sold the mortgaged property, and returned a deficiency of $7,913, for which a judgment was docketed as per order of the court. It appears that on May 12, 1891, Clarke paid $4,025.60 of this judgment in addition to his payment of one third of the whole debt before judgment, and also that full satisfaction of the judgment was entered on the same day; but it does not appear when or by whom the balance of the judgment was paid. Clarke claimed the benefit of the judgment to enforce contribution or repayment from Austin to him of the full sum, $4,025.60, paid by him on the judgment, under section 709 of the Code of Civil Procedure; and within 10 days after his payment of this sum filed with the clerk of the court in which the judgment was docketed the following notice:

"Notice of payment. To A. C. Williams, Esqr., county clerk of Fresno county: You will please take notice that the defendant E. K. Clarke did on this 12th day of May, 1891, pay to the plaintiffs four thousand and twenty-five dollars and sixty cents, and that said payment was more than the due proportion of the judgment herein which said defendant Clarke ought to pay in the whole of said sum so paid, to wit, $4,025.60, and that he claims that he has the right to contribution and repayment from the defendant Paul P. Austin, and that he is entitled to the benefit of the said judgment against said Austin in said sum of four thousand and twenty-five dollars and sixty cents. You are requested to enter this claim upon the judgment docket. CRAIG & MEREDITH, Attorneys for Defendant E. K. Clarke."

Thereupon the clerk made the following entry in the margin of docket of the judgment: "The defendant E. K. Clarke has filed with me notice of his claim to repayment from defendant Paul P. Austin of four thousand and twenty-five dollars and sixty cents, being more than his due proportion, and he claims the benefit of the judgment herein against said Austin. Attest: A. C. WILLIAMS, Clerk. By L. R. WILLIAMS, Deputy. May 12, 1891."

Neither this entry nor the notice filed with the clerk was served on Austin or Cavitt. On June 6, 1891, Clarke served by mail on Austin the following notice and affidavit: (Title of court and cause.) "Notice of motion. You will please take notice that on Wednesday, the 24th day of June, 1891, at the hour of ten o'clock A. M., in the court room of department two of said court, in the county courthouse of said county, the defendant E. K. Clarke will move the court to order execution to issue herein in favor of defendant Clarke and against the defendant Austin, on the ground that the defendant Clarke has paid more than his due proportion of the judgment herein. Said motion will be made upon the affidavit of defendant Clarke, a copy of which is herewith served, and upon the papers and pleadings on file and the entries in the record of this cause. CRAIG & MEREDITH, Attorneys for Defendant Clarke." (Title of court and cause.) "Affidavit of defendant Clarke. E. K. Clarke, being sworn says, that he is one of the defendants in the above-entitled cause; that the consideration upon which the defendants Austin, Cavitt, and the affiant became liable to pay the note and mortgage mentioned in the judgment herein was as follows: The defendant Griffith did on or about the 1st day of September, 1889, sell and convey to the three last-named defendants the land described in said judgment in the following proportion: One half thereof to the defendant Austin, one third to this affiant, and one sixth to the defendant Cavitt. And the said three defendants furnished and agreed with each other to furnish the consideration moving to the said Griffith in the same proportion. A portion of said consideration was the assuming by said grantees of the mortgage described in said judgment; that the residue of said consideration was the assignment to said

Griffith of an interest in a certain patent right to manufacture ice machines; that said patent right was owned by said three defendants in said proportion; that afterwards, on or about the 1st day of December, 1889, this affiant paid to the said plaintiff the sum of $4,065, and said sum was one third of the amount then due on said note and mortgage; that afterwards, on the 12th day of May, 1891, this affiant also paid to the plaintiff on account of the judgment herein the sum of $4,025.60; that neither Austin nor Cavitt has paid to this affiant any part of said last-named sum; that the defendant Austin has not, nor has the defendant Cavitt, paid the plaintiff any part of said note or mortgage; that the defendant Griffith did on the 12th day of May, 1891, procure and cause to be entered a satisfaction in full from the plaintiff McKenzie of said judgment."

It appears that the motion was heard on the foregoing papers and the judgment roll and docket entries in the foreclosure action, and that the motion was denied. But the record does not show whether or not Austin appeared at the hearing, though it is asserted by counsel for appellant and not denied that he did. Clarke brings this appeal from the order denying his motion.

It is true that the right of Clarke to enforce contribution by proceedings under section 709 of the Code of Civil Procedure[1] is made to depend upon the condition that he must have filed with the clerk, within 10 days after his payment of more than his proportion of the judgment, "notice of his payment and claim to contribution or repayment." It is also true that Austin was entitled to notice of Clarke's motion for execution upon the judgment. But it was not necessary, as contended by respondent, that the notice filed with the clerk should have been served on Austin within 10 days after Clarke's payment of more than his proportion of the judgment, as this is neither expressly nor impliedly required by the section of the Code authorizing the proceeding. The only purposes of filing the notice with the clerk are to authorize and to enable him to make the proper entry in the margin of the docket. Without such notice the clerk would have neither the authority nor the ability to make the proper docket entry. Some *dicta* apparently inconsistent with this view are to be found in Davis v. Heimbach, 75 Cal. 262, 17 Pac. Rep. 199. In that case, however, execution was ordered and issued without notice to the parties against whom it was issued. The lower court quashed the execution, and this court affirmed the order, saying: "The order directing the execution having been without notice, the proceedings were properly vacated." This is all that was decided in Davis v. Heimbach. It is contended by respondent that upon the showing made at the hearing Austin was not bound to contribute to Clarke the sum claimed, $4,025.60; but I think this is a mistake. From the *data* furnished, I cannot figure Austin's liability to Clarke to be less than the sum demanded. But, however this may be, the whole matter may be properly estimated and adjusted upon a rehearing of the motion. I think the order should be reversed, and the cause remanded for further proceedings.

We concur: Temple, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for further proceedings.

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96 Cal. 413

IRELAN v. COLGAN, Comptroller. (No. 14,811.)

(Supreme Court of California. Nov. 1, 1892.)

CONSTRUCTION OF STATUTE — APPROPRIATION FOR SALARY OF STATE OFFICER.

The legislature created an office to remain in existence two years only from the 18th of May, 1889, and provided therefor a salary of $3,000 a year. The act in which the appropriation of $6,000 for the salary for the two years was made stated that the sums appropriated were for the objects thereinafter expressed, and for the support of the government of the state for the forty-first and forty-second fiscal years. The forty-first fiscal year began July 1, 1889, a month and a half after the creation of the office. *Held*, that it was the intention of the legislature to provide in its appropriation for the payment of that part of the salary which became due before the beginning of the forty-first fiscal year.

Department 1. Appeal from superior court, Sacramento county.

Petition by Irelan for a writ of mandate to compel Colgan, state comptroller, to pay money to petitioner, claimed by him to be due on his salary as state engineer. From an order sustaining a demurrer to his petition, petitioner appeals. Reversed.

Matt Clarken and *Mr. De Alexander*, for appellant. *Atty. Gen. Hart*, for respondent.

Paterson, J. In 1889 an act was passed and approved which created the office of state engineer, "to remain in existence for a period of two years only," and provided that the state mineralogist should be *ex officio* state engineer, at a salary of $3,000 per year. St. 1889, p. 328. The act took effect on May 18, 1889,—60 days after its passage; and from that time until May 19, 1891, when the office ceased to exist, the petitioner—who was the duly appointed, qualified, and acting state mineralogist—performed the duties of the office created by the act. He received his salary as engineer from July 1, 1889, to May 19, 1891, which period constituted the forty-first fiscal year, and a portion of the forty-second. The respondent refused to draw a warrant in favor of petitioner for salary ($350) due the latter as engineer from May

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[1] Code Civil Proc. § 709, provides that where one of several persons liable on a judgment pays more than his proportion he may compel contribution from the others, and that in such case he is entitled to the benefit of the judgment to enforce contribution or repayment "if within 10 days after his payment he file with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution. Upon the filing of such notice the clerk must make an entry thereof in the margin of the docket."

19, 1889, to July 1, 1889, claiming that no appropriation had been made to pay any portion of the salary for the fortieth fiscal year. Thereupon the petitioner applied to the superior court for a writ of mandate, a demurrer to his petition was filed, the court below sustained the comptroller in his contention, the prayer of the petitioner was denied, and from the judgment the latter has appealed to this court.

The attorney general, on behalf of the respondent, contends that the item, "For the salary of the state engineer, state mineralogist *ex officio*, six thousand dollars," in the general appropriation act of March 21, 1889, (St. 1889, p. 438,) was an appropriation for the forty-first and forty-second fiscal years only, and that no part of it can be used in payment of salary earned in the fortieth fiscal year. The argument is based upon the provisions of section 1 of the act, which reads as follows: "Section 1. The following sums of money are hereby appropriated out of any money in the state treasury not otherwise appropriated, for the objects hereinafter expressed, and for the support of the government of the state of California for the forty-first and forty-second fiscal years." It is said that, as the fiscal year commences on July 1st, this provision of the general appropriation act expressly limits the use of the moneys therein appropriated to the support of the government from July 1, 1889, to July 1, 1891. The fallacy of the contention rests in the assumption that the intention of the legislature must be gathered from the provisions of the appropriation act alone, and in the failure to consider other statutes which bear upon the question. The appropriations made are not only for the "support of the government * * * for the forty-first and forty-second fiscal years;" they were made also for the objects thereinafter expressed, one of which objects was the payment of $6,000 to the state engineer, whose term of office had been expressly limited to two years, and his salary fixed at $3,000 per year. In determining whether an appropriation has been made for the payment of a particular claim, we do not look merely at the form of words used. The intention of the legislature is to be ascertained from the language of the act, and the provisions of other statutes relating to the same subject, and the nature of the claim for which the appropriation is made. If it clearly appears from these things that the legislature intended to pay a certain amount at a certain time, or in installments at certain times, and has designated the fund from which the money is to be paid, the appropriation is complete, and payment will be enforced by mandate, regardless of form in the wording of the appropriation act. Humbert v. Dunn, 84 Cal. 57, 24 Pac. Rep. 111.

Looking at the various provisions of the law bearing upon the question under consideration, the intention of the legislature to appropriate enough to pay the state engineer $250 per month from the time the act took effect until the office ceased to exist is clearly shown. The life of the office was fixed at two years. The salary of the officer was fixed at $3,000 per year. The legislature knew that under section 1029, Pol. Code, "unless otherwise provided by law, the salaries of officers must be paid out of the general fund in the state treasury, monthly on the last day of each month;" that is to say, it was known that, unless the bill creating the office and providing for the payment of the salary thereof, provided otherwise, the officer would be entitled to receive at the end of each month and every month of his term of office one twelfth of his annual salary. To meet the demands which would thus be made upon the treasury every month of the two-years term fixed in the act of March 19th, the item of $6,000 was inserted in the general appropriation act. If the legislature did not intend to provide for the payment of the engineer's salary for the period of one month and twelve days prior to the commencement of the forty-first fiscal year, why did it include the amount necessary therefor ($350) in the appropriation? The legislature knew, of course, that the amount of the engineer's salary for the forty-first and forty-second fiscal years would be only $5,650, and that at the end of that period the office would cease to exist. What disposition was to be made of the balance of the $6,000 appropriated "for the salary of the state engineer, state mineralogist *ex officio*?" It is entirely clear to us that the amount was set aside to pay the engineer's salary for the full period named in the act creating the office, and to avoid the necessity of any further appropriation for that purpose. It was unnecessary for the legislature to add to this item of appropriation the date of payment of the first installment. The appropriation, being one for payment of the salary of an officer of the state, whose term and whose office began and expired together, (section 1029, Pol. Code,) fixed the times of payments as conclusively as if such times and installments had been expressly stated in connection with the item of appropriation. It is alleged in the petition, and must be taken as true, "that there is an unexhausted specific appropriation provided by law in the state treasury of said state, and not otherwise appropriated, to meet and pay the said $350." The judgment is reversed, with instructions to the court below to overrule the demurrer, and permit the respondent to answer.

We concur: HARRISON, J.; GAROUTTE, J.

96 Cal. 426

HUBBACK v. ROSS et al. (No. 13,148.)

(Supreme Court of California. Nov. 10, 1892.)

DELIVERY OF DEED—AUTHORITY OF AGENT.

Defendant executed a deed, naming plaintiff as grantee, and delivered it to M. There was no evidence to show for what purpose such deed was executed, nor was there any agreement between plaintiff and defendant in regard thereto. *Held*, that a delivery of the deed to plaintiff by M. could only constitute either an absolute sale of the land to plaintiff, or a mortgage of it by defendant to plaintiff, for some liability of her own to plaintiff, and that M. was not acting within the apparent scope of his authority when he delivered the deed to secure plaintiff for advances made to himself.

Department 2. Appeal from superior court, Marin county; E. B. MAHON, Judge.

Action to have a deed declared a mortgage, by Hubback against Ann S. Ross and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Moses G. Cobb and *Hepburn Wilkins*, for appellant. *Wm. Barber*, for respondents.

DE HAVEN, J. The complaint in this action alleges, among other matters, that in the year 1885 the plaintiff had business correspondents in Liverpool, and that one Makin requested him to procure from said correspondents an advance of money to him, Makin, upon the security and in anticipation of the sale of a quantity of wheat which said Makin had shipped to Liverpool, and that he agreed to secure the plaintiff against any loss by reason of the transaction; that thereupon the plaintiff drew in his own name certain bills of exchange upon said correspondents, amounting to about £31,000, payable to said Makin, and which were thereafter accepted and paid by the drawees. The complaint further alleges that at the time of drawing said bills of exchange he demanded of Makin security therefor, and thereupon the defendant Ann S. Ross, by request of said Makin, made and executed an instrument in writing, in form a deed of conveyance of certain described real property, and gave the same to Makin, with direction to deliver it to plaintiff, which was done by him on or about April 1, 1885. The complaint then proceeds to aver that said conveyance was executed and delivered to plaintiff as a mortgage to secure the repayment to him by said Makin "of any moneys which plaintiff might be required to pay to his said correspondents and agents in case the proceeds of sale of said wheat should be insufficient to repay them the amount of said drafts so accepted and paid by them." It is further alleged that plaintiff was compelled to pay on account of said bills of exchange the sum of $10,733, and this action is brought to have the said deed declared a mortgage, and that the land therein described be sold, and the proceeds of the sale applied to the payment of the said sum of $10,733, costs, etc. The defendants, in their answer, deny that the deed was executed to plaintiff for the purposes alleged in the complaint, and in this connection allege "that, prior to the month of April, 1885, the said R. G. Makin had contracted a debt to the firm of Makin & Bancroft, of Liverpool, in England, and that at the request of the said R. G. Makin, the defendant Ann S. Ross executed the said deed to the said plaintiff for the purpose of enabling him, by means thereof, to raise money to discharge the said indebtedness of the said R. G. Makin to the said firm of Makin & Bancroft." The defendants also filed a cross complaint, in which they allege that "the said plaintiff received the said deed from said Makin with full notice of the purpose for which it was to be used, namely, to raise money to enable said Makin to pay the aforesaid claim secured by said mortgage, (a mortgage alleged to have been executed by defendant Ann S. Ross to secure the claim of Makin & Bancroft against R. C. Makin and defendant Ross,) and promised and agreed with said defendant Ann S. Ross to use it for that purpose, and no other;" and that the defendant failed to raise any money to pay said claim, "and redelivered the said deed to the said Makin, who retained possession thereof until his death." At the close of the testimony offered by plaintiff, the defendants moved to dismiss the action, which motion was granted, and a judgment of dismissal entered. The plaintiff appeals.

The plaintiff was a witness in his own

behalf, and testified that Makin delivered to him the conveyance referred to in the complaint. He was then asked what Makin gave him the deed for, and whether he accepted it as an absolute conveyance; and, if he did not, to state the purpose for which he received it; and at a later stage of the trial the plaintiff offered to prove what was said by Makin at the time he delivered it. The defendants objected to the questions and offer, and their objections were sustained by the court. It is apparent, and, indeed, it is conceded by respondents, that plaintiff sought by this offered evidence to show by the declarations of Makin, made at the time, that he delivered the conveyance in behalf of defendant Ross for the purposes and upon the agreement alleged in the complaint; in other words, the plaintiff sought to show that it was agreed between himself and Makin that the deed was to be delivered to secure the plaintiff against any loss which he might sustain on account of the bills of exchange he had drawn in favor of Makin. The rulings of the court in excluding this evidence present the questions which are necessary to be noticed in this opinion. There was no evidence given or offered to show that Makin had any actual authority from defendant Ross to deliver the deed to defendant for the purposes alleged in the complaint, and the pleadings upon the part of defendants do not admit that he had any such authority. These pleadings only contain the admission that Makin was authorized to deliver the deed as a mortgage to raise money to pay a certain named indebtedness, the amount of which is not specified, but which was shown by the evidence to be about $2,000. It needs no argument to show that a power to deliver the deed for such a purpose was not an actual authority to Makin to enter into any such transaction in behalf of his principal, the defendant Ross, as that which is alleged in the complaint. We do not understand that this position is seriously controverted by plaintiff, but it is claimed by him that Makin was clothed with an apparent authority to deliver the deed as a mortgage to secure the plaintiff for the advances made to Makin. There can be no doubt that if Makin did have conferred upon him such ostensible authority, then the court erred in not permitting the plaintiff to show that such authority was in fact exercised by him. While it is true that the authority of a person to act as agent for another in a particular matter cannot be proven by the declarations of the one assuming to act as such agent, yet, when it is once shown that a person has been given an actual or ostensible authority to act for another in a particular matter, any declarations made by such agent at the time of the transaction of the business intrusted or apparently intrusted to him, and relating to such business, is admissible as a part of the *res gestæ*. 2 Whart. Ev. §§ 1170, 1173; 1 Greenl. Ev. (15th Ed.) § 113; Moore v. Bettis, 11 Humph. 67; Robinson v. Walton, 58 Mo. 380. This being so, the real question to be decided here is whether it was shown that defendant Ross did confer upon Makin the apparent authority to act for her, and deliver to plaintiff the deed referred to for the purpose of securing plaintiff against loss by reason of the bills of exchange which he drew in favor of Makin, the plaintiff knowing at the time that such bills were to be used by Makin in his own business. The defendant Ross never personally made any agreement with the plaintiff for a sale of the land described in the deed, or any personal agreement with him for the delivery of the deed for any purpose; and it is contended that when, under such circumstances, she intrusted to Makin the deed signed by herself, and in which the plaintiff was named as grantee, she conferred upon such agent an ostensible authority to agree upon the terms and conditions upon which it should be delivered, and that she is bound by the agreement under which the deed was in fact delivered by Makin, as plaintiff was without actual knowledge that such agent was making a fraudulent use of the deed. But it seems clear to us that, upon the facts stated, Makin was not clothed with any ostensible authority to deliver the deed as a security for a personal loan or advance made to himself, and, as plaintiff knew that this was the purpose for which the deed was given to him, he accepted the same at his own peril, and defendant Ross is not bound by such act of Makin, without proof that she actually authorized him to deliver the deed as security for the debt of such agent. This conclusion rests upon these two propositions, either one of which is a complete answer to the contention of plaintiff that defendant Ross is bound by the agreement under which it is claimed that Makin delivered the deed: *First.* The apparent authority of Makin to act for defendant Ross, arising from his possession of the deed, did not extend further than to empower him to make a sale of the land to plaintiff; to agree upon the price and other terms of the contract of sale; and thereupon to deliver the deed as an absolute conveyance. *Second.* But if it should be conceded that, by intrusting such deed to Makin, the defendant Ross gave him, as such agent, an apparent authority to deliver the same to plaintiff as a mortgage, still such apparent authority in Makin was limited by one of the fundamental principles of the law of agency to the right to deliver it only as a security for some obligation of his principal. In intrusting the deed in question to Makin the defendant Ross did not clothe him with any apparent authority to deliver it except for her benefit, and the plaintiff was not justified as a matter of ordinary prudence in presuming that Makin might use the instrument for his own benefit and purpose. In the case of Nippel v. Hammond, 4 Colo. 211, the agent was authorized by a written power of attorney "in the name, place, and stead" of the principal "to sell and convey the premises by warranty deed or deed of trust, or by deed of mortgage, as he might deem advisable." The agent executed a trust deed of the premises,—mentioned in the power of attorney,—but for the purpose of securing his own individual note. There was nothing in the power which, by express terms, limited the right of the agent to execute conveyances only for the benefit of the principal, but the court held that such was the only authority conferred, saying: "A general power to incumber real estate, without declaring for whose benefit it may be incurred, will not warrant the attorney in incumbering it for the benefit of himself or any other person. It hence results that the deed of trust was ineffectual to convey Arnold Hofstadt's interest in the premises described therein." This principle is also illustrated in Trust Co. v. Abbott, 44 N. J. Law, 257. That was an action upon a promissory note, signed with the defendant's name by Jesse R. Abbott, who acted under the following power of attorney: "Sir: This is to certify that J. R. Abbott * * * is this day appointed with power of attorney, and authorized by me to sign my name to any paper or papers, notes, etc. T. ABBOTT." It was shown that the note in suit was executed by the agent for his own personal benefit, and it was held that, as its execution was outside of the principal's business, it was unauthorized, and that the plaintiff could not recover without showing that it took the note before maturity for value, and without notice. It follows from these views that, as Makin was not acting within the scope of his apparent authority in delivering the deed for the purposes alleged in the complaint, the court did not err in refusing to admit in evidence his declarations, or in excluding evidence of the agreement which he assumed to make with plaintiff at that time. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

(3 Cal. Unrep. 597)

BAKER v. BAKER et al. (No. 14,286.)

(Supreme Court of California. Nov. 10, 1892.)

EXPRESS TRUST — DECLARATION IN WRITING — ESTOPPEL — ACTION TO SET ASIDE PARTITION — EVIDENCE.

1. Under Civil Code, § 852, subd. 1, providing that no trust in relation to real property is valid unless created and declared "by a written instrument subscribed by the trustee," such a trust is sufficiently declared by a deposition of the trustee, made in an action wherein the question of the creation of such trust was involved, and by which it appears that he so held the property in question.

2. Where a mother conveys real estate to her son, in trust, the rents and profits thereof to be used for her support, and on her death the estate to be equally divided among her heirs, and the son and other heirs voluntarily partition the same among themselves, before the mother's death, such son or his wife should not afterwards be allowed to complain of such partition on the ground that it was made in violation of the trust.

3. In an action by the son's wife to set aside one of the partition deeds, on the ground that she did not join therein, there is no prejudicial error in refusing to allow her to introduce the judgment roll of an action by the mother against the son, his wife, and the other heirs, to set aside the partition and enforce the trust, and wherein it was decided that the property was not held in trust, but that defendants therein, as against the mother, were the owners of the parts partitioned to them.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by Isabella L. Baker against Andrew T. Baker and Mary T. Baker to set aside a deed of certain land. Judgment for defendants. Plaintiff appeals. Affirmed.

J. D. H. Chamberlin, for appellant. *Buck, Wheeler & Cutler*, for respondents.

BELCHER, C. This action was commenced in the superior court of Humboldt county on the 15th day of March, 1889, and it is alleged in the complaint that the plaintiff is, and at all times mentioned therein was, the wife of Erastus J. Baker; that on the 22d day of January, 1879, she and her husband were the owners in fee and possessed of a certain described tract of land situate in Humboldt county, and containing 20 acres, more or less, and that on the day named her husband filed and caused to be recorded a declaration of homestead on the said land, in which all the facts necessary for the selection of a homestead were fully and truly set out; that the homestead was never abandoned, and thereafter, on the 29th day of September, 1886, the husband executed to the defendants a deed of the said land, in which she refused to join; that under the said deed the defendants entered into possession of the land, and have ever since claimed, and now claim, the sole and entire ownership thereof, to the exclusion of and in hostility to the plaintiff; that such claim of ownership and possession is a cloud upon plaintiff's title, and prevents her from having the full enjoyment of her homestead rights. Wherefore, she prays that the deed to defendants may be declared null and void, and that she be restored to the possession of the land. The defendants answered, denying all the averments of the complaint, and by way of cross complaint set up facts showing that the land in controversy, with other land, was held by their grantor in trust for them and others, and that the deed complained of was made and delivered in execution of that trust. The plaintiff answered to the cross complaint, denying most of its averments, and alleging that the affirmative defense set up therein is barred by the statute of limitations, and also by a former judgment rendered in an action, in which Elvira B. Wolverton was plaintiff, and Erastus J. Baker and others were defendants. The court below found the facts and rendered judgment in favor of the defendants, and from that judgment and an order denying her motion for a new trial the plaintiff appeals. After an elaborate discussion of the matters involved in the case, the learned counsel for appellant says in his brief: "This appeal turns entirely upon two questions: (1) Are the findings relating to the alleged trust supported by the evidence? (2) Did the court err in the introduction and rejection of evidence to sustain or refute the said trust?" The material and admitted facts of the case are as follows: In 1878, Elvira B. Baker was the owner of 80 acres of land in Humboldt county, of which the land in controversy was a part. She was a widow, 73 years of age, and had four children, Erastus J. Baker, Andrew T. Baker, Alonzo T. Baker, and Mary A. Church. On the 3d day of December, 1878, she, by a bargain and sale deed, expressing a consideration of $10, conveyed to her son Erastus all of her said land, and on the 30th day of the same month, for the expressed consideration of $1, she executed to him a second deed of the land. In the first deed there were some errors in the description of the property, and the second deed was made to correct those errors. At the time of the execution of these deeds, Erastus had a wife and three children, and was residing on the land conveyed to him, near the house of his mother, and was the only one of the three brothers who lived in the county. On the 22d day of January, 1879, Erastus filed and had recorded a declaration of homestead upon the said 80 acres, in which he stated that he was the head of a family, and was actually residing with his family upon the land described, and that he intended to claim and use the same as a homestead, and estimated its value to be $4,500.

On the 1st day of January, 1879, the mother, Elvira, married one B. F. Wolverton, and on the 12th of July of that year Erastus executed to her and her husband a written lease of about five acres of the land for the term of the natural life of the lessees, and at an annual rent of one cent. In June, 1885, Alonzo and his then wife, the defendant Mary, executed to Erastus a deed conveying to him all their right, title, and interest in and to the said 80 acres, and for this conveyance Erastus paid Alonzo $1,000 in cash. Alonzo afterwards died during that year, and his widow subsequently married the defendant Andrew. In September, 1886, the two surviving brothers and sister partitioned the said 80 acres among themselves, as follows: The defendants and Mrs. Church conveyed all their right, title, and interest in and to 40 acres thereof to Erastus; Erastus and the defendants conveyed all their right, title, and interest in and to 20 acres thereof to Mrs. Church; and Erastus and Mrs. Church conveyed all their right, title, and interest in and to the 20 acres thereof here in controversy to the defendants. Upon receiving their deed, defendants entered into possession of the parcel so conveyed to them, made valuable improvements upon it, and have ever since resided thereon. In March, 1887, the mother, in the name of Elvira B. Wolverton, commenced an action in the superior court of Humboldt county, in which Erastus and his wife, the plaintiff here, Andrew and his wife, the defendants here, and Mrs. Church were made defendants. In her complaint the plaintiff alleged, among other things, that in December, 1878, she was the owner of a described tract of 80 acres of land, and that "reposing a personal confidence in said defendant Erastus J. Baker, and by the mutual consent of said plaintiff and said defendant, and without any valuable or other consideration given or agreed to be given therefor," she, "being of the age of seventy-three years or thereabouts, and infirm in mind and body, and desiring to make a suitable provision for her future support and maintenance, as well as to secure the proper distribution thereof to her heirs at law upon her death, transferred and conveyed the said lands and premises to said defendant Erastus J. Baker, upon the sole and only consideration that the said defendant should hold the same in trust for said plaintiff, and that the rents, issues, and profits and proceeds thereof should be applied in providing for and maintaining said plaintiff during her natural life in a manner suitable to her station and condition in life, and, upon her death, in trust for the benefit of, and to be delivered in equal proportions to, her heirs at law aforesaid;" that Erastus voluntarily accepted the transfer and conveyance, and "agreed with and promised this plaintiff that, in consideration of the transfer and conveyance to him of said lands and premises as aforesaid, he, said defendant, would hold the same in trust for this plaintiff, would apply the rents, issues, profits, and proceeds thereof to the providing for and in maintaining this plaintiff during her natural life, and at her death that he would hold the same in trust for, and would deliver the same to, her heirs at law in equal proportions;" that Erastus accepted the conveyance with intent to wrong, cheat, and defraud the plaintiff out of the title to, and the uses and benefits of, the said lands, and that he had violated his trust by mortgaging the land, filing a homestead thereon, and conveying described portions thereof to the other defendants, who had notice of the trust. And the prayer was that it be adjudged that plaintiff is the owner of the lands described, and that whatever title thereto is held by the defendants, or either of them, is held in trust for the use and benefit of the plaintiff; that all of the defendants be required to make proper conveyances of the property to the plaintiff; and that the homestead of Erastus and Isabella be declared null and void. The defendants all answered jointly to the complaint, and after trial judgment was entered, in and by which it was "ordered, adjudged, and decreed that the plaintiff is not the owner of the lands and premises described in the complaint herein, but that defendants, as against the plaintiff, are the owners thereof, in severalty, in fee simple, of the several distinctive pieces or parcels of land mentioned and described in the complaint herein, free and clear of any and all the trusts, exceptions, limitations, and conditions set forth and alleged in said complaint;" and also that the homestead carved out of the land "by the defendant Erastus J. Baker and Isabella L. Baker, his wife, be, and the same is hereby, adjudged a valid homestead, free and clear of any and all the trusts, exceptions, limitations, and conditions set forth in the complaint herein." That judgment was never reversed or modified, and it is the same judgment pleaded by the plaintiff in bar of the defense set up in the cross complaint. While that case was pending, Erastus made, subscribed, and swore to a deposition to be used in the case, and the defendants here introduced that deposition in evidence for the purpose of showing that the trust set up and relied upon by them had been declared by a written instrument, subscribed by the trustee, in a manner sufficient to meet the requirements of section 852 of the Civil Code.

It appears that the deponent, after stating that the lands in controversy in that case were conveyed to him by his mother, without any money consideration paid therefor, gave, among others, answers to questions propounded to him as follows: "Question. On September 28, 1886, Andrew T. Baker, Mary T. Baker, and Mary A. Church conveyed to you certain land, a portion of that property? Answer. Yes, sir. Q. The consideration expressed in that deed is one dollar? A. Yes, sir. Q. For what purpose was that deed made? A. Well, as a settlement between us. Q. Settlement of what? A. Of an interest in the property. Q. Andrew T. Baker had no interest, had he? A. If one had, another had. Q. You have told us already in this examination that the land was conveyed to you for you and Mrs. Church? A. I also told you that some of my brothers thought they ought to have the same interest as the rest of us. Q. That did not affect Andrew T. Baker, did it? A. If one had an interest, my brother had an interest, too. Q. So, then, at the time these deeds were made you considered that all the children of your mother had an interest in the property? A. Yes, sir. Q. At the same time you, Mary T. Baker, and Andrew T. Baker conveyed certain land to Mary A. Church? A. Yes, sir. Q. At that time you recognized the fact that Mary A. Church had a certain interest in that land which stood in your name? A. Yes, sir. Q. At the same time you and Mary A. Church made a deed to Andrew T. Baker and Mary T. Baker? A. Yes, sir. Q. Was that deed made for the same purpose? A. The same purpose. Q. Then at that time you recognized the fact that Andrew T. Baker held an interest in that land? A. Yes, sir. Q. Then, if I understand your testimony correctly, at the time these several deeds were made you recognized the fact that you held this land in your name for your sister, your sister-in-law, and your brother? A. Yes, sir. Q. You held it that way for them, and these deeds were made for the purpose of straightening out their several interests? A. Yes, sir; that is what they were for." Mrs. Wolverton, the mother, was called as a witness by defendants, and testified as follows: "Question. What I want to know is, at the time this deed was made to E. J. Baker, what was the consideration of the deed,—why it was,—what it was that induced you to make that deed? Answer. I deeded it to him so that the children could have it after me. It was my wish that the children should have it after I was gone. Q. That was the reason you made this deed to Erastus? A. Yes, sir." The defendants also introduced and read in evidence the several deeds above referred to, between the brothers and sister. The evidence given by the several witnesses on direct and cross examination was quite voluminous, but we have referred above to the most material parts of it.

The first question then is, was it sufficient to justify the findings in relation to the alleged trust? In our opinion, this question must be answered in the affirmative. A valid trust in relation to real property may be declared by a written instrument, subscribed by the trustee. Civil Code, § 852. And the statute will be satisfied if the trust is declared by any writing subscribed by the trustee in which the fiduciary relation between the parties can be clearly read. The writing may be executed simultaneously with or subsequent to the conveyance, and may be of a most informal nature. Letters, recitals, memoranda, affidavits, depositions, and verified pleadings have been held sufficient. 1 Perry, Trusts, § 82; 2 Pom. Eq. Jur. § 1007; 2 Reed, St. Fraud, § 845; Garnsey v. Gothard, 90 Cal. 603, 27 Pac. Rep. 516. The deposition read in evidence was a sufficient declaration in writing to satisfy the requirements of the Code, and from it it clearly appears that Erastus took and held the legal title to the land conveyed to him by his mother in trust for his brothers and sister. And this conclusion is greatly strengthened by the fact that he bought out one brother's interest, and voluntaily joined with the other brother and sister in fairly partitioning an equal share in the property to each. It is objected, however, by appellant that, conceding Erastus held the property in trust for his brothers and sister, still it was a trust to be executed only after the death of the mother, and as they proceeded to partition the property before her death they thereby violated the trust, and are entitled to no relief in a court of equity. But the mother is not now complaining that the property was prematurely divided. When she failed in her efforts to get it back for her own use, she ceased to have any interest in its retention by Erastus till her death. And it having been voluntarily divided by Erastus, we do not think he or his wife should now be heard to complain of the division on this ground.

The next question is, did the court err in its rulings upon the admission of evidence? Most of the evidence offered by the defendants was objected to by the plaintiff, and the objections were overruled, and exceptions reserved. It is unnecessary to speak of these rulings separately. We see no material error in them. The evidence was admissible, and the court properly overruled the objections.

In rebuttal the plaintiff offered in evidence the judgment roll in the case of Wolverton v. Baker et al., before referred to. The defendants objected to the offered evidence "on the ground that it did not bind the parties to this suit in any way, shape, manner, or form." The court sustained the objection, and the plaintiff excepted. It is urged for appellant that this ruling was erroneous; "that the judgment roll offered estops the defendants in this action, and should have been admitted in evidence." And it is said: "The question of the same trust between the same parties, and the effect of the judgment, in that case has been determined by this court;" citing Wolverton v. Baker, 86 Cal. 591, 25 Pac. Rep. 54. The case cited was a second action of the mother against her children, in which she again sought to have her deeds to Erastus set aside. The children pleaded in bar of the action the judgment in the first case, and the trial court sustained the plea. In deciding the case on appeal, it was said by the court: "This judgment was palpably erroneous upon the facts found, but nevertheless it prevents a relitigation of the matters determined." And again: "It is a shameful thing that a son should refuse to support his aged mother, after obtaining her property, without consideration, upon the conditions mentioned. But the law must be declared." By the judgment pleaded in bar in that case, and offered in evidence here, it was adjudged that the defendants did not hold the property in trust for the plaintiff, and it was also adjudged "that defendants, as against the plaintiff, are the owners thereof in severalty of the several distinctive pieces or parcels of land mentioned and described in the complaint herein." The plaintiff here was one of the defendants in that action, and, if the judgment can be said to operate at all as an estoppel between the defendants, we think it should be held to estop her from now claiming that the defendants here were not the owners in severalty of the parcel of land mentioned and described as owned by them. There was therefore no prejudicial error in this ruling. Looking at the whole record, we see no good ground for reversal, and therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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96 Cal. 433

WICKERSHAM v. COMERFORD et al.

(No. 14,782.)

(Supreme Court of California. Nov. 10, 1892.)

HUSBAND AND WIFE—SEPARATION—ALLOTMENT TO WIDOW—RIGHTS OF CREDITORS—ACTION TO SET ASIDE.

1. By a deed of separation a husband conveyed all his lands to his wife, to be her separate estate, free from all claims by him, and the wife gave to the husband money, to be his separate estate, free from all claims from her. *Held*, that the agreement, both as to separation and division of the common property, was valid, under Civil Code, §§ 158, 159, providing that the husband and wife may enter into any agreement with each other respecting property which either of them might do if unmarried, and that they may, in writing, agree to a separation, which shall not change their legal relations except as to property.

2. In such case, on the death of the husband, the wife would not be entitled to a family allowance out of his estate, under Code Civil Proc. §§ 1465, 1466, 1468, providing that, in case of the husband's death, the husband's estate may be set apart for the surviving wife and minor children, because said sections should be construed as setting apart the husband's estate for the temporary use of the family, and the wife was not a member of the family at the time of the husband's death.

3. A complaint alleged that the wife filed a petition in the probate court to allot to her said estate as a homestead; that the petition stated that the husband had resided on the estate during his lifetime, and that she had resided there since his death, which statement was false, and made with intent to deceive the court; that the petition said nothing about the separation of the parties, which omission was willfully made to mislead the court; that said statement and omission did deceive and mislead the court, and induced it to order the setting apart of the estate to the wife as a homestead, to the prejudice of the plaintiff, who was a creditor of the husband. *Held*, that the complaint alleges facts constituting a fraud of which plaintiff has a right to complain.

4. The creditor's remedy was not limited to an appeal from the order setting apart the homestead, since the record in such case would not show the debt of the husband to the creditor, or the fraud of the wife, both of which were necessary to the creditor's relief.

5. Nor did the creditor have an adequate remedy by motion to vacate the order, since he could not appeal from an order denying the motion, because the order sought to be vacated was itself an appealable order.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

Action by I. G. Wickersham against Sarah Comerford and Philip Comerford to annul an order of court fraudulently obtained to set apart a homestead to defendant Sarah Comerford. From judgment for defendants, plaintiff appealed. Reversed.

Lippitt & Lippitt, for appellant. *Haskell & Meyer*, for respondents.

VANCLIEF, C. This is an action to set aside and annul an order of the superior court of Sonoma county, designating and setting apart a homestead to the defendant Sarah, as the widow of Richard Comerford, deceased, on the alleged ground of fraud in its procurement. The court sustained a general demurrer to plaintiff's complaint, and, as plaintiff declined to amend, gave judgment for the defendants. The plaintiff appeals from the judgment, and contends here that the court erred in sustaining the demurrer. The complaint shows that on August 11, 1888, Richard Comerford and the defendant Sarah, being husband and wife, executed a written agreement as follows: "That the said parties have agreed, and hereby agree, to live separate and apart from each other henceforth, and to divide the community property between them as herein provided. Sarah Comerford to have the custody of their minor child, Philip P. Comerford, and provide for the support of said child. All the real estate situate in Sonoma county, state of California, which Richard Comerford has hitherto deeded to Sarah Comerford, shall remain and become her separate estate, free from all claim of the said Richard Comerford in law or equity, and he hereby waives all claim to the same as husband, and all right to the same at her death by reason of his relation as husband. He hereby also sells to her all the chattel property now upon the said ranch constituting their present home. The said Richard Comerford also hereby deeds to said Sarah Comerford all lots of land situate in Alameda county now belonging to him, or in which he has any interest, to be and become in like manner her separate estate, free from all claim of the said Richard Comerford; and in consideration of the aforesaid conveyance to her the said Sarah Comerford pays to the said Richard Comerford the sum of three thousand five hundred dollars, gold coin of the United States of America, the receipt whereof is hereby acknowledged by the said Richard Comerford, and the said sum shall be the separate estate of the said Richard Comerford, and to it Sarah Comerford relinquishes all right as his wife, in law or equity, or by descent; and each party shall have hereafter no claim upon the other for support or sustenance. The said Richard Comerford to surrender the possession of all the said premises and property to said Sarah Comerford, and leave her in the sole occupation of the same. These presents to bind said parties during their relative lives, unless vacated by the joint deeds of revocation of said parties. In witness whereof, the said parties hereunto set their hands and seals this 11th day of August, 1888. RICHARD COMERFORD. SARAH COMERFORD." That this agreement had been duly acknowledged and recorded in the counties of Sonoma and Alameda. That upon the execution of this agreement the parties thereto immediately separated, and never again lived together. The wife, with her minor son, the defendant Philip, removed to Alameda county, upon the lots described in the agreement as being there situated, and continued to reside there until after the order in question, setting apart to her a homestead, was made, and never, after the execution of said agreement, asked or received any assistance or support from her husband, nor complained that the agreement was not fair. With the $3,500 received by the husband as per agreement he purchased a lot of land in Sonoma county, containing seven acres, a deed for which he procured to be executed to himself and his eldest son, who had remained with him, and on which he resided until February 10, 1890, when he died intestate, leaving no other property than his interest in said lot. On February 18, 1890, the defendant Sarah applied for letters of administration on his estate, and was appointed administratrix on March 3d. On March 6th she published the requisite notice to creditors, and on March 10th filed an inventory of the estate, in which the said lot was described as the only property of the estate. On the day of the filing of the inventory (March 10th) she filed her petition for an order setting apart to her as a homestead the said lot of seven acres, which stated, among other things, "that said decedent, during his lifetime, resided upon said tract of land, and that she had been residing there since his death," but which stated nothing about the deed of separation, nor the fact of separation. Thereafter, on March 24th, the court made the order setting apart the lot to her alone as a homestead, absolutely, and without any limitation as to time. That plaintiff was a creditor of Richard Comerford at the time of his death, and within the time limited by the notice to creditors presented his claim to the administratrix for allowance, and that it was allowed by her on June 4, 1890, and by the judge of the court on June 9, 1890. That plaintiff first learned that the order setting apart the homestead had been made on June 4, 1890,—more than 60 days after that order had been entered. The complaint charges that the statement in the petition for a homestead, to the effect that defendant had resided on the lot of seven acres since the death of her husband, was willfully false, and made with intent to deceive and mislead the court, by falsely suggesting that she had resided upon said lot with her husband immediately before and at the time of his death; and also that she intentionally and willfully suppressed and concealed from the court the said agreement to separate from her husband, and the fact of separation according to the agreement, for the purpose of deceiving and misleading the court; and that such false statement and suggestion as to her residence, and the concealment of the deed and fact of separation, did deceive and mislead the court to believe that she had resided with her husband, as a part of his family, immediately before his death, and that there had been no separation, and thereby induced the court to make the order setting apart the homestead. It is further alleged that plaintiff thereafter moved the court in which the order was made to set it aside on the grounds above stated, and that the court denied this motion.

I think the court erred in sustaining the demurrer to the complaint.

1. It seems clear that defendant was not entitled to the homestead which was set apart to her, even for a limited period. In consequence of the agreement of separation, which had been fully executed on the part of the husband, and the fact of separation in accordance with the terms of the agreement, she was not a member of his family at the time of his death, nor at any time after the separation, and therefore, upon his death, was not entitled to a family allowance out of his estate, under sections 1465, 1466, 1468, Code Civil Proc., (Estate of Noah, 73 Cal. 583, 15 Pac. Rep. 287, and 88 Cal. 472, 26 Pac. Rep. 361;) and since I think the setting apart of a homestead by the court from the separate property of the husband, as required by section 1465, "for the use of the surviving wife * * * and the minor children, or * * * for the use of the minor children," means the setting of it apart for the temporary use of the family, in the sense in which the word "family" is used in sections 1466 and 1468, it follows that the surviving wife is not entitled to such homestead, unless she had been a member of her husband's family immediately before and at the time of his death. Another consequence of the deed and fact of separation was to deprive the wife of the right to select any part of her husband's separate property as a homestead, under the homestead act, during his life; and it is well settled that "no property can be set apart by the probate court as a homestead, which might not have been dedicated as such under the homestead act immediately preceding the death of the deceased." In re Ackerman, 80 Cal. 208, 22 Pac. Rep.

141; In re Armstrong, 80 Cal. 71, 22 Pac. Rep. 79; Estate of Noah, supra. By the agreement of separation the common property was fairly divided to the satisfaction of both parties, and each party relinquished all right to the share allotted and assigned to the other. As to the share allotted to the husband, ($3,500,) the wife agreed that "the said sum shall be the separate estate of said Richard Comerford, and to it Sarah Comerford relinquishes all right as his wife, in law or equity, or by descent; and each party shall have hereafter no claim upon the other for support or sustenance." I think the agreement, both as to the separation and the division of the common property, was fully authorized by sections 158 and 159 of the Civil Code, and is binding upon the parties, and that the wife thereby absolutely relinquished her right to select as a homestead, during his life, any part of the property thereby alloted to him as his separate estate; and consequently, as above shown, the court had no authority to set apart to her any part of it after his death. In opposition to this view, counsel for respondents cite Eproson v. Wheat, 53 Cal. 715, in which it was held that the agreement of separation in that case did not bar the wife's right to a probate homestead. But in that case the agreement did not divide any property, but merely provided for a separation, and that the husband should pay the wife $100 per annum for her support during his lifetime. The wife relinquished no right to property; and the setting apart to her of a homestead, after his death, was not in contravention of any express or implied term of the agreement.

2. Counsel for respondents claim that the facts stated in the complaint do not constitute fraud of which plaintiff is entitled to complain. The complaint charges a willful suppression of a material truth and the suggestion of a falsehood by defendant, with intent to deceive and mislead the court, to the prejudice of the creditors of the estate, and avers that such suppression and suggestion had the intended effect, to the injury of the plaintiff, who was one of such creditors. I think this constituted fraud. Pom. Eq. Jur. §§ 901, 919, 1364; Civil Code, §§ 1572, 1710; Estate of Hudson, 63 Cal. 454; Dean v. Superior Court, Id. 474.

3. It is contended that plaintiff's only remedy was an appeal from the order setting apart the homestead. No doubt that order was appealable. But, conceding that plaintiff's relation to the case (that of a mere creditor of the estate, whose claim had not been allowed) was such as would have entitled him to appeal from that order, yet he could have obtained no adequate relief by such appeal, since neither the fraud upon which this action is grounded, nor the fact that plaintiff was a creditor, could have been brought into the record on appeal from that order. Nor did plaintiff have an adequate remedy by motion to vacate the order, even conceding that he was entitled to make such motion, and had made it within the proper time. To say nothing of the disadvantage of trying an issue of fraud on such a motion, he could not have appealed from an order denying the motion, because the order sought to be vacated, viz., the order setting apart the homestead, was itself an appealable order. Railroad Co. v. McGrath, 74 Cal. 49, 15 Pac. Rep. 360; Larkin v. Larkin, 76 Cal. 323, 18 Pac. Rep. 396. It will hardly be contended that a remedy for the wrongs complained of, thus restricted, is not defective and inadequate, as compared with an original equitable action, adapted to a thorough investigation of the issues, and in which all errors committed by the trial court may be corrected on appeal. I think the judgment should be reversed, and the cause remanded, with instructions to the court below to overrule the demurrer, and proceed in the cause.

We concur: Belcher, C.; Haynes, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with instructions to the court below to overrule the demurrer, and proceed in the cause.

(3 Cal. Unrep. 590)

DAUBENBISS v. WHITE et al. (No. 14,519.)

(Supreme Court of California. Nov. 10, 1892.)

Public Lands—Right of Possession—Abandonment—Transference—Ejectment—Findings—Sufficiency of Evidence.

1. An occupant of public land who is ousted by a stranger will not be presumed to have abandoned his right to possession, where, after a contest for a year, he ceases to contend against a superior force maintaining an armed resistance.

2. In ejectment to recover possession of public land, plaintiff claimed under a deed from D., who had occupied the land without color or claim of title. There was no evidence of any act of possession on plaintiff's part, and several witnesses testified that defendants were in possession of the land in July, 1889. *Held*, that the evidence did not support a finding that D. sold and delivered possession to plaintiff in August.

3. Bare right of possession, without claim or color of title, cannot be transferred by deed, nor otherwise than by the former possessor yielding up or abandoning the possession, and permitting a new possession to be taken by another.

Commissioners' decision. Department 2. Appeal from superior court, San Benito county; James F. Breen, Judge.

Ejectment by John Daubenbiss against Amos White and others. The court found in favor of defendants for a part of the land, and in favor of plaintiff for the remainder. A motion for a new trial was overruled, and defendants appeal. Reversed.

Briggs & Hudner, for appellants. *Montgomery & Scott*, for respondent.

Haynes, C. In ejectment. Plaintiff bases his right to recover upon prior possession alone. The answer denied plaintiff's possession and his right thereto, alleged prior possession in themselves to part of the land, title in one Robinson to part, and their right to the possession of such part under a lease from the owner. The cause was tried by the court, without a jury. The court found in favor of defendants for the part they held under lease from Robinson, and in favor of plaintiff for the remainder. Defendants moved for a new trial upon a statement, and this appeal is from the judgment, and the order denying a new trial. The transcript does not show the date at which the action was commenced, nor does it state the names of any of the defendants except that of Amos White. We gather from the findings, however, that the other defendants were L. M. Ladd, as administrator of the estate of C. H. Waters, deceased, and William Eastman. Prior to the trial the defendants White and Eastman succeeded to the interest of Waters, deceased. The land sought to be recovered is section 23, township 15 S., range 6 E., M. D., in San Benito county, and situate in the Gabilan mountains. Long prior to 1883, this section and other adjacent sections were in the possession of Root and Martelli, who used the same for grazing purposes, for which alone it was useful. This tract contained about 3,000 acres. In 1883 C. H. Waters acquired all the right of Root and Martelli, and entered into possession, placed improvements thereon, consisting of fencing, houses, and a barn, and pastured his stock on the whole tract. Afterwards Waters let White and Eastman into possession with him, but at what precise date does not clearly appear, and continued in the exclusive possession of the whole tract up to the year 1886, in which year the Dakan Brothers and one Burns acquired possession of sections 14 and 15, lying adjacent to section 23, and in May of that year drove their cattle upon section 23, and expelled Waters' stock therefrom. The court found, upon conflicting evidence, that Waters had a fence, which with the natural barriers inclosed the whole tract of 3,000 acres, but that it was not sufficient to restrain or to turn stock without the aid of herders, and also found that there were fences, which with natural barriers nearly inclosed section 23; that these fences also, at the time of the entry of the Dakans, were generally prostrated, and insufficient, without herders, to turn stock; that the entry of the Dakans upon section 23 "was peaceably effected, and without passing through gates or tearing down fences." There appeared to have been disputes about the possession of other lands besides section 23 between Waters and the Dakans, but touching section 23 the court found: "This latter section continued to be the subject of frequent and grave disputes between the parties. These disputes led to a condition of armed hostility, in which threats of violence were exchanged, firearms were exhibited, and *melees* indulged in. Continuously throughout this state of affairs, the Dakans maintained themselves in the possession of section 23 by force of arms and superior numbers. Finally, after about a year's contention, Waters recognized the superior might and right of the Dakans to the possession of section 23. The Dakans continued to herd their cattle thereon, and excluded all other stock therefrom until they sold out to the plaintiff. That in August, 1889, the Dakans sold and delivered the possession of section 23 to the plaintiff, who at the time last stated entered upon section 23 with a herd of cattle, and pastured the same thereon, to the exclusion of all others, until September, 1889, when the defendants entered, and ousted plaintiff from the possession, and still exclude him therefrom." The defendants White and Eastman participated in the controversy with the Dakans respecting that section. The pre-emption entry of Robinson was perfected February 18, 1889, and covered the N. W. ¼ of the N. W. ¼, and the E. ½ of N. W. ¼ of said section. The remainder of the land in controversy is government land, to which it is conceded plaintiff has no right unless he acquired a right of possession by an alleged conveyance from Dakan, or by otherwise obtaining a possession prior to that of defendants. Following the formal findings of fact in the transcript is the decision or opinion of the court, consisting of a restatement of many of the facts and conclusions therefrom, and arguments upon questions of law, and following which are conclusions of law "from the foregoing facts and opinion." From this decision, as well as from the findings, it is apparent that the court concluded that the acquiescence of Waters and his associates, the defendants, in Dakan's possession, destroyed his right based on prior possession. In its opinion, the court conceded that relief could not be granted where the plaintiff's possession was a mere scramble, or maintained by force, violence, or threats; but added that this did not continue during the whole time of Dakan's possession. "Peace succeeded the hostilities, and he [Dakan] was not compelled to maintain himself by force or violence during the last year of his occupation;" and that it was not material whether the submission was compulsory and solely in the interest of peace. The findings, thus construed, (and without the comments of the court they could bear no other construction,) do not justify the conclusions of law drawn therefrom, nor support the judgment. It would be monstrous that a right conferred by a prior peaceable possession could be lost after a contest kept up for a full year, simply by ceasing to contend longer with a superior force maintaining an armed occupation. The defendants might have resorted to law, but they were not bound to do so within a week, a month, or a year. They might safely await an opportunity to re-enter peaceably, as they afterwards did. Their cessation from an armed contention cannot be construed as an abandonment of their prior right, and such right could only be lost by abandonment, or by the occupation of Dakan for the period of the statute of limitations. There is no finding, nor any evidence upon which any finding could be based, that defendants' entry, after the alleged possession of plaintiff, was not peaceably made and peaceably maintained.

But aside from this, if the findings as made were sufficient to support the judgment, the fourth finding is not justified by the evidence. This finding is that in August, 1889, the Dakans sold and delivered the possession to plaintiff, and that plaintiff then entered with a herd of cattle, and pastured the same, to the exclusion of all others, until the alleged ouster in September, 1889. Plaintiff testified that he "obtained the land in controversy from William Dakan; received a deed." The deed was offered and received in evidence against defendants' objection. The record nowhere shows the date of the deed, nor when it was delivered, but does show that "it was acknowledged December 14, 1889, after the commencement of the action." The plaintiff further testified that he did nothing to section 23; that he had an agent, his son, thereon, but did not know what he did. The son, F. B. Daubenbiss, testified that he went to this place the 3d or 4th of August, 1889; that as he was on his way to take possession, he met the Dakans with their cattle at Watsonville, 40 or 50 miles from this land; that they (the Dakans) were to keep their cattle there until August 1st, but took them away before he got there, and that he reached the land two days after he met the Dakans at Watsonville. Neither he nor the plaintiff nor any witness testifies that either the plaintiff or his son had any cattle, or ever put any cattle on the land, or that any act of possession was ever performed by or for the plaintiff. The Dakans had neither title nor color nor claim of title to the land. If by their occupation they had acquired any right, it was that of possession simply; a right which was wholly lost by their leaving the land, and removing their stock therefrom. All the circumstances show that they left without any intention of returning, and their leaving under such circumstances was an abandonment, and they could not put the plaintiff in possession after such abandonment. Nor would it aid plaintiff's case if the deed had been delivered, as it possibly was, before the commencement of the action, or when he met the Dakans at Watsonville, or before they left the land, for the reason that a bare right of possession, without claim or color of title, cannot be transferred by deed, nor otherwise than by the former possessor yielding up or abandoning the possession, and permitting a new possession to be taken by another. A deed only transfers title and the incidents flowing from title, or some right, as of possession, where the right depends upon title. In Society v. Dalles City, 107 U. S., at page 344, 2 Sup. Ct. Rep. 672, the court said: "All persons, therefore, who settled upon the public lands acquired no rights thereby, as against the government. They were merely tenants by sufferance. The most they could claim was the right of actual occupancy as against other settlers. Such an occupant could yield his right of actual possession to another settler, but he could convey no other interest in the land. If he abandoned the land, and another settler occupied it, the former lost all right to the possession. If he transferred the possession to another, and the transferee abandoned the land, the first possessor could claim no right in the land unless he again took actual possession." And on page 345, 107 U. S., and page 679, 2 Sup. Ct. Rep., in relation to the transfer in the case then under consideration, the court said: "The method adopted by the appellant to turn over the station to the American Board by an actual transfer of possession was as effectual as any could be. It could be done only by yielding the actual occupancy, and this could not be effected by a written transfer. It could be accomplished only by the going out of one party, and the going in of the other." If it be said that the Dakans had improvements on the land which might be the subject of transfer, the deed was inoperative for that purpose, as it only purported to convey the land, and, being ineffective for that purpose, did not convey or transfer improvements upon the land. Besides, by the abandonment of the land, the Dakans lost all right to the improvements, if any they had. Section 1013 of the Civil Code provides: "When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section 1019, belongs to the owner of the land, unless he chooses to require the former to remove it." Section 1019, above referred to, permits a tenant to remove certain things affixed to the premises during the continuance of the term. Not only is there no evidence that plaintiff ever had possession of the land in question, but there is evidence strongly tending to prove that defendants were in possession and had their stock on section 23, in July, 1889. Defendant White testified that in July, 1889, he drove everything off section 23 except his own stock; that he also saw Eastman's cattle on section 23 during the early part of 1889; and that he had been in possession, and had a man on section 23, since July, 1889. Harry Waters testified that in July, 1889, he had helped White drive 150 head of Dakan's cattle off section 23, and saw some of White's cattle on the place at the time. Appellants also attack the finding that the entry of the Dakans was without passing through gates or tearing down fences; and that the fences were generally prostrated. The findings, as well as the evidence, show that Waters and his associates, the present defendants, were in the actual possession of section 23 prior to the entry of the Dakans. It was not at all essential to such actual possession that the land should have been inclosed with a fence sufficient to turn stock, or that it was fenced at all. In McCreery v. Everding, 44 Cal. 246, the court below charged the jury that: "Neither complete inclosures, nor any inclosures at all, are essential to a possession of land. If the claimants, although they had no fences, yet exercised dominion and control over the land, and subjected it to their power, the matter of fences becomes immaterial and unimportant;" and this court, approving the instruction, said: "It is well settled that actual possession of land may be had without fences or inclosure." See, also, Sheldon v. Mull, 67 Cal., at pp. 300, 301, 7 Pac. Rep. 710; Goodrich v. Landigham, 46 Cal., at p. 603. The only importance properly attaching to the fences in the case at bar is that they served to mark, in connection with the use made of the land, the boundaries of the actual possession by the defendants. Any other physical and visible signs, clearly indicating the extent of the possession, would have served the purpose. The fences were erected for the purpose of confining cattle to the range inclosed, and excluding the cattle of others, and, whether sufficient for that purpose or not, clearly marked the extent of their possession. The fact that the Dakans drove their cattle in without tearing down the fence, and drove defendants' cattle therefrom, did not affect the character of their entry. Several exceptions were taken to the rulings of the court on the admission and exclusion of evidence, which should be briefly noticed. The deed from Dakan was, as we have seen, immaterial, whether defective or not, and was improperly received. There is not enough shown in the transcript to enable us to determine whether the exclusion of the certificate of the surveyor general touching White's application to purchase the land described in the certificate was or was not erroneous. Neither the date nor the substance of the certificate is stated, nor does the transcript show that it covered the land in controversy, or any part of it. We find in the opinion of the court a description of the land described in the certificate, and the statement that it was offered for the purpose of proving title. While if offered generally, or for the purpose of proving color of title, it would have been competent, we are not disposed to pass upon a question so defectively presented by the record. It is not necessary, in many cases, to do more than to state in the record the substance of papers offered in evidence, but where any question is raised as to the effect of any written instrument, enough should be stated for that purpose, and if the whole instrument is essential to a proper construction, then it should be set out in full. The judgment and order appealed from should be reversed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

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3 Cal. Unrep. 589

MAGNOLIA & H. FRUIT CANNERY v. GUERNE. (No. 14,302.)

(Supreme Court of California. Nov. 9, 1892.)

DISMISSAL OF ACTION—LACK OF AUTHORITY OF ATTORNEY.

Where the evidence warrants a finding that the attorney who brings a suit for a corporation against one of the stockholders was not authorized by the corporation to do so, it is proper for the court, on motion of defendant, to enter a judgment dismissing the action.

Department 2. Appeal from superior court, Sonoma county; JOHN G. PRESSLEY, Judge.

Action by the Magnolia & Healdsburg Fruit Cannery, a corporation, against George E. Guerne, a stockholder. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Barham & Bolton, for appellant. *Thomas Ruthledge*, for respondent.

MCFARLAND, J. The plaintiff is a corporation; the defendant is one of its stockholders. Defendant moved to dismiss the action upon the ground that it was brought without the authority of plaintiff, and that the attorney who signed the complaint was not the attorney of plaintiff, and had no authority to bring the action. The court granted the motion, and rendered judgment dismissing the action. Plaintiff appeals from the judgment.

It would serve no useful purpose to notice here in detail the evidence upon which the court below acted. It is sufficient to say that, in our opinion, the evidence warranted the finding that the attorney who brought the suit was not authorized by the corporation plaintiff to bring it. That being so, it was proper practice for the court to enter judgment dismissing the action. Turner v. Caruthers, 17 Cal. 431; Clark v. Willett, 35 Cal. 534.

The judgment is affirmed.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

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96 Cal. 421

CASTRO et al. v. GAFFEY. (No. 14,252.)

(Supreme Court of California. Nov. 9, 1892.)

EVICTION OF TENANTS — ACTION FOR DAMAGES — PARTIES.

Plaintiffs entered upon land under an oral agreement with defendant for a lease. The proposed lease was reduced to writing, while plaintiffs were in possession, signed by defendant and one of plaintiffs, and then left with defendant for the other plaintiff to sign, but he never did so, and there was no evidence that he ever accepted the lease, or knew of its existence. Plaintiffs afterwards, having left the premises at the command of defendant, brought an action on the lease. *Held*, that the action could not be maintained by the plaintiff who had not signed or accepted the lease, and therefore a nonsuit was properly granted.

Department 2. Appeal from superior court, Santa Cruz county; F. J. MCCANN, Judge.

Action by Castro and another against Gaffey to recover damages for eviction from land which plaintiffs alleged they had leased from defendant. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Lucas F. Smith, (*J. Edward Marks*, of counsel,) for appellants. *James A. Hall* and *Cross & Hall*, for respondent.

SHARPSTEIN, J. Appeal by plaintiffs from a judgment of nonsuit. The plaintiffs, in their complaint, allege that on the 14th day of January, 1890, the defendant "entered into an agreement under his hand and seal, whereby he hired, and the plaintiffs leased, for the term of two years," the premises in said complaint described; that defendant in said instrument in writing covenanted with the plaintiffs that they should peaceably and quietly occupy and enjoy the premises and privileges therein set forth and described for the said term of two years. Plaintiffs then allege that they "have not been permitted, peaceably or at all, to occupy and enjoy the possession of said premises; but, on the contrary, after the beginning of the term, on the 15th of January, 1890, the defendant, W. V. Gaffey, who was, at the time of making said lease and entering into said covenant, thereafter the lawful owner of said premises, evicted the plaintiffs from said premises, and has ever since kept them out of the possession of the same, to their damage in the sum of five thousand dollars." Defendant, in his answer, specifically denied all the material allegations of the complaint, including the allegation that plaintiffs had not been permitted peaceably to occupy and enjoy possession of said premises. The issues in said action came on for trial, and the plaintiffs, to maintain the issues on their part, offered in evidence an instrument in writing, signed by the defendant and one of the plaintiffs, which was in form a lease by defendant to plaintiffs of the premises described in the complaint. Defendant objected to its introduction on the ground that it was not signed by both of the parties named as lessees in it. The objection was overruled.

A. C. Castro, one of the plaintiffs, testified "that he and his brother, R. Castro, are the plaintiffs in this action. That about the 1st day of January, 1890, he and his brother, R. Castro, rented a tract of land from the defendant, it being the same land described in the complaint. 'We rented the land for two years, and went out there with Gaffey, and left a sledgehammer there, and fixed some harrow teeth. The lease was to run during the years 1890 and 1891. The proposed lease was reduced to writing while we were in possession, and signed by defendant and myself, and delivered to me in presence of Ed. White as a witness, after which, at the request of the defendant, I left it with him, to be signed by my brother the following day. The defendant, Gaffey, refused to permit us to continue in possession of said premises, and ordered us to leave the premises, as he would have nothing more to do with us. I did $50 worth of work on the premises while in occupation, and expended $100 in money and time in preparing to cultivate said rented premises;' and that none of said money or damages have been paid by defendant to plaintiffs." "During the introduction of plaintiff's testimony the defendant asked leave to introduce the evidence of two of his witnesses out of the regular order, which the court permitted him to do with the consent of plaintiffs. The plaintiffs here rested their case, whereupon the defendant moved for a nonsuit upon the grounds that plaintiffs had failed to make out a cause against the defendant; that the lease made by the defendant to plaintiffs, and for the noncompliance with which by the defendant the plaintiffs sue, was a written lease, and was signed by the defendant, Gaffey, and one of the lessees only. The plaintiffs objected to the hearing of said motion, because the defendant had introduced part of his case, whereupon the court suggested to defendant that it would hear said motion, provided defendant would withdraw the testimony introduced by him, to which ruling of the court the plaintiffs then and there duly excepted and still except. Thereupon the defendant withdrew his said testimony, and made his motion for a nonsuit, which was granted by the court, to which ruling of the court plaintiffs then and there duly excepted, and still except, and here assign the same as error."

The ground on which the nonsuit was asked and granted is that the lease on which plaintiffs have their cause of action is signed "by the defendant, Gaffey, and one of the lessees only." A lease signed by the lessor and accepted by the lessee has the same force and effect as it would have if signed by the lessee. But in this case there is no evidence tending to prove that the lease was accepted by the lessees. The only evidence on this point is that of A. C. Castro, one of the plaintiffs, who testified that about the 1st of January, 1890, he and his brother, R. Castro, the other plaintiff, rented the premises of the defendant, and went upon them with defendant, and left a sledgehammer, and fixed some harrow teeth; that the proposed lease was reduced to writing while plaintiffs were in possession, and was signed by defendant and witness, after which, at the request of the defendant, witness says, "I left it with him, to be signed by my brother the following day." The statement on motion for a new trial contains a copy of the lease, which it is stated was produced in court by the defendant, and offered in evidence by the plaintiffs, except a certain part of it. There is no evidence tending to prove that the plaintiff who did not sign the lease ever accepted it, or ever knew of its existence. Plaintiffs were on the premises when the lease was "reduced to writing" and abandoned them when ordered by defendant to do so. It is clear, we think, that the instrument introduced in evidence as a lease was never executed as such, because it was not signed by both of the lessees, nor accepted as a lease by the lessee who did not sign it. The lease contained covenants to be performed by the lessees, other than the one for the payment of rent, and we think the lessor was entitled to have a lease signed by both of the lessees. We do not doubt that, if they had accepted the lease as it is, and had occupied the premises under it, the law would imply a promise to pay the rent reserved, although neither of the lessees had signed the lease; but that is not the case. There is no evidence of an acceptance by R. Castro, one of the lessees. It is quite clear that he should not be permitted to maintain an action upon an unexecuted lease. The motion for a nonsuit was properly granted. Judgment affirmed.

We concur: McFarland, J.; De Haven, J.

96 Cal. 418

SALMINA v. JURI et al. (No. 14,465.)

(Supreme Court of California. Nov. 9, 1892.)

TAXATION OF COSTS—ATTORNEY'S FEE.

In an action to declare property assets of a partnership formerly existing between plaintiff and defendant's testator, and to have it sold to pay the debts of the partnership, where the parties are hostile litigants, each employing his own attorney, and contesting the main issues of the case, and the court on finding for plaintiff allows him his legal costs, and commissioner's fee of $131, out of the proceeds of the sale, the court does not abuse its discretion in refusing to allow plaintiff an additional sum of $200 for an attorney's fee.

Department 2. Appeal from superior court, Napa county; E. D. HAM, Judge.

Action by Frank Salmina against Louis Juri, executor, and John Even, to declare certain property assets of a partnership formerly existing between plaintiff and Juri's testator, and to have it sold. From a judgment for plaintiff, in so far as it fails to allow him an attorney's fee, plaintiff appeals. Affirmed.

F. E. Johnston, for appellant. *A. J. Hull* and *Dennis Spencer*, for respondents.

MCFARLAND, J. Plaintiff averred that he and one Gambetta, now deceased, were partners in the business of farming, dairying, and stock raising; that they owned, as such partners, certain personal property, and also certain land; that in order to raise money for said business they borrowed $2,600 of the defendant Even, and as security therefor executed a mortgage upon said land to said Even; and that, although said mortgage appears upon its face to have been executed by them as tenants in common, it was really executed by them as partners, and for partnership purposes. The history of the alleged partnership, and many facts concerning it, are set forth in the complaint. It is then averred that Gambetta died, and that defendant Juri is his executor; that the said mortgage was not presented to said executor, and that the time for presenting the same has expired; that plaintiff, as surviving partner, has disposed of all the other partnership property, and accounted for the same, and that there is no property other than said land out of which said debt to Even can be paid; and that Even threatens to enforce payment of the whole thereof against plaintiff. The prayer is that the land be adjudged to be partnership assets, and the debt and mortgage partnership liability; and that the land be sold, and the proceeds of the sale be applied to the satisfaction of the mortgage debt, etc. In the answer of defendant Juri, executor, nearly all the averments of the complaint are denied; and it is particularly denied that said land was partnership assets, or said mortgage debt partnership liability. The prayer of the answer is that plaintiff take nothing by his action. The court found the main issues in favor of plaintiff, and adjudged that the land be sold, and that the proceeds of the sale be applied, first, to the satisfaction of said mortgage, and that the surplus, if any, be divided between plaintiff and defendant Juri. This was accordingly done. There was a surplus, amounting to nearly $4,000, which was divided between said parties. The decree allowed the plaintiff his legal costs; and the fees of the commissioner who sold the land, amounting to $131, were also allowed out of the proceeds of the sale. But the court denied plaintiff's claim for an attorney's fee of $200; and plaintiff appeals from the judgment, and particularly from that part thereof which denies the attorney's fee. No point is made against the judgment except the refusal to allow said fee. As the real demand in controversy is less than $300, it may be considered somewhat doubtful whether or not this appeal lies; but waiving that question, we see no error committed by the court below in denying the attorney's fee. The general rule is that counsel fees are not recoverable in actions either at law or in equity. In some equity cases they may be awarded at the discretion of the court. In the case at bar the parties were hostile litigants, each employing his own attorney, and contesting the main issues of the case; and it is difficult to see how the successful party is any more entitled to recover his attorneys' fees from his opponent than would be the successful party in any ordinary litigated case. Certainly the court below did not abuse its discretion in refusing to allow them.

Judgment affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

(3 Cal. Unrep. 605)

SHIRLEY v. BOARD OF TRUSTEES OF COTTONWOOD SCHOOL DIST. et al. (No 14,348.)

(Supreme Court of California. Nov. 10, 1892.)

MANDAMUS TO SCHOOL TRUSTEES—WHEN LIES.

Mandamus will not lie to compel school trustees, who have wrongfully dismissed a teacher before the completion of her contract, to issue an order for the full amount of her salary, where no demand was made on them.

Commissioners' decision. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Application by Ada Shirley for a writ of *mandamus* to compel the board of trustees of Cottonwood school district, and E. Moore and others as members, to issue an order for the balance of salary alleged to be due her as a school teacher. A judgment was entered that plaintiff was entitled to a peremptory writ, and defendants appeal. Reversed.

M. T. Dooling, for appellants. *Briggs & Hudner*, for respondent.

BELCHER, C. This is an appeal by the defendants from a judgment awarding the plaintiff a peremptory writ of mandate, and the case is brought here for review on the judgment roll. The court found the facts of the case to be in substance as follows: In July, 1890, the defendants were the duly elected, qualified, and acting trustees, and constituted the board of trustees of Cottonwood school district in San Benito county. The plaintiff was a duly qualified school teacher, and on July 1, 1890, was employed by the defendants to teach the pupils of the Cottonwood school for the term of four months, commencing on the 14th day of that month. She was to receive, and agreed to accept, for her services $60 per month, payable monthly by orders drawn by the board on the county superintendent of schools. At the time named she entered upon the performance of her duties as such teacher, and continued to teach the school until August 23d, a period of six weeks, when the defendants, as such board of trustees, wrongfully and without cause discharged and dismissed her from the school, and prevented her thereafter from teaching the school, and completing her part of the contract. She was ready, willing, able, and competent to teach the school and complete her contract, and repeatedly offered to do so, but the defendants, as such board of trustees, prohibited and prevented her from occupying the schoolhouse and teaching the school after the 23d of August. On August 23d, a majority of the board proposed to her that she teach the school two weeks longer, if at the end of the two weeks she would resign her place as teacher. She assented to this proposition, but demanded as a condition of her resignation that she be paid her salary for the full term of four months. The board refused to pay the full amount, but drew an order in her favor for the sum of $90, the same being in full payment for the time she had already taught. "No demand was made by plaintiff on defendants after the expiration of said four months, nor was any demand for the full term's salary made by her, other than as a condition for her resignation, as above set forth, and such demand was made on August 23, 1890." "Said discharge of plaintiff was for the alleged cause of incompetency as a teacher, and for cruel and unusual punishment of a pupil, but plaintiff was during all of said time competent as a teacher, and performed and fulfilled her duties properly as such, and did not punish said child either in a cruel or unusual manner, nor for any purpose except for just cause, and to a moderate extent, but said board of trustees in discharging plaintiff acted under the honest belief that plaintiff had punished the child excessively, and in a cruel and unusual manner." The court further found that the sum of $150 was due the plaintiff, and unpaid, for the balance of her salary under her contract, and as conclusions of law: "That plaintiff by the wrongful acts of defendants in ignoring the contract, and expelling plaintiff from said school, was exonerated from making formal demand for the issuance of an order on the superintendent of schools. That plaintiff is entitled to the peremptory writ of mandate compelling defendants, as said board of trustees, to issue to plaintiff the order upon the said superintendent of schools of San Benito county for the sum of one hundred and fifty dollars, but without costs." Judgment was accordingly so entered. It is alleged in the complaint, and not denied, that, notwithstanding the action of the trustees in discharging her, plaintiff entered another house within the school district, and convenient for the pupils living therein, and taught the pupils of the district continuously from the time of her discharge up to October 31st, making full four months' service as a teacher, and thus fulfilling her contract. It is also alleged "that at the expiration of said four months plaintiff demanded of and from said defendants, the said board, that they issue to her the order for the amount due to her upon the county superintendent for payment thereof, but said board refused, and still refuses, to issue said order, or to pay the same, or any part thereof." And it is said in the brief filed on behalf of respondent that such a demand was in fact made. The allegation was, however, denied by the answer, and the finding upon it cannot therefore be controverted here. Upon the facts shown it is entirely clear that respondent was entitled to full payment for her four months' service; for as said in Webster v. Wade, 19 Cal. 291, "the law is well settled that where a contract for service is made for a fixed period, if the employer discharge the servant before the termination, without good cause, he is still liable, and the servant may recover the stipulated wages." The appellants, however, contend—and this is the only point made for a reversal of the judgment—that the respondent was not entitled to the relief demanded, for the reason that no express demand was made upon them to perform the act sought to be enforced before the proceedings were instituted. This point seems to be well taken. In People v. Romero, 18 Cal. 90, the court, by FIELD, C. J., said: "To authorize a *mandamus* it must appear not only that the performance of the act, to enforce which the writ is asked, is a duty resulting from the office, trust, or station of the party to whom the writ is to be directed, but that the performance has been requested and refused." And the learned justice then quoted with approval from Tapp. Mand., as follows: "It is an imperative rule of the law of *mandamus* that, previously to the making of the application to the court for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the prosecutor to the defendant, who must have refused to comply with such demand, either in direct terms, or by conduct from which a refusal can be conclusively implied; it being due to the defendant to have the option of either doing, or refusing to do, that which is required of him, before an application shall be made to the court for the purpose of compelling him." This language was again quoted with approval in Oroville & V. R. Co. v. Plumas County, 37 Cal. 362, and the same rule was declared in Price v. Land Co., 56 Cal. 434. The rule thus declared seems to be general, and to apply to all cases, except when the thing to be done is a duty to the public in which the petitioner has no special interest. "In such case," it has been said, "the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal." High, Extr. Leg. Rem. § 13. The court below based its conclusion, as we have seen, upon the fact "that plaintiff, by the wrongful acts of defendants in ignoring the contract, and expelling plaintiff from said school, was exonerated from making formal demand." But we do not think this conclusion can be sustained. We advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

(3 Cal. Unrep. 609)

BULLOCK et al. v. CONSUMERS' LUMBER CO. (No. 14,813.)

(Supreme Court of California. Nov. 10, 1892.)

JURY TRIAL—WAIVER OF RIGHT—CONTRACT—INTERPRETATION—EVIDENCE—ADMISSIONS BY OFFICERS OF CORPORATION—SALE—INSPECTION OF LOGS.

1. Though both parties to an action which Code Civil Proc. § 592, provides must be tried by a jury, unless a jury trial is waived, waive the trial by jury, the court has the right to call a jury for the trial of the cause.

2. In an action on a contract for saw logs sold and delivered, the controversy was as to the meaning of a clause in the contract which stated that the logs were "to be scaled by licensed scalers by the quarter scale, with ten per cent. deducted for waste." It was claimed that the terms "by the quarter scale" and "for waste" were technical terms, having a particular meaning in the locality where the timber was sold, and testimony of the licensed scalers was introduced to show their meaning. *Held*, that testimony of the one who made the contract on behalf of defendant, as to what he understood by the terms at the time he made the contract, was inadmissible.

3. Defendant offered to prove by the same witness that by reason of his belief as to the terms of the contract he agreed to pay one dollar per thousand more for the logs than he would otherwise have paid, and also offered to show from the "mill tally" the quantity of merchantable lumber obtained from the logs. *Held*, that this evidence was properly excluded, the price as well as the mode of ascertaining the quantity of lumber being fixed by the contract.

4. Defendant offered to prove that the words "for waste" in the contract were understood by both parties to mean the cut of the saw after the logs had been squared by the quarter scale, with all deductions for rot, rotten knots, sap, and shakes. *Held*, that the evidence was not admissible, unless defendant could show that those terms in the agreement have a technical meaning, and apply simply to the cut of the saw.

5. The president and managing agent of a corporation have authority to make admissions in regard to the fulfillment of contracts which will be evidence against the corporation.

6. Where a contract provides that the logs shall be scaled by a licensed scaler, an officer authorized to pass on the merchantable character of logs, both parties, in the absence of fraud, are bound by his decision.

7. Even if the purchaser was not bound by the inspection and decision of the scaler, yet if the defects which rendered the logs unmerchantable were plain and readily seen on ordinary observation, and there was no fraud on the part of the seller, and the purchaser, having full opportunity to observe the defects, made no objection, he would be bound by his acceptance.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by N. Bullock, assignee of D. H. McFarland, and Harvey Pinkerton, against the Consumers' Lumber Company, to recover for saw logs furnished defendant corporation under a contract. From a judgment for plaintiff, defendant appeals. Affirmed.

J. D. H. Chamberlin and *J. W. Turner*, for appellant. *Ernest Sevier*, *Coonan & Sevier*, and *Ford & Burnell*, for respondents.

HAYNES, C. This action was tried before a jury, plaintiffs had judgment against the defendant, (a corporation,) and this appeal is taken from the judgment, and from an order denying defendant's motion for a new trial. Both parties waived a jury trial, but the court, against the protest and objection of the defendant, called a jury. An exception was taken by the defendant, and this action of the court is assigned for error. Appellant contends that this action of the court was an irregularity which deprived defendant of a fair trial, and also that it was an error of law occurring at the trial, and cites sections 214 and 592 of the Code of Civil Procedure. Section 592 provides that certain actions therein named (of which this was one) "must be tried by a jury, unless a jury trial is waived or a reference ordered. * * * In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury." Section 681, Code Civil Proc., provides how and when a jury may be waived. This question was before the court in Doll v. Anderson, 27 Cal. 249. The court said, at page 251: "The court, however, has the right, notwithstanding such waiver, to direct an issue of fact to be tried by a jury. Besides this, it would not be presumed that any injury had accrued to the plaintiff in consequence of the issues of fact being tried by a jury instead of the court." The action there, as in the case at bar, was upon a contract. In McCarthy v. Railroad Co., 15 Mo. App. 385, the action was upon contract. Section 3600, Rev. St. Mo. 1879, provided: "An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered." The court said: "The right of trial by jury is deemed a valuable right, and is guarantied in actions of law by our constitution. The effect of the above statute is merely to allow the parties to waive that right, if they should see fit to do so; but they do not extend so far as to oblige the judge to try the issues of fact in a case at law, although requested to do so by both parties, if he should deem it a proper case for trial by jury. * * * Not only is there no abuse of discretion in this case, but, as the question is here presented, the very statement of it seems to suggest its answer. The trial by jury is the constitutional mode of ascertaining the facts in actions at law. Both parties were willing to waive this mode of trial, but the judge was not willing to take upon himself the burden of determining the facts, for reasons which were within his own breast, and which he was not bound to disclose. What more is it, then, than the case of one party to an action at law objecting that the facts were tried and ascertained in the usual mode pointed out by the constitution and laws?" Counsel do not cite any authority, and I know of none, that tends to sustain their contention.

This action was brought to recover a balance alleged to be due from defendant under a contract made September 1, 1890, wherein said lumber company (a corporation) was named as the first party, and McFarland and Pinkerton as the second parties. The question in dispute arose as to the proper construction of that part of said contract, which reads as follows: "That said party of the first part agrees to buy from the parties of the second part five hundred thousand (500,000) feet of redwood lumber in logs, said logs to be delivered at the mouth of Dean's slough on or before the first day of January, 1891. Said logs are to be scaled by a licensed scaler, by the quarter scale, with ten per cent. deducted for waste; only merchantable timber to be sold or bought under this contract. Said party of the first part agrees to pay for said logs when each 100,000 feet is delivered, and the whole to be paid in five installments. Said parties of the second part agree to sell and deliver said 500,000 feet of merchantable lumber in logs to the party of the first part at the mouth of Dean's slough on or before January 1, 1891."

Plaintiffs under this contract delivered at the place and within the time named a quantity of merchantable saw logs, which were scaled by licensed scalers by the "quarter scale," and were found to contain, after deducting 10 per cent. for waste, the quantity required by the contract. The defendant contends that the contract required plaintiffs to furnish logs containing 500,000 feet of merchantable lumber; that, in addition to a deduction of 10 per cent. of the scale for waste, there must be an allowance for "rot, rotten knots, sap, and shakes," which would require a further reduction of 35 to 50 per cent.; "that the term 'quarter scale' had a local meaning peculiar to Humboldt bay and nowhere else, and meant that each log should be squared at its smallest end, then deduct for the sawdust and saw kerf, then throw off for rot, rotten knots, sap, shakes, and other defects, and the residue of the logs merchantable lumber;" and that the word "waste" had a local meaning, and meant the deduction under the "quarter scale" for the saw kerf.

A large number of exceptions were taken to the rulings of the court upon questions of evidence, and to instructions given to the jury, and to requests to instruct, which were refused. Most of the exceptions, however, go to the question as to what is the proper construction to be given to the contract, and the decision of that question disposes of nearly all there is in the case, including the objection to any evidence being given by the plaintiffs, upon the ground that "the complaint does not state facts sufficient to constitute a cause of action;" for only upon the theory that the contract required the plaintiffs to furnish "500,000 feet of merchantable lumber in logs" could the complaint be deemed insufficient. Appellant rests its contention mainly upon an alleged local meaning of the term "quarter scale." This term is used, in an act of the legislature passed in 1878, (Laws 1877-78, p. 779, § 4,) entitled "An act for the scaling of logs in the county of Humboldt," as "the rule known in the county of Humboldt as the quarter scale." This act also provided for the appointment by the board of supervisors of three or more surveyors of logs, who were required to take an oath of office, and to give bonds for the faithful performance of their duties, and who were to have the exclusive right to survey for hire all logs that might be required by any buyer or seller; and said act also defined a merchantable redwood log "to be at least sixteen inches in diameter at the smallest end, and at least twelve feet and two inches long."

Plaintiffs called as witnesses the two licensed scalers, McAdam and McMillan, who were employed by the parties and scaled the logs in question, each scaling a part. These witnesses testified in chief that they scaled the logs in question by the quarter scale, and, after deducting 10 per cent. for waste, they contained 500,000 feet. The scale bills, which were put in evidence, were made in duplicate, and one copy delivered to each of the parties at the time the logs were scaled. Upon cross-examination by defendant's counsel, Mr. McAdam testified that he measured the logs the way he understood the contract, a copy of which he had when he made the survey; that it seemed to him to be very plain how he should measure them. He was asked by counsel for defendant if he did not ignore that clause of the contract which said, "Nothing but merchantable timber to be bought or sold under this contract;" to which the witness replied, "I would understand that to mean merchantable saw logs. Merchantable timber is not merchantable lumber." The witness, upon cross-examination, explained that "the term 'quarter scale' has a meaning among loggers, millmen, and scalers. It is a rule laid down to determine the amount of square-edged boards contained in any log, without regard to its quality. By the quarter scale, a log is squared from its smallest end. The balance of the contents of the log is merchantable. If a log is not sound, scale it just the same;" and illustrated the operation as follows: "This log is 40 inches in diameter and 12 feet long. To square that would make it 30 inches in diameter, which would bring it to a square. That would be 30 inches square and 12 feet long, with 900 feet in it. The sawdust would have to come out of that, and saw scarf. There is generally enough on the outside to make up for the saw scarf. That is the quarter scale." The other scaler, McMillan, upon cross-examination by defendant's counsel, said that the "quarter scale" was simply the name of a scale. That under it the diameter of the log was taken, say sixty inches; one-quarter of the diameter was taken off, which would leave forty-five inches, the square of the log. No other witnesses testified as to the meaning of the term "quarter scale."

Some questions put to witnesses for defendant, intended to have some bearing upon the meaning of that term, were excluded by the court, and require attention. A. W. Graham, who made the contract in question on behalf of defendant, was called as a witness by defendant, and was asked what he understood, at the time he made the contract, by the terms, "said logs to be scaled by a licensed scaler, by the quarter scale, with 10 per cent. deducted for waste." An objection by plaintiffs was sustained by the court; and counsel for defendant then offered to prove by the witness that he (the witness) understood that language in the contract to mean that the logs were to be scaled by the quarter scale in accordance with the custom of Humboldt bay; rot, rotten knots, sap, and shakes to be thrown out to make merchantable timber out of the scale, with 10 per cent. in addition to be thrown out. An objection was sustained to this offer, and defendant excepted to both rulings.

The ruling was right. If the contract, through fraud or the mutual mistake of the parties, did not express their intention, it might have been revised on the application of the party aggrieved so as to express that intention, (Civil Code, § 3399;) but no mistake or misunderstanding was alleged in defendant's answer. Defendant stood upon the interpretation of the contract which the law would have put upon it. The first answer was a general denial; and for a second answer and counterclaim defendant set out the contract in full, and alleged, as a breach on the part of the plaintiffs, that they did not deliver, as required by the terms of said contract, any other or greater amount of "merchantable timber" than 312,000 feet, and claimed damages in the sum of $2,000. It is clear, therefore, that defendant did not claim that anything was omitted from the written contract which was intended to be inserted, or anything inserted that was not intended; for, if the counterclaim means anything, it meant that, under the construction they gave to the contract as written, they were entitled to 500,000 feet of merchantable lumber instead of merchantable logs. The rule is established, not only by the authorities, but by the Code, that, "when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, * * *" (Civil Code, § 1639;) and "technical words are to be interpreted as usually understood by persons in the profession or business to which they relate," (Id. § 1645.) If, therefore, the terms "quarter scale" and "waste," used in this contract, are to be regarded as technical terms, or as terms having a special signification given to them by local usage, proof can only be made of such local usage, or of the sense in which they were usually understood, and the testimony of a party as to how he understood them is immaterial and incompetent.

Defendant, after having put a question which was excluded, offered to prove by the same witness that, by reason of his belief as to the terms of the contract, he agreed to pay a dollar per thousand more for the logs than he otherwise would have paid. The refusal of the court to permit this evidence was proper, as was also the refusal of the court to permit the defendant to show by the "mill tally" the quantity of merchantable lumber obtained from these logs. The price, as well as the mode of ascertaining the quantity and quality of the lumber, was fixed by the contract, and could not be changed by the belief of the witness, or by the quantity of lumber of a quality not provided for in the contract, however it might be ascertained. Defendant also offered to prove, by a witness on the stand, that the words "for waste" in the contract was understood by both parties to mean the cut of the saw after the logs had been squared by the quarter scale, with all deductions for rot, rotten knots, sap, and shakes. Upon plaintiff's objecting to the proof, the court ruled that he would sustain the objection, "unless defendant could show that those terms in the agreement have a technical meaning, and apply simply to the cut of the saw." No evidence of that character having been given or offered, the ruling was correct. If the testimony sought to be introduced by defendant were admissible, written contracts would be subject to all the doubts and uncertainties and opportunities for equivocation that attend oral contracts, and the rule in regard to the interpretation of written instruments would be virtually abrogated. Code Civil Proc. § 1856. In the absence of technical words or phrases, whose meaning is obscure, the office of interpretation belongs to the court. In Verzan v. McGregor, 23 Cal. at page 344, the court, after saying that the execution, authenticity, and delivery of a written instrument are usually proved by parol, said: "But evidence of the declarations of the promisee as to his intention in taking the contract in that form, and as to his understanding of the meaning and construction of its terms, could have no effect in giving a construction to the instrument, as the court was bound to construe it according to its terms, and could not be aided by the declarations of the parties made at the time." See, also, Platt v. Jones, 43 Cal. at page 223; Hewitt v. Dean, 91 Cal. at page 11, 27 Pac. Rep. 423; Dwight v. Insurance Co., 103 N. Y. 341, 8 N. E. Rep. 654.

Mr. McFarland, one of the plaintiffs, (whose assignee in insolvency, N. Bullock, was afterwards substituted in his stead,) was called as a witness on behalf of the plaintiffs, and was asked the following question: "Did either the managing agent of the defendant, or its president or secretary, after the removal of the logs from the slough, ever admit to you the receipt of the five hundred thousand feet of lumber in logs provided to be delivered under this contract?" To this question defendant interposed two objections: "(1) That it was not shown that any person was authorized to make an admission which would bind defendant; and (2) that there was an express warranty upon the face of the contract that survives the acceptance of the property." The objection was overruled, and the witness answered, "Both of them did." At the time the question was put, there was no evidence to show the authority of these persons to make admissions which would be evidence against the corporation defendant, other than their official designations specified in the question. That the president and managing agent were so authorized, I think may be presumed, inasmuch as a corporation can only act through its agents, and such authority in matters pertaining to the ordinary business of the corporation is implied in the designation of those officers. Whether the secretary may be presumed to have such authority it is not necessary to decide, for the reason that evidence was afterwards given tending to show that he, with the president, conducted the business of the company at that time; and besides, the exclusion of the evidence could not have affected the result of the case; so that if the ruling was erroneous, so far as it related to this officer, the error was not prejudicial.

As to the second branch of the objection, the warranty only extended to the species of timber, "redwood," and that "only merchantable timber was to be sold or bought under this contract." The contract, however, provided that the logs should be scaled by a licensed scaler, an officer who was authorized to pass upon the merchantable character of the logs, and by his decision both parties were bound, in the absence of some fraud or artifice practiced upon the vendee by the vendor resulting in injury to the latter. It was not the case of an implied warranty, which arises in cases of sale for future delivery, where the buyer has no opportunity for inspection, but an inspection was provided for and had. But, if defendant was not bound by the inspection and decision of the scaler, yet, if the defects which rendered the logs unmerchantable were patent, plain, and readily seen upon ordinary observation, as the evidence in the case tends to show was the fact, and there was no fraud on the part of the plaintiffs, and the defendant had full opportnity to observe their defects, and made no objection, they would be bound by such acceptance. The conclusions reached as to the exceptions to evidence herein specifically noticed apply to a very large number of other exceptions, which raise the same or similar questions, and also apply to the exceptions taken to the instructions given to the jury and to instructions refused. The motion for new trial was properly denied. The evidence was amply sufficient to justify the verdict. It was expressly admitted that the quantity specified in the contract had been received, according to the scale actually made. If that scale, therefore, conformed to a proper construction of the contract, as we think it did, there was no conflict in the evidence as to the full performance of the contract on the part of the plaintiffs. The exceptions to the instruction given to the jury, as well as those refused, all involved the questions we have discussed, and do not require further notice. Finding no prejudicial error in the record, I advise that the judgment and order appealed from be affirmed.

We concur: Belcher, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

96 Cal. 448

In re SPENCER'S ESTATE. (No. 13,967.)

(Supreme Court of California. Nov. 16, 1892.)

WILLS—PROBATE AND CONTEST—TRIAL—INSTRUCTIONS—APPEAL.

1. An order denying a motion for a new trial in a contested will case is appealable. Estate of Bauquier, 26 Pac. Rep. 178, 88 Cal. 302, followed.

2. Where the verdict and judgment would have been the same, even though the court had ruled and instructed throughout the trial as asked by appellant, the judgment will not be reversed, though some errors have occurred.

3. The fact that testatrix had a strong dislike to her daughter-in-law, contestant's mother, whom her son had married against her wishes, and who had always repelled her advances towards a reconciliation, is not evidence of insanity.

4. The fact that one believes in spiritualism is not proof of one's insanity.

5. It is not error for a court, in charging a jury, to quote from decisions of courts in other cases, provided the quotations correctly state the law.

6. Where the execution of the will was fully and clearly proven, and there was no evidence to the contrary, a charge that "there is no evidence tending to show that said instrument [the will] was not executed and attested according to law," if erroneous, as charging in respect to a matter of fact, is immaterial.

7. Where in an instruction the word "yes" is used instead of "no," but the instruction itself and the other instructions show clearly that the mistake was inadvertent, the jury could not have been misled by it, and it is not material error.

In bank. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

Proceeding by Rufus Homer Spencer, by his guardian, to contest the probate of the will of Mary C. Spencer, deceased. From a judgment admitting the will to probate, and denying a motion for a new trial, contestant appeals. Affirmed.

Henley & Oates, for appellant. *A. B. Ware* and *T. J. Geary*, for respondents.

MCFARLAND, J. This is an appeal from a probate order denying a motion for a new trial in a contested will case. Counsel for respondents argue very elaborately that the said order is not appealable; but although the provisions of the Code about appeals from probate orders are not as clear as they might be, it must be held as settled practice since the decision in Estate of Bauquier, 88 Cal. 302, 26 Pac. Rep. 178, that, when there has been a regular contest over the probate of a will, an appeal lies from an order denying a motion for a new trial.

Mary C. Spencer died in January, 1888. In September, 1884, she made a will,—duly executed,—in which she gave all her property, except five dollars, to her daughter Ida McDannel and May McDannel, the infant daughter of the said Ida, with a provision also for other daughters of said Ida, if any such should thereafter be born. At the date of the will said Ida McDannel was the only living child of said testatrix. There had, however, been another child of the testatrix, a son named Homer T. Spencer, who had died before the date of the will. He had married a lady whose maiden name was Ella Murphy; and there had been born to said Homer and Ella a son named Rufus Homer Spencer, who at the date of the will was about one year old. To this son the testatrix gave by her will five dollars; and he, by his guardian, contested the probate of the will upon the ground that at the time the will was made "she, the said Mary C. Spencer, was not of sound and disposing mind." There were other grounds of contest which need not be noticed. The main issue was submitted to a jury, who found in favor of the validity of the will, and judgment was entered admitting it to probate. The contestant made a motion for a new trial, which was denied, and he appeals from the order denying his motion. The record presents nearly 100 alleged errors committed by the court in ruling upon the admissibility of evidence, and in instructing the jury. Some of these will be briefly referred to hereafter; but it is difficult to conceive how the verdict and judgment could have been different if the court had ruled throughout the trial as asked by appellant. And in such a case a judgment will not be reversed, even though some errors have occurred during the progress of the trial. Estate of Briswalter, 72 Cal. 107, 13 Pac. Rep. 164; Green v. Ophir, etc., Co., 45 Cal. 522; Levitzky v. Canning, 33 Cal. 299.

There is no pretense that Mrs. Spencer was of unsound mind in any general sense. It appears clearly that she was a woman of excellent judgment and discretion in the ordinary affairs of life. She must have had exceedingly good business capacity; for thrown suddenly on her own resources, with but little property, and that heavily incumbered, she managed to raise her children well, giving her son, at least, an expensive education, and to accumulate quite a little fortune. None of the friends and acquaintances who had known her for many years—and there were more than a score of them who testified—ever had a suspicion of her insanity. It is claimed, however,—and this is the main contention in the case,—that she was insane in one particular, namely, in her dislike to her daughter-in-law Ella, the mother of contestant. There is no doubt that the testatrix had a dislike of her daughter-in-law; but there is no evidence that would have justified the jury in finding that such dislike was the result of an insane delusion, or any form of insanity. She disliked Ella's family. She had a notion that the Murphys were beneath her, morally and socially. Whether or not this notion was well founded is immaterial. She had a very high estimation of the worth of her son Homer, and was very much attached to him. She had raised him very carefully, and had expended a great deal of money, for a woman in her circumstances, on his education. He appears to have been a bright and promising young man, and her motherly affection no doubt somewhat exaggerated his virtues. She expected him to cut quite a figure in the world. When she discovered the probability of his marrying, at the early age of 21 years, a member of what she considered an inferior family, to which she had a great aversion, she was greatly chagrined and provoked. The circumstances of the marriage also added to her discomfiture. It was not supposed that the marriage would take place at any early date; but the family of the daughter-in-law having removed to San Francisco, Homer went there from Santa Rosa, somewhat hurriedly, and was married to Ella without the knowledge of the testatrix. She did not hear of it until a considerable time afterwards, and then learned of it accidentally. Ella testified that this was not the fault of herself or her family, that he had informed his mother, and that the latter was expected at the wedding. Nevertheless, the mother was not so informed. One or two witnesses—not intimate friends of the testatrix, however—testified that she said that Homer was entrapped into the marriage. If she did make such a statement, it was not, under the circumstances, any evidence of an unsound mind. A couple of weeks after the marriage, Homer and Ella visited Santa Rosa for a week, and did not go to see Mrs. Spencer. Afterwards the latter made overtures for a reconciliation. She wrote to Homer, asking him and Ella to visit her and attend the christening of her granddaughter May McDannel. Ella replied coldly, refusing the invitation. She testified at the trial that the letter was written at Homer's request. Afterwards there was a partial reconciliation. Homer coming of age, his mother wanted him confirmed, according to the custom of the Episcopal Church; and upon her invitation Homer and Ella visited her, and she at that time treated Ella kindly. Soon thereafter Homer lost his health, and his mother went to San Francisco and helped to nurse him. Afterwards he was removed to her home at Santa Rosa, where he died. During his last illness his mother and Ella were brought into contact, and did not get along very well. After the funeral of Homer they never saw each other. Ella never sent the grandchild to see the grandmother. There is nothing in the evidence against the character of Ella; but she evidently did not make much effort to effect a reconciliation with her mother-in-law. The foregoing is only a meager statement of the history of the relations between the persons named; but taking all the details as they appear in the long transcript, there is nothing to show anything like mental unsoundness or monomania on the part of the testatrix. It is quite probable that the conduct of Homer in various matters caused her to attach blame to Ella, when it should have fallen on Homer himself; but she did not know the real facts. She believed the son, whom she loved, rather than the daughter-in-law, whom she disliked and mistrusted; but would not any sane mother, under the circumstances, have done the same? The likes and dislikes of human beings—their confidences and mistrusts—are often capricious and arbitrary; but they are not evidences of insanity because they cannot be logically defended to the satisfaction of those who think them wrong. In the case at bar there is no warrant for the claim that the testatrix's dislike of her daughter-in-law and her family was an insane delusion. It was simply such a feeling, arising out of the recondite principles of attraction and repulsion, as is quite common among people of undoubted sanity. And it can hardly be said even that the will was in any way unreasonable. She was much attached to her only living child, Mrs. McDannel, and to the infant daughter of the latter; she had a partiality for girls, saying that boys could take care of themselves; she had been offered no opportunity of becoming attached to the contestant, as he had been kept away from her; and it is not improbable that she thought he would be provided for by other relatives. But even if we could consider the will as unjust, it would make no difference. In disposing of her property, she was not called upon to consult the wishes or views of juries or courts. Her own will was supreme. "The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust." Jackson v. Jackson, 39 N. Y. 157.

There is some claim made that Mrs. Spencer was a spiritualist, and therefore insane. In the first place, the evidence does not show that she was a spiritualist, but merely that at one time she took an interest in investigating spiritualism, and was disposed to accept some of its claims. She always remained a member and devoted adherent to the Episcopal Church. In the second place, spiritualism is not itself insanity. And in the third place, there is not the slightest evidence that any views which she may have had on the subject of spiritualism had anything to do with the making of her will.

It was testified by one or two witnesses—not intimate friends of the testatrix—that Mrs. Spencer said that contestant was not Homer's child. It is clear, however, that she had no such belief. She always recognized him as Homer's son, offered to raise and educate him, and declared him in her will itself to be such son. But if she had, once or twice, made the statement sworn to, it would have been, under the circumstances appearing in the transcript, no evidence of insanity, although it would have been undoubtedly a mistake. What Mrs. Spencer is reported to have said about excessive sexual indulgence needs no comment.

With respect to alleged errors in law committed at the trial, we are not able to see any that could have been at all prejudicial to appellant. To many of the rulings no exceptions were taken. Contestant put a long question, covering between six and seven pages of the printed transcript, to his witness Dr. Smith. It contained a number of things which the witness knew about Mrs. Spencer from his own acquaintance with her, and a great many other propositions put in a hypothetical form. An objection to this question was sustained, and there was no exception to this ruling. Afterwards an objection was sustained to a somewhat similar question on the ground that the facts within the witness' knowledge should be separated from the hypothetical part of the question, and exception was taken. But the witness then went on, and testified both as to his knowledge of Mrs. Spencer and as to his opinion upon the hypothetical statement, and it cannot be seen how the ruling of the court was of any consequence. Most of the other exceptions to the rulings on evidence were where appellant sought to prove declarations of Homer made to his wife and others. All this was clearly hearsay and immaterial, and the rulings of the court were correct. It was offered mainly to explain and vindicate the conduct of Ella; but her conduct and character were not on trial. Moreover, she did afterwards testify very fully as to the matters first excluded. We perceive no other rulings on the admissibility of evidence which need special notice.

We have carefully examined the lengthy charge of the court to the jury, including what the court said of its own motion, and instructions given at request of parties. It covers about 35 pages of the printed manuscript; and it is a difficult task to construct a charge of that length without including in it some errors. In the present case, however, a great deal of the charge is repetition of the same matter; and it is sufficient to say that a close inspection of it discloses no material error. It is not error for a court, in charging a jury, to quote from decisions of courts in other cases, provided the quotations correctly state the law.

It is contended that the court erred in instructing that "there is no evidence tending to show that said instrument [the will] was not executed and attested according to law." If it be conceded that this was erroneous, as charging in respect to a matter of fact, still, as the execution of the will was fully and clearly proven, and there was no evidence to the contrary, no possible harm could have been done by the instruction. In such a case the verdict will not be disturbed. Levitzky v. Canning and Green v. Ophir, etc., Co., supra.

Of the instructions asked by appellant, 21 were refused; and the refusal of each one is assigned as error. We have examined these rejected instructions, and find that those parts of them which are correct appear in the instructions given. Two other instructions asked by appellant were slightly amended by the court, and then given; and we see no errors in the amendments. For instruction No. 25 the word "yes" is used by mistake instead of "no;" but the instruction itself, and the other instructions, show clearly that the mistake was merely one of inadvertence, and it could not have misled the jury. We see no reason for more particular comment upon the numerous assignments of error; for the evidence against the soundness of the testratrix's mind at the time of the execution of the will was so slender that the verdict must have been the same under any rulings which a respectable court could have been expected to make.

The order appealed from is affirmed.

We concur: GAROUTTE, J.; DE HAVEN, J.; SHARPSTEIN, J.; PATERSON, J.; HARRISON, J.

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3 Cal. Unrep. 618

ELECTRIC IMP. CO. v. SAN JOSE & S. C. R. CO. (No. 14,423.)

(Supreme Court of California. Nov. 12, 1892.)

VERDICT — SPECIFYING AMOUNT OF RECOVERY — ACTION FOR BREACH OF CONTRACT.

1. Code Civil Proc. § 626, provides that where a defendant establishes a claim for the recovery of money, in an action for the recovery of money, greater than the claim established by plaintiff, the jury must find the amount of the recovery. *Held*, that a verdict for defendant "for its costs" is not within the meaning of the statute, because such a verdict is for costs only, and there is no recovery by either party.

2. In an action to recover for services by plaintiff in constructing an electric railroad for defendant, and for damages by reason of defendant's failure to perform its part of the contract, defendant set up by way of counterclaim that plaintiff had abandoned the contract before completing the road, and it appeared that the road had been sold in an uncompleted state. *Held*, that evidence of the price for which it was sold was inadmissible, since such evidence would not affect the amount of damages defendant would be entitled to by reason of plaintiff's failure to complete the road.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Action on a contract by the Electric Improvement Company against the San Jose & Santa Clara Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Haggin, Van Ness & Dibble, for appellant. *F. B. Laine* and *Jackson Hatch*, for appellee.

HAYNES, C. This action was brought by plaintiff to recover $1,196.59, alleged to be due from defendant under a contract for the construction and electrical equipment of a street railroad from San Jose to Santa Clara, and the further sum of $17,328.49 damages for an alleged refusal and neglect of the defendant to perform its part of said contract. The answer denied defendant's alleged failure to perform its contract, and that anything was due plaintiff; and by way of counterclaim alleged that plaintiff quit and abandoned the contract, to defendant's damage in the sum of $100,000. The cause was tried before a jury, which rendered the following verdict: "We, the jury in the above-entitled cause, find a verdict for the defendant for its costs." Judgment was entered upon the verdict in favor of the defendant for its costs in the sum of $273.50. Plaintiff took a bill of exceptions, and moved thereon for a new trial, which was denied, and appeals from the judgment and the order denying a new trial.

Appellant contends for a reversal upon two grounds:

1. That the verdict is void, and insufficient to support the judgment, for the reason that it fails to specify the amount to be recovered. Section 626 of the Code of Civil Procedure provides: "When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery." If the jury find nothing in favor of the plaintiff, and did not find in favor of the defendant upon its counterclaim an amount exceeding the amount established by the plaintiff, the verdict would necessarily be for the defendant, and the defendant, on such verdict, would be entitled to costs. In such case the jury could not specify the amount of any recovery, for there was no recovery by either party. There is nothing in the record to indicate that a different verdict was intended by the jury, or that it was based upon any other ground. The addition of the words, "for its costs," was harmless surplusage. The verdict, without this addition, would have given costs to the defendant, and hence the plaintiff was not prejudiced. Watson v. Damon, 54 Cal. 278, cited by appellant, is not in point. There the jury found for the plaintiff $2,250, with interest at 10 per cent. per annum from a given date, less the amount of notes of the value of $950, "with interest on said notes;" but neither the verdict nor the pleadings gave any basis for the computation of the interest on the notes. In Redmond v. Weismann, 77 Cal. 423, 20 Pac. Rep. 544, the verdict was: "We, the jury in the above-entitled action, find for the plaintiff." In that case the amount of plaintiff's claim stated in his complaint was not in controversy; the sole controversy being as to the liability of the defendant. This court refused to send it back for a new trial, judgment having been entered for the amount stated in the complaint.

2. Appellant's second point is that the court erred in not permitting the question, "For how much?" The pleadings show that the road was only partly constructed under the contract. The only recital in the bill of exceptions explanatory of the ground upon which the question was based is the following: "During the trial defendant was allowed to introduce, in support of its counterclaim for damages, evidence of the entire cost of the road constructed by it under the contract set forth in the pleadings. Whereupon Jacob Rich, a witness, and a director and treasurer of defendant, was asked by Mr. Haggin, (counsel for plaintiff:) 'Question. Has the San Jose and Santa Clara Railroad Company sold its road?' Answer. Yes, sir. Q. For how much?'" Defendant's objection that it was irrelevant and immaterial was sustained. Appellant insisted that, if defendant sold the road for more than it had paid out, it could not have been a loss to it. The contract required the plaintiff to furnish certain electrical supplies, and to construct certain work. It was not a contract for manufacturing or furnishing certain articles for sale, but for the construction of a railway for use. The cost of the work, so far as it had proceeded, might tend to prove, where the plaintiff abandoned the work before completion, that it would cost the defendant more than the contract price to complete the work the plaintiff had contracted to do, and so aid the jury in determining one item of the damage sustained by the defendant. That, and the loss of the use of the railway for the time the construction was delayed by plaintiff's breach, would ordinarily be the measure of defendant's loss; and a profit made by the sale of the road could not affect the amount of the defendant's recovery in such case. Counsel for appellant, in their brief, insist that the evidence of the entire cost of the road, so far as constructed, necessarily created the impression upon the jury that, if the road was a failure, and utterly worthless, the defendant's loss was the amount expended; but the record does not disclose any evidence tending to show that defendant claimed the work done to be worthless. We think the question was properly denied; but, if it was error, appellant was not prejudiced, as the jury did not award damages to the defendant. We find no prejudicial error in the record, and therefore advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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3 Cal. Unrep. 621

GOLLIN v. LYLE. (No. 14,294.)

(Supreme Court of California. Nov. 12, 1892.)

REVIEW ON APPEAL—GRANT OF NEW TRIAL.

A motion for a new trial, on the ground that the evidence does not sustain the verdict, is addressed to the discretion of the court, and its judgment thereon will not be disturbed unless clearly abused.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Ejectment by Walter W. Gollin against Mary E. Lyle. There was a verdict for defendant. From an order granting a new trial, defendant appeals. Affirmed.

J. D. Sullivan, (*W. H. L. Barnes*, of counsel,) for appellant. *Lloyd & Wood*, for respondent.

MCFARLAND, J. This is an action of ejectment. The defendant pleaded the statute of limitations. The jury found in favor of defendant; and the court below, upon motion regularly made by plaintiff, granted a new trial. The defendant appeals from the order granting a new trial. The motion was made upon the ground, among others, of the "insufficiency of the evidence to sustain the verdict;" and that was the main ground upon which the motion was granted, as appears from an opinion delivered by the trial judge. In such a case the trial court has a wide discretion, and we do not disturb its rulings, unless it clearly appears to us that such discretion has been abused; and it is quite clear that there was no such abuse of discretion in the case at bar.

The order appealed from is affirmed.

We concur: SHARPSTEIN, J.; DE HAVEN, J.

(96 Cal. 441)

HANSON v. CORDANO et al. (No. 14,733.)

(Supreme Court of California. Nov. 14, 1892.)

MECHANIC'S LIEN—APPROPRIATION OF PAYMENTS.

Under Civil Code, § 1479, subd. 1, providing that if an act of performance by a debtor under several obligations is made with the intention or desire that such performance should be applied to the extinction of any particular obligation, manifested to the creditor at the time, it must be so applied, a payment made to a material man by a builder, who intended at the time, as the former knew, to settle a debt for building supplies, cannot be applied towards an earlier debt of the builder.

Department 2. Appeal from superior court, Santa Clara county.

Action by Albert Hanson, as assignee of a mechanic's lien on the land of Stephen Cordano, to enforce the lien for a part of the price of building material supplied by Charles Hanson, the assignor, to the builder. Judgment for defendants. Plaintiff appeals. Affirmed.

William H. Jordan and *T. C. Van Ness*, (*L. A. Redman*, of counsel,) for appellant. *S. F. Leib*, for respondents.

MCFARLAND, J. This is an action for the enforcement of a material man's lien. The court below rendered judgment for defendants, and the plaintiff appeals from the judgment upon the judgment roll, there being no bill of exceptions. The court found that the amount of money for which appellant claims a lien had been fully paid and satisfied, and the main question in the case is about the application of certain payments.

The facts necessary to be stated, as they appear in the findings, are these: The respondent Cordano, being the owner of certain land, made a written contract with one MacBain, by which the latter, for the sum of $7,100, was to construct a building on said land. The contract was recorded as required by section 1183 of the Code of Civil Procedure. MacBain bought of Charles Hanson lumber and materials of the value of $1,879.75, to be used in, and which were used in, the construction of said building. During the course of the construction of the building Cordano made several payments of money to MacBain upon said contract, and of the identical money so paid by Cordano to MacBain the latter paid to Hanson the full amount due him for said lumber and materials. Cordano, supposing that all demands and liens had been satisfied, paid the balance of the contract price to MacBain a short time before the expiration of 35 days after the completion of the building. But Hanson afterwards claimed that MacBain did not make any application of the payments made by him to Hanson, and that he, Hanson, applied said payments, except $506.09, to a former debt owing to him by MacBain. Hanson filed a lien for the alleged balance due, viz., $1,318.66. He assigned the lien to the plaintiff, Albert Hanson.

As there is no evidence before us, we must be governed entirely by the findings of the court. The business was done with and the payments made to a certain agent of Hanson, and the finding of the court on the point in question is as follows: "That said agent, at the several times he received said three payments hereinbefore found from said MacBain, well knew that said moneys were paid by said Cordano on said contract to said MacBain, and that said MacBain intended said payments to be applied on account of said lumber and materials so furnished for said building; and that he, MacBain, believed that they were being so applied by said Charles Hanson and his said agent." It appears, therefore, from the finding that at the times when the payments were made the debtor intended them to be applied upon the indebtedness incurred for the materials furnished for the Cordano building, and that the creditor "well knew" that the debtor so intended. Nothing further was necessary to fix the application. The Code[1] merely provides that "the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation be manifested to the creditor;" and the mode by which the debtor in the case at bar manifested his intention is immaterial, provided that "at the time" he intended to make a particular application, and the creditor "well knew" it. This view of the case makes it unnecessary to notice the point that the lien was not filed in time, or any of the other points made by the respondents. Judgment affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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[1] Civil Code, § 1479, subd. 1.

(96 Cal. 443)

RICHARDSON v. CITY OF EUREKA. (No. 14,475.)

(Supreme Court of California. Nov. 15, 1892.)

Presumptions on Appeal — Record — Application for New Trial — Amendment of Statement—Evidence.

1. Where the statement of a case appears to have been duly presented, settled, and allowed by the court, and is a part of the record, it must be presumed, on appeal from a judgment and order denying a new trial, that it was used on the hearing of the motion for such new trial, nothing to the contrary appearing.

2. A statement, certified by the judge as correct, is not open, on appeal, to the objection that it does not contain all the evidence.

3. There is no error in allowing a party on the settlement of the statement to amend such statement by signing it.

4. When an appeal is taken by defendant, and he serves on plaintiff's attorneys a statement, indorsed, "Defendant's statement of the case," and such service is accepted without objection, plaintiff's attorneys cannot be misled by the omission of the signature of defendant or his attorneys.

5. There is no error in allowing a party to insert, in the proposed statement of the case, a request for its settlement and allowance, where such request is necessary to the validity of the statement, though the time for filing such statement has expired.

6. Where the charge of the court in a case is not in the record, it must be presumed, on appeal that proper instructions were given on all matters connected with the subject-matter of the action.

7. In an action to abate a nuisance, it is not error to exclude an answer to the question: "How, in your opinion as an expert, would that plastering be in the condition that you found it, had the building, since the plastering was placed there, settled six or seven inches?" since it must appear to any one that the plaster of a building which has settled six or seven inches cannot be in the condition that it was before the building settled.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Charles Richardson against the city of Eureka to abate a nuisance and to recover damages occasioned by the obstruction of a natural water course flowing across plaintiff's land. From a judgment for plaintiff, and an order denying its motion for a new trial, defendant appeals. Affirmed.

J. N. Gillett, for appellant. *E. W. Wilson* and *J. W. Turner*, for respondent.

Paterson, J. This is an action to abate a nuisance, and to recover damages occasioned by the obstruction of a natural water course flowing across the plaintiff's land. The obstruction complained of consists of an embankment erected in grading a street in the city of Eureka across the natural water course referred to. A motion was made to dismiss the appeal, but the same was denied, (92 Cal. 64, 28 Pac. Rep. 102,) the court saying: "Any defects alleged to exist in the statement of the case will be considered when the cause comes before us upon its merits." It is urged that the statement ought not to be considered because it does not appear by any indorsement of the judge thereon that it was used on the hearing of the motion for a new trial, and that it does not contain or purport to contain all the evidence. Neither of these objections is well taken. The statement appears to have been duly presented, settled, and allowed by the court. It is a part of the record, and we must presume that it was used on the hearing of the motion, there being nothing to the contrary shown. There is no merit in the contention that the statement does not contain all the evidence. The certificate of the judge that the statement is correct is sufficient.

It is also contended that the statement was not authenticated. This contention is based upon the fact that it was not signed by the moving party or his attorneys. Objection was made on that ground to the settlement of the statement, whereupon the attorneys for the moving party asked permission to amend the statement by signing the same. This request was granted, and properly so. The statement as presented to the attorneys for the respondent was indorsed, "Defendant's statement of the case," and service thereof was accepted without objection. The attorneys for the respondent could not have been misled by the omission.

It is claimed, also, that the court erred in allowing the moving party to insert in the proposed statement a request for its settlement and allowance. If such matter was essential to the validity of the statement, there was no error in the ruling of the court, although the amendment was made after the time for filing the statement had expired. Low v. McCallan, 64 Cal. 2, 27 Pac. Rep. 787; Macadamizing Co. v. Williams, 70 Cal. 538, 12 Pac. Rep. 530.

It was alleged in the complaint that the waters which were caused to be thrown back upon plaintiff's property by the embankment in the street were the waters of a natural water course. The answer in effect admitted that there had been a natural water course across plaintiff's property, but averred that "for a long time prior thereto it had and now has no defined course or channel by reason of the improvements made in said city; that lots over and through which it formerly passed had been filled in, and buildings have been constructed thereon; that streets have been graded over and along said waterway, and the water flowing therein now runs through culverts and in sewers." Upon the issue thus raised there was a sharp conflict of evidence. If it was a natural water course, the city was not authorized to place any obstruction across the channel without taking the necessary precautions for the escape of the water flowing therein. There is evidence tending to show that the city attempted to do this by the construction of a sewer, but the evidence on behalf of the plaintiff tended to prove that this sewer had been changed or abandoned, and that no proper channel of escape had been provided in lieu thereof. The charge of the court to the jury is not in the record, and we must presume that proper instructions were given upon all matters connected with the subject of the action.

We do not think the court erred in sustaining the objection to the question: "Now, in your opinion as an expert, would that plastering be in the condition that you found it, had the building since the plastering was placed there settled six or seven inches?" It must be apparent to any one that the plaster of a building which has settled six or seven inches cannot be in the condition that it was before it settled.

There are other exceptions argued by counsel for appellant, but we do not deem it necessary to discuss them in this opinion. We have examined them, and think there is no merit in any of them.

Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

96 Cal. xvii; 3 Cal. Unrep. 634

BERLIN v. FARWELL. (No. 14,467.)

(Supreme Court of California. Nov. 28, 1892.)

BROKERS—COMPENSATION—ACTING FOR BOTH PARTIES.

Where the evidence shows that plaintiff in an action to recover commissions earned under a contract to find a purchaser for defendant's land was employed by the purchaser without defendant's knowledge to buy the land from defendant at a figure which would suit the purchaser's views, a finding that he was the purchaser's agent was proper, though he had no written agreement with the purchaser for compensation, but was to get his compensation from defendant; and, being the agent of both parties without defendant's knowledge, he cannot recover.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; JOHN ELLSWORTH, Judge.

Action by C. H. Berlin against Elizabeth Farwell. Judgment for defendant, and plaintiff appeals. Affirmed.

F. A. Berlin and *D. M. Smoot*, for appellant. *Haven & Haven*, for respondent.

FOOTE, C. This action was brought against the defendant for the purpose of recovering certain commissions alleged to have been earned by the plaintiff in finding a purchaser in the person of Mr. H. D. Bacon for certain lands which Mrs. Farwell had in writing trusted to the plaintiff to sell for her at a certain price. The court below determined the matter adversely to the plaintiff's claim, and from the judgment made and given in the premises this appeal is taken upon the judgment roll and a bill of exceptions.

The plaintiff and appellant claims that the court below was not justified by the evidence in making the seventh finding of facts, and that the conclusions of law are not warranted by the findings. Upon the disposition of these matters the appeal is to be determined. The finding referred to reads thus: "*Seventh.* That prior to the 22d day of September, 1889, and thence to and at the time of the authorization of plaintiff by defendant to sell said land, by writing, signed by her on said 22d day of September, 1889, and thence to the time and at the time of the receipt by defendant from plaintiff, on the 25th day of September, 1889, of said sum of $500 as a deposit by said H. D. Bacon on account of his proposed purchase of said land from defendant, the plaintiff had been and was acting as the agent of said H. D. Bacon in the matter of the proposed purchase by the said H. D. Bacon from the defendant of said land. That in securing from the defendant the said written authorization of sale of date September 22, 1889, the plaintiff was acting at the request and as the agent of said H. D. Bacon; and in the payment to defendant, on the 25th day of September, 1889, of the sum of $500 on account of said proposed purchase, the plaintiff was acting at the request and as the agent of said H. D. Bacon." The conclusions of law run thus: "That the plaintiff is not entitled to take anything from the defendant by this action, and that the defendant is entitled to recover from the plaintiff her costs." The court below was evidently of the belief, and the facts as found and shown in evidence warrant such belief, that the plaintiff was working in the interests of Mr. Bacon, and was employed by him to do so, although the agent had no written agreement for compensation from Mr. Bacon, but was to get his compensation from Mrs. Farwell; and that the agent was acting in the interests of Mr. Bacon, the proposed purchaser, in endeavoring to get Mrs. Farwell to sell the property at a figure which would meet Mr. Bacon's views, without the knowledge of Mrs. Farwell, from whom he obtained a written agreement for compensation in case he sold the property to Bacon for her. To this extent, at least, the plaintiff was the agent of both parties; and the sole question left for determination is whether, under such state of facts as here exist, the plaintiff can hold the defendant responsible for the commissions claimed in this action. It was said in Kronenberger v. Fricke, 22 Ill. App. 550: "It is a well-established rule of the law of agency that an agent must not put himself, during the continuance of his agency, in a position which is adverse to that of his principal, for the principal bargains for the exercise of all the skill, ability, and industry of the agent, and he is entitled to demand the exercise of all this in his own favor. * * * For this reason an agent of the seller cannot become the agent of the purchaser in the same transaction. As a consequence of this rule it is held that a person who attempts to act as the agent of both parties to a transaction, without disclosing such fact to his principals, is precluded from recovering compensation for his services." To much the same effect is a similar matter treated in Carman v. Beach, 63 N. Y. 97. In Farnsworth v. Hemmer, 1 Allen, 494, a broker negotiating an exchange of real estate acted for both parties without informing either that he was employed by the other. It was held that he was not legally entitled to commissions for his services, the court saying: "It is of the essence of his contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do where he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract." We conclude, therefore, that the conclusions of law are proper under all the findings; and, as heretofore stated, the challenged finding being supported by the evidence, it follows that the judgment appealed from should be affirmed, and we so advise.

We concur: Temple, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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96 Cal. 381

DORN et al. v. CRANK. (No. 19,160.)

(Supreme Court of California. Oct. 15, 1892.)

Appealable Order.

The receiver of an insolvent street-railway company applied for permission to issue certificates of the company to pay for paving which it was obliged by law to lay near its tracks. The contract, to be approved by the court, provided that the work was to be paid for in cash or certificates issued by order of the court. Holders of the first mortgage bonds of the company intervening protested against the issuance of the certificates, and asked that if issued they should be made subordinate to the liens of their bonds. The court denied their petition, approved the contract, and the interveners appealed, and applied for a writ of supersedeas to stay the issuance of the certificates pending the appeal. *Held*, that the application is premature where the court did not direct the issuance of the certificates, or refuse to declare them subordinate to the liens securing the bonds.

In bank. Appeal from superior court, Los Angeles county; Wade, Judge.

Application for a writ of *supersedeas* by Dorn and McKee, trustees, and interveners in an action by Russell against the Pacific Railway Company, whose receiver was J. F. Crank. Writ denied.

John D. Pope, for appellants. *John D. Bicknell, Wilson Lamme, J. H. Polk*, and *J. F. Smith*, for respondent.

Paterson, J. The property of the Pacific Railway Company was placed in the hands of the respondent, Crank, as receiver. Prior to the appointment of the receiver, the company had been operating a horse-car line in the city of Los Angeles, under a lease from the East & West Los Angeles Street Railway Company to the predecessor of the insolvent defendant. The lease provided for the payment of an annual rental of $10,000, but no payments have ever been made on account thereof, and the receiver is unable to make any payments on account of the lease. The municipal authorities have recently ordered Figueroa street to be paved, and under the law the horse-car company is required to pave between its tracks, and for two feet on the outside thereof. The receiver, having no funds with which to do the work, presented a petition to the court below, accompanied by a contract for the paving, and providing for payment in certificates to be issued by the receiver of the insolvent railway company. The interveners, who hold a large amount of first mortgage bonds on the cable line, protested against the issuance of the certificates to pay for paving the street, and asked that, in case the certificates were issued, they should be made subordinate to the liens securing the bonds held by them. The court denied their petition, and directed the acceptance of a bid for the work, and approved the contract providing for the issuance of receiver's certificates. To this order the interveners excepted; a bill of exceptions was presented and allowed; notice of appeal was served and filed; and two undertakings on appeal, each in the sum of $300, were given. This is an application for a writ of *supersedeas* to stay the issuance of the certificates pending the appeal. We think that the application is premature. The court has done nothing thus far except to approve the contract entered into by the receiver for the performance of the work. That contract provides that "all payments under this contract are to be made in cash, or, at the option of the party of the second part, in receiver's certificates issued by the court. * * * This contract is made by the parties hereto with the express understanding that the same is subject to the approval of the judge of the superior court." The court has not directed the issuance of any certificate, nor has it refused to declare that the receiver's certificates, if issued, shall be subordinate to the lien created by the deed of trust. Until the certificates have been issued, and the court has adjudicated that they shall not be subordinate to the lien of the interveners, the latter have no grounds of complaint.

The application is denied.

We concur: McFarland, J.; Harrison, J; Garoutte, J.; Sharpstein, J.

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96 Cal. 381

DORN et al. v. CRANK. (No. 19,160.)

(Supreme Court of California. Oct. 19, 1892.)

Dismissal of Appeal by Consent—Right to Hearing Below.

Where interveners apply for a supersedeas, which is denied as premature, and consent that their appeal from the order may be dismissed, they are entitled to a hearing on the merits of their intervention in the court below.

In bank. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Application for directions on dismissal of appeal. For former report, see ubi supra.

John D. Pope, for appellants. *John D. Bicknell, Wilson & Lamme, J. H. Polk*, and *J. F. Smith*, for respondent.

Paterson, J. In a recent decision in this case (see ubi supra) we held that the application for a *supersedeas* was premature, and upon that ground denied the motion. The correctness of the decision is conceded, and appellants consent that the appeal from the order may be dismissed, but are apprehensive that the court below may again refuse to give them a hearing, and deny their right to be heard in opposition to the issuance of receiver's certificates. We are asked, therefore, to so direct the court that they may be heard on the merits of any objection which they may make to further proceedings in the matter. We do not deem it necessary to make any order, except to dismiss the appeal, but to prevent any misunderstanding it may be well to state that the interveners are entitled to a hearing in the court below on the question whether receiver's certificates should be issued to pay for the proposed work. The motion to dismiss the appeal is granted.

We concur: HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.

(96 Cal. 484)

FISH v. McCARTHY. (No. 14,986.)

(Supreme Court of California. Nov. 28, 1892.)

MECHANIC'S LIEN—PROPERTY OF MINORS—WHEN SUBJECT.

Where a mechanic performs work on the property of minors under a contract with the guardian, the mechanic's lien cannot be enforced, where the guardian has not obtained an order of the court authorizing her to do the work.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Joseph W. Fish against Mary McCarthy, guardian of Mary, Joseph, and Patrick Powers, to enforce a mechanic's lien. From a judgment sustaining a demurrer to the complaint, the plaintiff appeals. Affirmed.

Ash & Mathews, for appellant. *Stafford & Stafford*, for appellee.

VANCLIEF, C. Action to enforce a mechanic's lien. The court sustained a general demurrer to the complaint, and, plaintiff declining to amend, judgment passed for defendant. Plaintiff appeals from the judgment on the judgment roll, and contends that his complaint was sufficient. The complaint shows that the defendant, Mary McCarthy, in her character of guardian of the persons and estates of Mary, Joseph, and Patrick Powers, minors, employed the plaintiff to repair a certain building, the property of her wards; that plaintiff repaired the building and furnished all materials necessary for that purpose; that the materials and labor were reasonably worth $120; and that he regularly filed with the recorder his claim and notice of lien. The wards are also made defendants, but the guardian is sued only in her official capacity. I think the following opinion of the learned judge of the trial court expresses the law of the case, and should be adopted: "This is an action to enforce a mechanic's lien. The work performed, materials furnished, for the value of which the lien is sought to be enforced, was performed as per notice for the defendant, Mary McCarthy, guardian of the persons and estates of certain minors, who are also joined as parties defendant. Assuming that the allegation in question is equivalent to an averment that the defendant, McCarthy, as guardian of the minor defendants, and on their behalf, made the contract in question, it seems clear that the defendant, as such guardian, could not subject the estate and property of her wards to a lien, such as is here sought to be enforced, without first obtaining an order of court authorizing her to do so. The supreme court of this state in Guy v. Du Uprey, 16 Cal. 196, have directly so held; and the same rule is maintained by other courts. See Phil. Mech. Liens, § 111; also Hunt v. Maldonado, 89 Cal. 636, 27 Pac. Rep. 56. As the mechanic's lien arises from work done and materials furnished under an obligatory contract, if the contract be not binding the lien necessarily fails. An infant is not bound by his contract, except in certain cases, in which the erection of a building is not included." See, also, Phil. Mech. Liens, § 108; Schouler, Dom. Rel. § 351. I think the judgment should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(96 Cal. xvii; 3 Cal. Unrep. 648)

ANGEVINE v. KNOX-GOODRICH. (No. 14,803.)

(Supreme Court of California. Nov. 29, 1892.)

LANDLORD AND TENANT—LIABILITY OF LANDLORD — INJURY TO TENANT'S HEALTH — DEFECTIVE SEWER.

Civil Code, § 1941, requiring the lessor to put buildings intended for human occupation in a condition fit for occupancy, does not create such an implied warranty that a tenement is fit for human occupation as to render the lessor liable to the tenant for injury to his health resulting from a defective sewer, where the lessor had no notice of the defect.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county.

Action by M. B. Angevine against S. L. Knox-Goodrich. Plaintiff had judgment, and from an order granting a new trial he appeals. Affirmed.

Jackson Hatch and *B. F. Bergen*, for appellant. *A. S. Kittredge* and *Morehouse & Tuttle*, for respondent.

FOOTE, C. The plaintiff demanded damages from the defendant for injury to his health, caused by the neglect of the defendant to construct a house with safe and proper sewage pipes and conduits, which house was occupied by the plaintiff as an employe of the lessees of the defendant. Following the verdict of the jury, judgment for $8,500 was rendered in favor of the plaintiff. A motion was made for a new trial upon various grounds, and it was granted, without any specification as to the ground moving the court thereto. The respondent contends that the trial court erred in its rulings upon the demurrer to the complaint, in the admission of evidence, and in the charge to the jury; and in this connection it is urged that the trial court in all these matters took an erroneous view of the force and effect of section 1941 of the Civil Code, in that it was ruled by that tribunal that under such section there was virtually written into every lease of the kind here involved, by operation of the statute, even though not expressed in the lease or a covenant, that the premises leased are habitable, and fit for occupation by human beings, if intended for habitation; and that, as a consequence, if such building or structure is not in such condition, the covenant is broken, and an action for damages such as here instituted will lie. Such evidently was the view taken and expressed by the court in all these matters, and such view is not in harmony with the decisions of the supreme court. It is raised in Sieber v. Blanc, 76 Cal. 173, 18 Pac. Rep. 260: "Nor was there any liability arising from section 1941 of the Civil Code, which provides that the lessor of a building intended for the occupation of human beings must put it in a condition for such occupation. In the first place, it is not alleged or found that the building was intended for the occupation of human beings; and, in the second place, it was held in Van Every v. Ogg, 59 Cal. 566, as we understand the decision, that the obligation imposed upon the landlord by section 1941 'should be limited by the extent of the privilege conferred upon the tenant' by section 1941; and that, therefore, the only consequence of a breach of the landlord's obligation is that the tenant may either vacate the premises, or expend one month's rent towards the repairs, after notice," etc. There is no fraud or deceit on the part of the landlord charged in the complaint, or proved in the case, as we read the transcript. It is a case where the plumbing of the house as constructed was defective, and the illness of the plaintiff was caused by noxious gases that escaped from sewage pipes by reason of this defective plumbing. It is not alleged or proven that the defendant knew anything more about this defect when the lease was made than the plaintiff or his employer, the lessee. But it is sought to make the defendant responsible under the idea that by the Civil Code (section 1941) there is an implied warranty in every lease of a house for the occupancy of human beings that the same is in a habitable condition when leased. This view of the case is not only opposed by the cases we have first cited, but it is in direct conflict with the decision of the appellate court in the case of Green v. Redding, 92 Cal. 548, 28 Pac. Rep. 599, where this was said about a somewhat similar contention: "This would be placing the burden of looking out for the health of one's family on the landlord, and leaving the husband and father without any responsibility, therefore, in renting a house for them to live in." If this is the extent of the defendant's responsibility to the tenant, it must be the same with reference to an employe of the tenant, as was the plaintiff here. Willson v. Treadwell, 81 Cal. 59, 22 Pac. Rep. 304; Tayl. Landl. & Ten. (8th Ed.) p. 198, § 175. We therefore conclude that the action of the court below was erroneous as to all the matters alluded to as occurring on the trial of the cause, and for these reasons its action in granting a new trial was founded in justice, and was the exercise of a sound judicial discretion. We therefore advise that the order granting a new trial be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting a new trial is affirmed.

(96 Cal. xvii; 3 Cal. Unrep. 637)

CAMERON v. CALBERG. (No. 14,499.)

(Supreme Court of California. Nov. 28, 1892.)

FRAUDULENT CONVEYANCES — CHANGE OF POSSESSION.

Plaintiff bought from M. a mare, then pasturing on the land of one W., five miles distant. He went to take possession of the mare, but W. was not at home. On his return he met W., and then arranged with him to remove the mare a few days later, and on the day specified he placed her on another ranch, under an agreement with the manager thereof, who received and held her for plaintiff. *Held*, that there was a sufficient compliance with Civil Code, § 3440, providing that every transfer of personal property will be deemed to be fraudulent as to creditors, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the things transferred.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Action by Ashley D. Cameron against G. F. Calberg to recover possession of a mare seized at suit of defendant against plaintiff's vendor. From a judgment for plaintiff, and order denying new trial, defendant appeals. Affirmed.

H. F. Crane, for appellant. *Wells Whitmore* and *David Stoddart*, for respondent.

FOOTE, C. This action of claim and delivery was instituted to recover possession of a certain mare named "Dolly," claimed to be wrongfully in possession of the defendant. From the judgment rendered in the premises, and from an order denying a new trial, this appeal is taken. The only point made for a reversal of the judgment and order is that the evidence does not support the findings. In this connection it is urged that the plaintiff, who had bought the property in question from his father-in-law, Mr. Murr, did not get it in such manner as to satisfy the provisions of section 3440,[1] Civil Code, because, as is claimed, the transfer of the property was not accompanied by an immediate delivery, and followed by an actual and continuous change of possession. As remarked by this court in Byrnes v. Moore, 93 Cal. 393, 29 Pac. Rep. 70, "every case of the kind here involved has its own peculiar features, and must be determined on the particular facts which surround the given transaction or transfer." Many of the facts in this case are similar to those developed in Williams v. Lerch, 56 Cal. 330, where it was held that the transfer was good. Here the vendee got a bill of sale, and paid a sufficient consideration for the property,—a mare, which was on a pasture in possession of a third party. The purchaser (the plaintiff here) went to get the mare and other horses he had bought, but did not find the party, Weyland, who had them in charge, at home. On that same day, on plaintiff's return to Oakland, his place of residence, the pasture where the mare was being five miles distant, he met Mr. Weyland, the person who had the mare and the plaintiff's other horses in charge on pasturage, and made arrangements to remove all of them on the 2d of April, 1890, to another ranch for pasturage, a few miles off. The vendor, Murr, in pursuance of one of the conditions of the sale, then paid Weyland for the previous pasturage of the mare and other horses he had sold the vendee. Then, on the 2d April, 1890,—only a few days after this,—the plaintiff and a son of the vendor, Murr, and Weyland took the horses that plaintiff had previously owned, the mare in dispute, and other animals bought from the vendor, Murr, and drove them to the Hewston ranch to be pastured. The plaintiff had previously made arrangements with Mr. Harrison, manager of the Hewston ranch, for the pasturage of all the animals above mentioned, and Harrison, in pursuance of that arrangement, received all of the horses, including the mare, from the plaintiff, as the property of the plaintiff, and kept them for him subject to his order, and never heard of, knew, or recognized any one else in the matter; and Harrison, as manager of the ranch, was in the possession of all the animals for the plaintiff from the 2d April, 1890, until the 24th May, 1890, when the mare Dolly was seized at the suit of an attaching creditor of Murr, the vendor, by Calberg, the defendant here, a constable executing the writ. We perceive no error in the action of the court below complained of by appellant, and advise that the judgment and order be affirmed.

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[1] Civil Code, § 3440, provides that "every transfer of personal property other than a thing in action * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession."

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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96 Cal. 505

CURRIER v. NELSON et al. (No. 14,138.)

(Supreme Court of California. Nov. 29, 1892.)

DEED—DESCRIPTION.

A deed conveying a lot described it as "commencing at a point on the northwesterly line of Harrison street, distant 125 feet 'north' of the northeasterly line of Fourth street, and running thence northeasterly along the northwesterly line of Harrison street, 25 feet." *Held*, that though the word "north," as used to describe the boundaries of land in a conveyance, may be qualified by other words of description used in connection with it, there is nothing in the deed set forth to indicate that "north" was used in any other sense than "due north," and that it must be so held.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Currier against Nelson and others to recover possession of a lot. Judgment for defendants. Plaintiff appeals. Reversed.

Theodore H. Hittell, for appellant. *Thos. F. Barry*, for appellees.

DE HAVEN, J. This is an action to recover possession of a certain lot in San Francisco, which is described in the complaint as "commencing at a point in the northwesterly line of Harrison street, distant one hundred and twenty-five feet northeasterly from the northerly corner of Harrison and Fourth streets, and running thence northeasterly along said northeasterly line of Harrison street twenty-five feet," and extending back from said street a distance of seventy-five feet. The court below gave judgment for the defendants, and the plaintiff appeals.

It appears from the record that one Jones was, on September 17, 1879, the owner and in possession of the lot in controversy, and both the plaintiff and defendant Schmalzlen claim to have succeeded to this title. The defendant Schmalzlen claims under a deed executed by Jones on September 17, 1879, and in which the lot conveyed is described as "commencing at a point on the northwesterly line of Harrison street, distant one hundred and twenty-five feet north of the northeasterly line of Fourth street, and running thence northeasterly along said northwesterly line of Harrison street twenty-five feet," and extending back from Harrison street a distance of seventy-five feet. The plaintiff's claim of title is based upon a later quitclaim deed executed by Jones, in which the land conveyed is described as in the complaint.

It will be seen from the foregoing statement that the only matter to be decided upon this appeal is whether the deed of September 17, 1879, under which defendant Schmalzlen claims, describes the land in controversy; and whether that deed does so describe it or not depends entirely upon the meaning of the word "north," as used in its first descriptive call. The first call in the deed referred to is for a point in the northwesterly line of Harrison street 125 feet north of the northeasterly line of Fourth street. The court below found as facts: "*Tenth*. That Harrison street, in said city and county, runs in a northeasterly and southwesterly direction, and Fourth street, in said city and county, runs at right angles to it, in a northwesterly and southeasterly direction; that the only point in the northwesterly line of said Harrison street, which is one hundred and twenty-five feet due north from the northeasterly line of said Fourth street, is a point on said northwesterly line of Harrison street eighty-eight feet four and three eighths inches northeasterly on said line of Harrison street from the north corner of said Harrison and Fourth streets, and thirty-six feet seven and five eighths inches southwesterly on said line of Harrison street, from the point of commencement of the real estate described in the complaint. *Eleventh.* That a line drawn due south from the point of commencement of the real estate described in the complaint does not strike the northeasterly line of said Fourth street in a less distance than one hundred and seventy-five feet due south from said point of commencement." In view of these facts, it is clear that if the word "north," as used in the first descriptive call of defendant's deed, is to be construed as meaning "due north," then the land in controversy was not conveyed by that deed, and the judgment in favor of defendants must be reversed. There is no doubt that the word "north" may be controlled or qualified in its meaning by other words of description used in connection with it. If, for instance, the deed here had described the lot as commencing at a point on the northwesterly line of Harrison street, 125 feet north of the north corner of Harrison and Fourth streets, there would then have been a necessity to construe the word "north," as thus used, to describe the course of the line between the two points named as meaning "northeasterly," in order to harmonize with the points given for the beginning and ending of such line; but in the case before us there is no room for construction, and the court would not be warranted in giving to the word "north," in the call referred to, any other than its ordinary meaning, as there is nothing whatever in the deed to indicate or suggest that it was used in any other sense. The word "north," unless qualified or controlled by other words, means "due north," and that is its meaning in the deed under consideration. "The term 'northerly' in a grant, where there is no object to direct its inclination to the east or west, must be construed to mean 'north.'" Brandt v. Walton, 1 Johns. 156. See, also, Fratt v. Woodward, 32 Cal. 220; Irwin v. Towne, 42 Cal. 326. It follows from the views we have expressed that the deed under which defendant Schmalzlen claims does not describe the land in controversy. It is not alleged in the answer that the parties to this deed adopted the description which it contains by mistake, and that such deed was intended and believed by them to convey the land which is the subject of this action. If such mistake was made, it may be shown under proper pleadings, and the defendant Schmalzlen should be permitted to amend his answer by setting forth any equitable defense which he may have to this action growing out of such mistake, if it was made.

Judgment and order reversed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

96 Cal. 486

MOORE v. SCHOFIELD et al. (No. 14,810.)

(Supreme Court of California. Nov. 28, 1892.)

WITNESS—TRANSACTIONS WITH DECEDENTS.

Where an action against two co-contractors is revived against the administrator of one of defendants, the surviving defendant is not, under Code Civil Proc. § 1880, which forbids a party to an action against an administrator to testify, a competent witness for plaintiff, though judgment has been rendered against such survivor by default.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county; JOHN CALDWELL, Judge.

Action by David Moore against Miles Schofield and W. S. Chapman. W. S. Chapman defaulted, and Miles Schofield died, and his administrator was substituted in his stead. Judgment for plaintiff against W. S. Chapman and against plaintiff for the administrator. Plaintiff appeals. Affirmed.

John Gale and *S. P. Davidson,* for appellant. *Goodwin & Goodwin* and *F. L. Ford,* for respondents.

TEMPLE, C. This appeal is upon the judgment roll, which, however, includes a bill of exceptions, settled at the time the decision was made, under section 649, Code Civil Proc. The action was brought to recover $8,400 alleged to be due from the defendants upon a contract made by them with plaintiff, whereby they agreed to purchase certain shares of stock in a mining corporation, upon terms agreed upon. There was also a cause of action set up for moneys laid out and expended for the use of defendants. It was therefore a suit founded upon an alleged joint obligation on the part of the two defendants. After suit brought, Schofield died, and his administrator was substituted in his place. Chapman made default, but the administrator of Schofield answered, denying each material allegation of the complaint, placing his denials on the ground that he had no information or belief on the subject sufficient to enable him to answer. At the trial, plaintiff called as a witness the defendant W. S. Chapman, whose default had been duly entered, and offered to prove by him the contract set forth in his complaint. To this evidence the defendant administrator objected on the ground that the same was incompetent, it appearing that the witness was a party to this action, and therefore incompetent to testify to any fact which occurred prior to the death of Schofield. The objection was sustained, and an exception was taken. Plaintiff then offered himself as a witness for the same purpose, but a similar exception was interposed and sustained. Plaintiff having no further evidence by which to prove the alleged contract, which was not in writing, judgment was entered in favor of the administrator of Schofield, and in favor of plaintiff as against Chapman. The point presented is whether Chapman was a competent witness, under section 1880 of the Code of Civil Procedure, for the plaintiff, against his codefendant and joint obligor, as to facts which occurred prior to the death of Schofield. The precise question was presented in the case of Blood v. Fairbanks, 50 Cal. 420. In that case Blood and Hewitt, as partners, had taken sheep from the defendant to keep for the increase, etc., agreeing to share the profits with the owner. Hewitt had sold his interest in the partnership to

Blood, who brought suit against the administratrix of the estate of Fairbanks, the owner of the sheep, for an accounting. As Hewitt had no interest in the proceeding, and asserted no claim against the estate, although made a party to the suit, it was contended that he was not incompetent, under section 1880, Code Civil Proc. But this court said: "Section 1880 of the Code of Civil Procedure provides that 'parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of the deceased,' cannot be witnesses. It is said that Hewitt is not a party against an executor, and that he has no claim against the estate. But the statute does not merely exclude parties who have or are supposed to have an interest adverse to the estate of the decedent, but, by its terms, renders all nominal parties to the action incompetent." Appellant does not deny that this case is in point, or that it is against him, but he contends that it has been overruled by subsequent cases. He says it renders all nominal parties to proceedings against an administrator incompetent, while the court in Sedgwick v. Sedgwick, 52 Cal. 336, held that one against whom an action is prosecuted by an executor or administrator may be a witness. Of course this ruling was based upon the proposition that the action was not against the executor or administrator, and therefore not made an exception to the general rule as to the incompetency of witnesses by the letter of the statute. This case, no less than the former, holds that the very words of the statute must control. Chase v. Evoy, 51 Cal. 618, simply holds that the executor may waive the objection, and make a party a witness in his own behalf.

A more recent case, and apparently more in point for appellant, is Myers v. Reinstein, 67 Cal. 89, 7 Pac. Rep. 192. The question there was whether certain property belonged to the estate. As the court said: "The very question to be determined here is whether the interest sought to be recovered was a part of Reinstein's estate or not." It was an action or proceeding then against an executor to recover property which the executor claimed belonged to the estate. It would indeed seem to be a claim or demand against the estate. But that was the very question upon which the decision was made to turn, and it was held that it was not. Whether right or wrong, therefore, it is not authority here. In Knight v. Russ, 77 Cal. 410, 19 Pac. Rep. 698, an attorney who was to recover for legal services rendered the decedent was permitted to state his occupation, and how long he had been practicing law, what his income from that source was, etc., as a basis upon which to estimate the value of his services. The court said that the statute was evidently intended to prevent parties from testifying to matters tending to establish an asserted claim, and not to prevent their testifying in reference to other matters which may arise incidentally. It may be said of this case that it is inconsistent with Blood v. Fairbanks, which very distinctly holds that the letter of the statute must control, and the statute makes the test as to the competency of the testimony of a party to the action, whether it relates to facts which occurred before the death of the deceased party; and, further, that in that particular case, if the proposed evidence did not tend to establish the claim, it was immaterial, and should have been excluded on that ground. In fact, I fail to see any reason in the distinction attempted. If the testimony was not material, it should not have been received. If it was, and tended to establish the claim against the estate, no reason can be given for supposing that the statute was not intended to include it. Apparently the idea of the writer of that opinion was that the statute could not be understood as excluding testimony of the parties upon subjects which the deceased could have known nothing of, and which did not refer directly to the transactions from which the cause of action arose. Whether this be so or not cannot help the appellant here, for the rejected testimony in this case was clearly not incidental in any sense, and tended directly to establish the contract on which the claim is based. In the still more recent case of Tyler v. Marye, 95 Cal. 160, 27 Pac. Rep. 160, and 30 Pac. Rep. 196, this section was again alluded to, but it was there held that the evidence received did not tend directly to establish a claim against the estate of the deceased. But on another ground the contention of appellant must be overruled. If it be conceded that the court can look beyond the letter of the statute, and determine whether a given case is within the reason of the rule, it does not appear in this case that Chapman had no interest in establishing the claim against the estate. His own default had been entered, upon which judgment subsequently passed against him. He had an interest in having judgment rendered, thereby compelling the estate to contribute to the satisfaction of the claim. I think the judgment should be affirmed.

We concur: HAYNES, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

96 Cal. 598

In re GUILFOYLE'S WILL. (No. 15,051.)

(Supreme Court of California. Dec. 1, 1892.)

WILL—VALIDITY—SUBSCRIPTION BY MARK.

1. Under Civil Code, § 14, defining certain terms, and providing that "'subscription' includes 'mark,' when the person cannot write," where testatrix knew how to write, but was physically too weak to do so, a subscription of her will by mark is sufficient.

2. Civil Code, § 14, requiring the name of the person in such a case to be written near the mark, is sufficiently complied with if the name is written so near as to show that the mark is intended to represent it.

3. In the absence of any allegations of fraud or mental unsoundness, the fact that another person did the writing under these circumstances raises no presumption against the validity of the will.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Proceeding to revoke the probate of the will of Bridget Guilfoyle, deceased. From an order revoking the probate of the will, and appointing an administratrix, proponents and administratrix appeal. Reversed.

F. J. Castelhun, for appellants. *H. G. Platt* and *Oscar T. Shuck*, for respondents.

VANCLIEF, C. Proceeding to revoke the probate of the will of the deceased. The bill of exceptions shows that the matter was submitted to the court on the following stipulation as to the facts:

"It is hereby stipulated and agreed that the application to revoke the will of the above-named deceased be, and the same is hereby, submitted upon the following statement of facts, to wit: Said will is in pencil, and barely covers a single page of small note paper. It is in the words and figures following, to wit:

"'August 29, 1891. I, Bridget Guilfoyle, leave $500 (five hundred dollars) for masses at St. Patrick; also want a nice funeral, and all other expenses to be paid from what I leave, and the rest to my two nieces, Maria and Aggie Johnson, equally.

"'X.

"'Witnesses: ELLEN O'CONNOR. EMMA ENDRES. MARY DALY.'

"The will was written by the witness Emma Endres, at the request of the deceased. After it was written, the witness Emma Endres read the will to the deceased in the presence of the other subscribing witness. The deceased was then asked whether that was her will. The deceased answered that it was. She was then given a pen by the witness Emma Endres. The deceased knew how to write her name, but was physically too weak to do so. She made a cross at the end of the paper, and declared that such paper was her last will, and requested the said Emma Endres, Mary Daly, and Ellen O'Connor to sign the same as witnesses thereto.

"OSCAR T. SHUCK, and
"H. C. PLATT,
"Attorneys for the Contestants.
"F. J. CASTELHUN,
"Attorney for the Proponents."

From these facts the court concluded "that said document is not subscribed at the end thereof by the testatrix herself, nor did any one in the presence of the testatrix, and by her direction, subscribe the name of the testatrix thereto;" and accordingly revoked its former orders admitting the document to probate, and appointing an administratrix. From these orders revoking the probate and the appointment of an administratrix, the proponents and administratrix bring this appeal.

As to what amounts to a "signing" by a testator under the statute of 29 Car. II., it is said, in Jarman on Wills, (page 201:) "It has been decided that a mark is sufficient and that, notwithstanding the testator is able to write, and though his name does not appear on the face of the will." To the same effect is section 303 of Schouler on Wills, citing American cases. Section 14 of the Civil Code provides that "'signature' or 'subscription,' includes 'mark,' when the person cannot write, his name being written near it, and written by a person who writes his own name as a witness." In this case the whole body of the will, including the name of the testatrix, was written by Emma Endres, who signed as a witness. If the mark can be regarded as subscription by the testatrix, the execution of the will was in perfect accordance with section 1276 of the Civil Code.

It is contended, however, by counsel for respondents that the name of the testatrix, which appears in the body of the will, is not "near" the mark, and therefore that the use of the mark to represent her name was not authorized. The only conceivable object of requiring the name to be written "near" the mark, is to show what name the mark is intended to represent. In this case it clearly appears that the mark was intended to represent the name of the testatrix. It is therefore near enough to her name, as written in the body of the will, to satisfy the requirement of section 14 of the Civil Code.

It is further contended that the mark was unauthorized, because the testatrix knew how to write, though she was physically unable to do so; and, from an extract from the opinion of the learned judge who decided the case, copied into respondents' brief, it would appear that the decision rested upon this ground. The extract is as follows: "In the case at bar it is especially proper to enforce the strict letter of the law, as it appears that the proposed paper was written and witnessed and marked as and for the act of a woman who could write, but who was too ill to even write her name. Wills executed under such conditions are presumably the wills of persons other than the one then actually dying." If the presumption mentioned should be indulged in any case, it surely cannot apply to this case, since there is no allegation of fraud, and no question that the testatrix was of sound and disposing mind at the time she made her mark and declared the instrument to be her will. Persons who know how to write may become physically incapable of writing their names by reason of rheumatism, or paralysis of the hands, and other causes besides general physical debility, though of sound mind; and it seems unreasonable that the legislature intended to exclude all such persons from the privilege of subscribing a will or other instrument by a mark. The language of the Code is, "when the person cannot write." This fairly includes all persons who are unable to write from any cause, even though they know how to write. I think the orders appealed from should be reversed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders appealed from are reversed.

96 Cal. 467

VERDIER et al. v. ROACH. (No. 13,086.)

(Supreme Court of California. Nov. 22, 1892.)

EXECUTORS AND ADMINISTRATORS — CONTINGENT CLAIMS AGAINST ESTATE.

Where a lessor had covenanted to indemnify lessee from damages by water during his term, and the lessor died, a claim on the contract of lease for damages from water, accruing after the death of lessor, and after notice to present claims had expired, is a "contingent" claim, under Code Civil Proc. § 1493, which provides that "claims * * * due, not due, or contingent must be presented to the administrator within the time limited in the notice;" and, under section 1500, no action can be maintained on such a claim unless it is first presented to the administrator.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action by Verdier and Moreau against Roach, administrator of Thomas H. Blythe, deceased, on a covenant of indemnity in a lease for damages by water in the building. Judgment for defendant, from which plaintiffs appeal. Affirmed.

Gustave Touchard, Jr., for appellants. *Napthaly, Frederich & Ackerman*, (*John A. Wright*, of counsel,) for respondent.

PER CURIAM. When this cause was pending in department 1, the following opinion was prepared by Commissioner VANCLIEF. After full consideration in bank, we are satisfied with that opinion and with the conclusion therein reached; and for the reasons therein given the judgment is affirmed.

"On the 12th day of November, 1881, Thomas H. Blythe leased to the plaintiffs the first story or ground floor of a building in San Francisco, to be occupied as a store for the term of nine years and ten months. The lease contained a covenant on the part of the lessor to indemnify the lessees and save them harmless, during the term, from one half of all damages and loss which they might sustain by the leaking or overflow of water upon their goods in the building, caused by any occupant of any part of the building, other than that demised to them. In September, 1882, plaintiffs entered into possession of the demised part of the building, under the lease, and stored their goods therein. On April 4, 1883, Blythe died. On June 12, 1883, Roach was appointed administrator of Blythe's estate, and as such, on June 23, 1883, commenced the publication of notice to the creditors to present and exhibit their claims against the estate within ten months thereafter, which publication was continued and completed as required by law; but during the period of ten months no claim of any kind was presented by plaintiffs. In 1886, more than two years after the expiration of the period of ten months had expired, the plaintiffs sustained damages in the sum of $3,321.10, by a leak and overflow of water caused by an occupant of a portion of the building other than that demised to plaintiffs; and thereupon they demanded of Roach, as administrator, payment of one half of the damages thus suffered by them, viz., $1,660.55, which he refused to pay; and this action was commenced to recover the same. The court found the facts substantially as above stated, and gave judgment for the defendant, solely upon the ground that the plaintiffs had failed to present to the administrator any claim upon the covenant in the lease, during the period of ten months after publication of notice to creditors. Plaintiffs bring this appeal from the judgment upon the judgment roll, and contend that, upon the findings of fact, the judgment should have been for plaintiffs.

"Was it necessary to a recovery by the plaintiffs that they should have presented to the administrator a claim against the estate, upon the covenant in the lease, during the prescribed period of ten months? is the principal question presented for decision. Section 1493 of the Code of Civil Procedure provides that 'all claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever: provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered.' Section 1500 provides that 'no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator,' except an action to enforce a mortgage or lien, etc., where all recourse against any other property of the estate is expressly waived in the complaint. Section 1493 is the Code substitute for section 130 of the old probate act, which provided that, 'if a claim be not presented within ten months after the first publication of the notice, it shall be barred forever: provided, if it be not then due, or if it be contingent, it may be presented within ten months after it shall become due or absolute.' As affecting contingent claims, this section of the probate act was construed, to a certain extent, in Pico v. De la Guerra, 18 Cal. 428, where it was said: 'We see in the one hundred and thirtieth section no authority for the presentation of a contingent claim. The plain effect of the section is to ignore all claims which are due, unless such claims be presented as therein described; and the last clause of the section is simply a proviso, exempting claims not due and contingent claims from the operation of the first clause, and making a new provision for them, namely, that they may be presented within ten months after becoming absolute liabilities or reaching maturity. But this does not do away with the necessity of presenting them to the executor after this character attaches to them.' Accordingly, it was held in that case that no action could be maintained against an executor upon a contingent claim until after it had been presented to the executor as a matured absolute claim. As if purposely and unmistakably to reverse the effect of this construction, section 1493 of the Code of Civil Procedure not only provided that 'all claims arising upon contracts, whether due, not due, or contingent, must be presented within the time limited in the notice,' or barred forever, but entirely omits the proviso in section 130 of the probate act upon which the above construction was grounded, viz., that a contingent claim might be presented within ten months after it should become absolute; and there is now no provision in the Code for the presentation of a contingent claim after the expiration of the period of ten months, except in case the holder of the claim was absent from the state, etc., and this exception applies alike to all claims, whether contingent or not.

"Section 131 of the probate act required every claim presented to be supported by an affidavit 'that the amount is justly due,' etc. Such an affidavit could not truthfully be made in the case of a contingent claim before the happening of the contingency upon which the claim was to become due or absolute. As if on purpose to remove this obstacle to the presentation of contingent claims, section 1494 of the Code (substitute for section 131 of the probate act) requires the affidavit to be made only in case the claim 'is due,' and provides that 'if the claim be not due when presented, or be contingent, the particulars of such claim must be stated.' Section 1498 of the Code, which is the same as section 134 of the old probate act, provides that when a claim is rejected, the holder must bring suit in the proper court 'within three months after the date of its rejection, if it be then due, or within two months after it becomes due; otherwise the claim shall be forever barred.' In Fallon v. Butler, 21 Cal. 25, it was held that a mortgage lien was not a 'claim against the estate' of a deceased person, within the meaning of the probate act, which must be presented within the period prescribed by the notice to creditors or be barred; and in support of this it was said, (*arguendo:*) 'Whatever signification, then, may be attached to the term "claims," standing by itself, it is evident that in the probate act it only had reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered. In this sense a mortgage lien is not a claim against the estate.' One of the reasons assigned for this construction of the probate act was that a contingent claim (assuming a mortgage lien to be such) could not be supported by the affidavit required by section 131 of that act, since a contingent claim could not become due, nor could the amount thereof be known before the contingency happened. But, as we have seen, this obstacle has been removed by section 1494 of the Code of Civil Procedure. The decision in Fallon v. Butler, however, is rested principally upon the ground that only those 'claims' upon which a personal money judgment may be rendered are required to be presented for allowance, without regard to whether they are 'due, not due, or contingent.' The mortgage in question in that case was overdue, and might have been enforced two years before the death of the mortgagor; but it was said that an action for the enforcement of the mortgage was distinct from an action to recover a money judgment on the note secured by the mortgage. It was not decided in that case that it was unnecessary to present for allowance an immature contingent claim upon which a money judgment might be rendered after it should become due. It was said, however, that the term 'claims' only referred to those demands upon which a money judgment might have been rendered against the decedent in his lifetime. Literally understood, perhaps, this would exclude from the meaning of the word 'claims' all demands of every kind, which did not fall due until after the death of the decedent, even though a money judgment might be rendered upon them after they should become due; and it would follow that claims upon promissory notes and other contracts for the direct payment of money, not due until after the death of the testator, need not be presented to the executor for allowance. It will hardly be contended that this was the intention of the learned justice who wrote the opinion in that case. Near the close of the opinion, however, the intention of the court is expressed more precisely, as follows: 'In the use of the term "claims" it [the legislature] intended to embrace only such demands or liabilities as might by action be reduced to simple money judgments, and to leave the enforcement of specific liens and equitable rights to the ordinary proceedings in the district courts.' This expresses all that could have been intended as to the meaning of the word 'claims.' Whether the claims were due, not due, or contingent must have been considered immaterial to the decision. Moreover, the decision, such as it was, and particularly as to the construction of the word 'claims,' was doubted and limited to the exact facts of that case in Ellis v. Polhemus, 27 Cal. 350, wherein Mr. Chief Justice SANDERSON, among other things, said: 'The meaning of the word "claim" is broad enough to embrace a mortgage or any other lien, and in the 186th section of the [probate] act mortgages and other liens are expressly mentioned as valid claims against the estate; * * * but if there was any doubt upon that point it would seem to be removed by the language of the 133d section, which provides that, "if the claim be founded on a bond, bill, note, or other instrument, the original shall be presented," etc.' The definition of the word 'claims,' given in Fallon v. Butler, was cited in Estate of McCausland, 52 Cal. 577, to the point that a proceeding for a family allowance by the widow is not an action or proceeding against an executor or administrator. Again, in Estate of Swain, 67 Cal. 641, 8 Pac. Rep. 497, the same definition is cited to the point that a balance struck upon an account may be presented as a claim against an estate, since an action might have been maintained upon it against Swain in his lifetime. Again, in Stuttmeister v. Superior Court, 72 Cal. 489, 14 Pac. Rep. 35, the case of Fallon v. Butler was cited in support of the proposition 'that the term "claim," as used in the Code in reference to estates of deceased persons, has reference to such demands or debts against the decedent as existed, and (if due) might have been enforced against him in his lifetime by proper action.' These are the only cases cited by counsel as affirming the case of Fallon v. Butler; yet none of them touch the point, even, that no claim need be presented except such as may be reduced to a money judgment, and certainly afford no support to the construction of the opinion contended for by counsel for appellants, to the effect that immature contingent claims upon which, when due, a money judgment may be rendered, are not required to be presented to the administrator for allowance, and are not barred if not presented. To this extent, however, the law must be found to go to maintain the action at bar; for, although the claim upon which it was brought is a contingent claim which did not become due or absolute until after the expiration of the period prescribed by the notice to creditors, it is nevertheless a claim upon which a money judgment may be rendered, and upon which such a judgment might have been rendered against Blythe in his lifetime, had it become due before his death. The decision in Fallon v. Butler, limited, as it has been, to actions to enforce mortgage liens, in which no money judgment is sought, was affirmed, however, by the legislature in 1876, and made an exception to section 1500 of the Code of Civil Procedure, as it theretofore stood, which, considered in connection with other sections of the Code above quoted, seems very significant of the intention of the legislature to allow no other exception to the rule that 'no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator.' And this exception was probably enacted in deference to the decision in Fallon v. Butler as limited in Ellis v. Polhemus.

"Counsel for appellants contend that the term 'contingent claim,' as used in section 1493 of the Code of Civil Procedure, 'must be confined to existing claims, and cannot be extended to mere possibilities.' There seems to be very little room for controversy as to the meaning of the adjective 'contingent' or the noun 'contingency.' Webster defines the noun as follows: '(1) The quality of being contingent or casual; the possibility of coming to pass. (2) An event which may occur; a possibility; a casualty.' And defines the adjective 'contingent' as follows: '(1) Possible, or liable, but not certain to occur; incidental; casual. (2) Dependent on that which is undetermined or unknown. (3) (Law.) Dependent for effect on something that may or may not occur.' The law dictionaries and the Century Dictionary give substantially the same definitions. Among those given in the Century Dictionary are the following: 'Not existing or occurring through necessity; dependent upon a foreseen possibility; provisionally liable to exist, happen, or take effect in the future.' Indeed, the word 'possibility' is defined (in law) to be 'a contingency.' See Webster, Bouvier, Burrill, and Anderson. All anticipated future events which are not certain to occur are contingent events, and may properly be denominated 'mere possibilities,' more or less remote, while anticipated events which are certain to occur, or must necessarily occur, are in no degree contingent.

"Section 1493, Code Civil Proc., distinguishes three classes of claims against an estate which must be presented: (1) Claims due; (2) claims not due; and (3) contingent claims. This implies that the mere fact that a claim is not due does not make it contingent. If the amount of the claim and the date at which it is to become due are certain, it is not contingent, though not due. Therefore a contingent claim is not distinguished from other claims by the qualifying words 'not due,' but by the words 'not absolute,' as in sections 1648, 1650, Id. A claim ceases to be contingent when it becomes absolute, though not yet due, as in the case of a contract to pay money six months after the future occurrence of a contingent event, in which the obligation becomes absolute six months before due; yet a contingent claim may become absolute and due at the same time.

"It is further contended for appellants that they had no existing claim against Blythe's estate which could have been presented during the period of ten months after publication of notice to creditors, since Blythe's liability to indemnify them did not become absolute or due until the contingency happened, two years after that period had expired. It is true that their claim was neither absolute nor due during that period, but it was nevertheless an existing valuable claim against the estate of Blythe, assignable, devisable, and descendible, (Kenyon v. See, 94 N. Y. 563,) and also detrimental to Blythe's estate. It consisted of a then-existing obligation arising from an express covenant of the decedent to indemnify the appellants for one half of all damages they might suffer from water, etc., during the term of the lease. It was substantially a covenant of insurance. Counsel ask, what would have been the effect of an allowance of this claim by the administrator? A sufficient answer to this is that an allowance of the claim would have admitted and established the validity of the obligation, and would have entitled it 'to be filed in court and ranked among the acknowledged debts of the estate, to be paid in due course of administration,' (section 1497,) 'as the circumstances of the estate required,' (section 1647.) If still contingent at the time of the settlement of accounts, 'the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto.' Sections 1648, 1650, 1651. It is assumed by counsel for appellants that before the contingency happens the obligation is not a debt; and thence they conclude that it could not have been 'ranked among the acknowledged debts of the estate.' Conceding, for the sake of the argument, that a contingent claim is not a technical legal debt, it does not follow that it may not be ranked 'among' debts. The first two examples given by Mr. Webster, of authorized uses of the verb 'to rank,' are as follows: 'Poets were "ranked" in the class of philosophers.' 'Heresy is "ranked" with idolatry and witchcraft.' The first does not necessarily mean nor imply that poets are philosophers, nor the second that heresy is idolatry or witchcraft. Nor does the requirement that an allowed claim shall be ranked 'among' debts exclude from the ranks all claims which may not properly be termed 'legal' debts. The statute plainly requires contingent claims to be presented for allowance, and that all allowed claims shall be filed in court, and ranked 'among' the acknowledged (allowed) debts, whether all such allowed claims are technical debts or not. Section 130 of the probate act, and section 1493 of the Code as first enacted, provided that, 'if a claim is not presented within the time limited in the notice, it is barred forever, except if it be not then due, or if it be contingent, it may be presented within ten months after it becomes due or absolute.' By the amendment of section 1493 of the Code, in 1880, this exception was omitted. This omission clearly shows it to have been the intention of the legislature, not only that contingent claims should be presented within the prescribed period, but that if not presented within that period they should be barred forever.

"Appellants' counsel finally insist that the term 'contingent claim,' as employed in section 1493, Code Civil Proc., cannot be so extended as to include a claim whose amount is contingent, and, as authority for this, refer to certain bankruptcy cases claimed to be analogous, most of which arose under the United States bankrupt act of 1841, (5 St. at Large, 444,) the fourth section of which provided that the judgment or certificate of discharge of the bankrupt shall 'be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act.' The fifth section provides for proving all kinds of contingent claims which may become absolute in the future, and that when they become absolute the present value thereof shall be ascertained 'under the direction of the court,' and allowed accordingly, 'as debts *in præsenti*.' In the cases cited, it was held that those claims whose amounts were contingent and uncertain were not provable under the act, and consequently that the bankrupt was not discharged from his obligation thereon. But even upon this point the bankrupt cases are conflicting. See Jemison v. Blowers, 5 Barb. 692, and Heywood v. Shreve, 44 N. J. Law, 104. I think the analogy of the bankrupt cases to the case at bar too remote to entitle the former to much, if any, weight as authorities in the latter, upon the point here under consideration. The principal object of the bankrupt act was to discharge insolvent living debtors from a part (not all) of their just debts and obligations, as a matter of grace; whereas, the probate laws of this state propose to enforce payment of all just debts of deceased debtors, as matter of strict justice. The question decided in the bankrupt cases cited related to the construction of the bankrupt act of 1841, namely, were contingent debts, the amounts of which could not be ascertained in the course of the proceedings, provable and dischargeable under that act? No such question is involved in this case. There is no doubt that all just contingent claims arising from contracts of a deceased person are provable against his estate at some time during the administration thereof, and must be paid or in some mode secured in the course of administration. The sole question in this case is one of construction of the probate law of this state, namely, does the probate law of this state require that all contingent claims, which are provable and payable at any time, shall be presented for allowance within ten months after publication of notice to creditors, as a condition precedent to the commencement of actions thereon? A true answer to this question depends upon peculiar provisions of our Code of Civil Procedure, nothing analogous to which is to be found in the bankrupt act of 1841. Besides, no question analogous to this was decided in any of the bankrupt cases cited.

"Counsel for appellants have suggested difficulties in the way of providing for the payment or security of that class of contingent claims, the amounts of which cannot be ascertained within the ordinary period of administration. Such difficulties have always been encountered, but generally, if not always, overcome. See 2 Williams, Ex'rs, (6th Amer. Ed.) top pages 1447–1453. Where the limited jurisdiction of a distinct probate court has proved to be inadequate, the original jurisdiction of courts of equity over the administration of estates has been invoked. Our superior courts have both probate and equity jurisdiction, so that whenever, in the course of the administration and settlement of estates, our probate statutes are found to be inadequate to authorize and accomplish all that a court of equity is authorized to do in such cases, our superior courts may exercise their equity powers in connection with, and as incidental to, their powers in probate matters, to the extent necessary to a complete administration and distribution of estates: provided, of course, that nothing be done in contravention of any statutory provision. 3 Pom. Eq. Jur. § 1153. As to the means and mode of procedure by which the payment or security of contingent demands is to be enforced, no question is involved in this case, except the question as to the necessity of their presentation for allowance within ten months after publication of notice to creditors. It is not denied that all just contingent claims arising from contracts should be paid or provided for in the course of administration, if our statutes have provided the requisite means and mode of procedure; and what has been said under this head is only intended to show that in this class of cases courts of equity have always had and exercised the power to protect and enforce contingent claims against the estates of deceased persons, and for this purpose have supplied the necessary means and modes of procedure, so far as not inconsistent with any statute; and that, since our superior courts have all the powers of courts of equity, they may do likewise.

"In conclusion, it may be remarked that if contingent claims are not to be entirely ignored in the administration of estates, it is quite as important that they should be presented for allowance as that absolute claims should be presented. Otherwise, how is any provision whatever to be made for them before the estate is settled? Timely notice of all claims which may prejudicially affect an estate should be given to the administrator, so that he may have an opportunity to investigate their merits, and to contest them, if advisable, before the evidence of their invalidity shall be lost. That they should be forever barred if not presented within the time prescribed by law is surely no greater hardship than that absolute claims should be so barred. I think the judgment should be affirmed. Vanclief, C.

"We concur: Temple, C.; Belcher, C."

Harrison, J., took no part in the foregoing decision.

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96 Cal. 455

McCROSKEY v. LADD et al. (No. 13,297.)

(Supreme Court of California. Nov. 22, 1892.)

Vendor and Purchaser — Rescission of Contract — Liability of Purchaser on First Installment.

1. Plaintiff agreed to sell land to defendants, a certain amount to be paid on the execution of the contract, and the balance within 60 days, when plaintiff was to make a deed. If defendants failed to make "said payments as herein named, they shall forfeit all right to said property, and all right to all payments made herein. If said title is not sufficient and good, then said money paid shall be refunded." On the execution of the contract, defendants gave their note for the first payment, payable one day after date, and, being dissatisfied with the title, afterwards repudiated the purchase. After 60 days plaintiff sued on the note. *Held* that, by not suing on the note until after the entire purchase price became due, plaintiff waived his right to recover thereon as an obligation independent of the deferred payment, and can only recover by showing that he has complied with his contract.

2. Where several persons agree jointly to purchase land, a tender of deed to one of them is insufficient to entitle the seller to recover the purchase price, without proof that all of such persons were named therein as grantees.

In bank. Appeal from superior court, San Benito county; James F. Breen, Judge.

Action on a promissory note by one McCroskey against Ladd and others. Defendants had judgment, and plaintiff appeals. Affirmed.

John L. Hudner and *M. T. Dooling*, for appellant. *N. C. Briggs*, for respondents.

Harrison, J. The plaintiff made an agreement in writing with the defendants and two others on the 25th of August, 1887, to sell and convey to them certain real estate in Hollister for the sum of $6,500, of which $650 was to be paid at that date, and the balance within 60 days thereafter. The agreement also contained the following clause: "And said McCroskey, upon receiving said payments, agrees to make a deed of said property to said persons, and convey title to said premises to them, and, if said persons fail to make said payments as herein named, they shall forfeit all right to said property, and all right to all payments made herein. If said title is not sufficient and good, then said money paid shall be refunded." Instead of paying the $650 in money upon that day, the defendants, for themselves and their associates, executed to the plaintiff their promissory note for $650, payable one day after date. After the execution of the agreement the parties thereto had some negotiations regarding the examination of the title to the property, which resulted in the vendees being dissatisfied therewith, and a demand by the defendants that the plaintiff surrender to them their note. This the plaintiff refused, but tendered a deed of the property to McClay, one of the vendees, and demanded payment of him of the full amount of the purchase money, viz., $6,500, but McClay refused either to accept the deed or pay the money. In November, 1888, the plaintiff brought this action against the defendants to recover from them the amount of the promissory note. The complaint is in the ordinary form of a complaint upon a promissory note. The defendants in their answer set up the transaction of which the note was a part, and pleaded a failure of consideration. The court rendered judgment in favor of the defendants, and the plaintiff has appealed therefrom, bringing the case here upon the judgment roll alone.

The action upon the note, being between the original parties thereto, is subject to an inquiry into its consideration, and is also subject to any equities existing between the parties which arise out of the execution of the note, or are connected therewith. The note was given for a portion of the purchase price of a tract of land to be thereafter conveyed by the plaintiff under his agreement with the defendants and their associates, was executed in pursuance of said agreement at the same time with the execution of the agreement, was a part of the same transaction, and is to be interpreted and regarded as a part of the agreement made between the parties at that date. The finding of the court that it was executed "in pursuance of said agreement, in the place and stead of the payment of $650" provided for in the written instrument, must be construed as a contemporaneous agreement between the parties to substitute the note for the provision in the instrument that the sum of money should be paid at the date of its execution. The execution of a promissory note for the payment of a portion of the purchase money did not render the relative obligations of the parties to the agreement of sale any different from what they would have been had this obligation been incorporated into the written agreement itself. The obligation of the purchaser under such an agreement is the same, whether the purchase money is made payable in installments by the terms of the agreement itself, or whether it is evidenced by a counter obligation on his part, or by promissory notes executed by him as a part of the same transaction. All of the writings that are executed at that time become a part of the transaction, and are to be considered together as parts of one agreement. Culver v. Burgher, 21 Barb. 324; Divine v. Divine, 58 Barb. 264; Glassell v. Coleman, 94 Cal. 260, 29 Pac. Rep. 508.

The respective obligations of the parties to an agreement for the conveyance of land when the purchase money is made payable in installments are to be construed as independent obligations, or as dependent and concurrent, according to the terms in which the agreement is expressed. If an installment is made payable prior to the date at which the conveyance is to be made, the obligation to pay the installment and to make the conveyance will be regarded as independent obligations, and the seller can maintain an action for the recovery of the installment without the execution or tender of a conveyance; whereas, if the payment of the installment is to be made upon the execution of the conveyance, no recovery thereof can be had, except upon the averment and proof of such execution, or of a tender thereof. If the agreement is silent upon this point, the obligations will be regarded as mutual and dependent, so that neither party can have a right of action against the other without a previous performance, or offer to perform, on his part; and, if the time for the performance of the conditions on both sides has expired, it is incumbent on either party, before he can enforce a performance by the other, to do or offer to do all that by the agreement he is required to do. If a recovery of the installment is not sought until after the time for the payment of the last installment, the plaintiff must aver and prove the same facts as would be required in an action to recover the last installment. Johnson v. Wygant, 11 Wend. 48. If he defers the collection of the several installments until the time for the collection of them all has accrued, he has no right of action upon any of the prior installments separate from that upon them all. His cause of action is not upon the agreement to pay the installments, but for the consideration upon which he agreed to convey the land, and is an entire and single demand. He has no right of action upon a part thereof distinct from that upon the whole, and in any action brought by him for a part or for the whole of the purchase money, after all of the payments have become due, he must aver and prove that before he commenced the action he had complied with the agreement on his part, or had offered so to comply, by making or tendering a conveyance of the premises. The obligations to make these payments, which were originally independent, have by his waiver of the right to enforce them become dependent and concurrent with his own obligation to convey, and can be enforced only upon his showing that he is not in default. As in the case of any other obligation which is entire, but by its terms is to be performed at stated intervals prior to the time for its complete performance, whether it be for the payment of money or for the delivery of merchandise, if the holder of such obligation delays its enforcement until after the time for its complete performance, his right of action for the several installments will have become merged in the entire obligation, and can be enforced only in a single action upon that obligation. These are elementary principles in the construction of contracts, and their application to cases involving facts like those under consideration is fully sustained by Beecher v. Conradt, 13 N. Y. 108; Eddy v. Davis, 116 N. Y. 247, 22 N. E. Rep. 362; Hoag v. Parr, 13 Hun, 95; Smith v. McCluskey, 45 Barb. 610; Williams v. Healey, 3 Denio, 366; Thomson v. Smith, 63 N. Y. 304. In Beecher v. Conradt, supra, the agreement of sale provided for the payment of the purchase money in five annual installments, and after the maturity of the last installment the plaintiff brought an action to recover the entire purchase price, without having made a tender of a conveyance before the commencement of his action, and, in holding that the action could not be maintained, the court said: "The plaintiff, having elected to wait until the fifth and last installment became due, and upon the payment of which the defendant would be entitled to a deed, cannot now sustain his action for either installment without proof of performance, or readiness to perform, on his part. The covenants as to the first four installments were originally independent, but the plaintiff, by his omission to insist upon a strict performance by the defendant, has lost the right to bring more than one suit for the money which formed the consideration for his conveyance. The parties by a lapse of time are in the same situation as though the purchase money was all payable at one time. The defendant has lost his right to pay the installments separately, and the plaintiff his right to enforce collection by separate suits. There is but a single cause of action, one and indivisible. The defendant, if he would obtain his deed, must pay all, and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration. The condition attaches to the whole debt and to every part of it." In the present case the plaintiff could have brought his action on the note at its maturity, and the obligation of the defendants would then have been construed as an independent agreement, and their liability determined solely by the terms of the note. But by deferring his action until after the time when the entire purchase money had matured, he has waived the right to treat this note as an independent obligation. That has become merged in the obligation to pay the whole of the consideration, and must be construed with reference to the terms of that obligation. In an action against the purchasers for the whole purchase money, they are entitled, as the consideration thereof, to a conveyance of the premises, and they cannot be compelled to pay a portion of the consideration for which they are to receive the conveyance, except upon receiving the entire consideration for their obligation. As a recovery by the plaintiff in this action would be a bar to any other action by him for the remainder of the purchase money, the defendants have the same right to a conveyance of the premises that they would have if the action was for the whole purchase price. It is neither alleged in the complaint nor found by the court that the plaintiff made any tender of a conveyance to the defendants, or either of them, and, as the judgment was in favor of the defendants, it was incumbent upon the appellant to cause it to appear by the record that at the time of commencing his action he had so complied with all the terms of his agreement as to place the defendants in default. The court does not find to whom the deed which the plaintiff tendered to McClay purported to convey the land, and, as the judgment must be presumed to be correct, we must assume that it was a conveyance in favor of McClay alone, and did not purport to convey the land to the defendants herein. The judgment is affirmed.

We concur: McFarland, J.; De Haven, J.; Sharpstein, J.; Garoutte, J.

96 Cal. 490

CHURCHILL v. PACIFIC IMP. CO. (No. 14,437.)

(Supreme Court of California. Nov. 29, 1892.)

Limitation of Actions—Liability of Innkeepers—General Demurrer.

1. Civil Code, § 1859, provides that an innkeeper is liable for all losses of personal property placed by guests under his care, unless occasioned by an irresistible, superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn. *Held*, that this is the liability created by common law, and therefore, in view of Civil Code, § 5, which provides that the sections of the Code, so far as they are substantially the same as the common law, must be construed as a continuation thereof, and not as new enactments, an action based on such liability is not governed by Code Civil Proc. § 338, providing that an action on a liability created by statute must be commenced within three years, but by section 339, which provides that an action on an obligation, not founded on an instrument of writing, must be brought within two years.

2. The word "construed," as used in section 5, means "regarded" or "considered," not "interpreted," "explained," or "translated."

3. Under Code Civil Proc. § 431, providing that a demurrer may be taken to the whole complaint or to any of the causes of action stated therein, a general demurrer may be taken to a complaint, though it contains two separate counts.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Churchill against the Pacific Improvement Company to recover the value of personal property lost by plaintiff through the burning down of defendant's public inn, at which plaintiff was a guest. From a judgment for defendant, entered on an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Carroll Cook, for appellant. *Frank Shay*, for respondent.

Paterson, J. A judgment in favor of defendant on demurrer to the complaint was entered in the court below, and plaintiff has appealed therefrom. The question is whether the cause of action stated in the complaint was barred by the statute of limitations. It is alleged in the complaint that the defendant is engaged in the business of keeping a public inn; that on April 1, 1887, the plaintiff and his wife were guests in said inn, and plaintiff had taken there with him as such guest, and placed under the care of the defendant as innkeeper, certain described personal property belonging to him of the value of $3,492; that on the night of said 1st day of April the inn and plaintiff's said property were, through the negligence of the defendant, destroyed by fire. Another and separate cause of action is set forth in the complaint, but it is the same as the first, except in two particulars, namely: It is alleged that a portion of the property, valued at $3,040, was the personal effects of the plaintiff's wife, and that, before the commencement of the action, she assigned to the plaintiff all claim for damages against the defendant. The complaint was filed March 5, 1890. The defendant filed a demurrer to the complaint on the ground that "it clearly and affirmatively appears upon the face of said complaint that the cause of action therein set forth is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure." This section provides that an action upon an obligation, not founded upon an instrument of writing, may be brought within two years. We think that the ruling of the court in sustaining the demurrer to the complaint was correct. Section 1859, Civil Code, provides that "an innkeeper is liable for all losses of or injuries to personal property placed by his guests under his care, unless occasioned by an irresistible, superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn." Appellant contends that the liability established by this section is one created by statute, and that the time within which an action can be commenced upon such a liability is governed by subdivision 1 of section 338, Code Civil Proc., which provides that "an action upon a liability created by statute, other than a penalty or forfeiture," must be commenced within three years. We do not agree with the appellant in this contention. The rule stated in section 1859 is simply declaratory of the common law, and section 5 of the Civil Code provides that the sections of the Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments. In Pinkerton v. Woodward, 33 Cal. 600, the court said: "But the preponderating weight of authority, from the time of the decision in Calye's Case, 8 Coke, 32, to the present time, is in favor of the rule that he [the innkeeper] is liable as an insurer." In Wilkins v. Earle, 44 N. Y. 172, the court said: "His liability extends to wearing apparel, jewelry, money, and even to the horses, wheat, butter, and other articles of bulk belonging to the guest, if received by the innkeeper into his care, and within his place of entertainment. This is the rule of the common law, enforced in the days of Lord Coke, and long prior, and ever since, as well in England as in this state. * * * The liability of an innkeeper for the goods of his guests has been settled for centuries. The act of 1855 does not purport to create it, nor even to declare it. It assumes the liability." If, therefore, there were no such statutory provision as we find in section 1859, the liability of the innkeeper would be the same as it is under that section.

Appellant's contention that the word "construed," as used in section 5, means simply to "interpret," to "explain," to "translate," or "to show the meaning of," cannot be sustained. As there used, the legislature clearly intended it to mean "regarded," or "considered." It certainly was not intended to say that the provisions of the Code, so far as they are substantially the same as the common law, should be construed the same as the common law. There is no such thing as construction of the common law. We do not interpret it; we declare it; we say what it is. Section 20 of the Civil Code adds no strength to the appellant's position.

It is claimed that the demurrer ought to have been overruled, because it is general in terms, and there are two separate and distinct causes of action stated in the complaint; that it is impossible, therefore, from the demurrer, to ascertain which of the counts is demurred to. In this contention, also, we think the appellant is in error. The demurrer is to the whole complaint. Section 431, Code Civil Proc., provides that the demurrer "may be taken to the whole complaint, or to any of the causes of action stated therein." There are two counts in the complaint, it is true, but neither of them is good. The authorities cited by the appellant, therefore, are not in point.

The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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96 Cal. 494

TREWATHA v. BUCHANAN GOLD MINING & MILLING CO. (No. 14,366.)

(Supreme Court of California. Nov. 22, 1892.)

NEGLIGENCE OF FELLOW SERVANT—DEFECTIVE APPLIANCES—INSTRUCTIONS.

1. Defendant's employes were raised and lowered in its mine by means of a hoisting tackle, which was also used to hoist the debris from the mine. Plaintiff, about to get into the bucket, gave, as he claimed, the proper signal to the engineer for hoisting a man. The bucket was at first raised slowly, and then at a great speed, and was not stopped at the proper time, but was hurled against the sheave with such force that plaintiff was injured. The engineer testified that he heard the signal for raising rock, but knew there was something lighter than rock in the bucket, and could not explain why he had not stopped the engine at the proper time. He had run engines for several years, and there was no proof of carelessness on his part prior to the accident in question. *Held*, that the accident was due to the negligence of the engineer, and defendant was not liable therefor, under Civil Code, § 1970, providing that an employer is not liable to his employe for the negligence of a fellow servant, unless he neglected to use ordinary care in the selection of the fellow servant.

2. A charge that if the bell and appliances used to signal the engineer were out of order, and defendant or its superintendent knew, or had the means of knowing, such fact, and plaintiff did not know, and did not have, equally with defendant, the means of knowing, this, and if plaintiff gave the proper signal, and the engineer, on account of the defect in the bell and other appliances, did not hear such signal, and for this reason hoisted plaintiff from the mine at such dangerous speed as to result in the accident in which plaintiff was injured, then the jury must find for plaintiff, is erroneous, because ignoring the rule of law that, where the proximate cause of the injury is the negligence of a fellow servant, no recovery can be had.

In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Action by Samuel Trewatha against the Buchanan Gold Mining & Milling Company. Judgment for plaintiff. Defendant appeals. Reversed.

For report of decision in department 2, see 28 Pac. Rep. 571.

James H. Budd and *E. A. Rodgers*, for appellant. *I. M. Kalloch* and *F. W. Street*, for respondent.

PER CURIAM. After full consideration of this cause in bank, we are satisfied with the conclusion reached in department 2, and with the opinion prepared in department by Commissioner BELCHER, (28 Pac. Rep. 571.) For the reasons given in that opinion the judgment and order appealed from are reversed, and the cause remanded.

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96 Cal. 462

BAUM v. REAY. (No. 14,028.)

(Supreme Court of California. Nov. 22, 1892.)

EJECTMENT—EVIDENCE OF POSSESSION—REFRESHING MEMORY OF WITNESSES.

1. Code Civil Proc. § 318, provides that no action for the recovery of real property can be maintained unless plaintiff, his ancestor or grantor, was seised or possessed of the property within five years before suit. In ejectment for an unimproved lot, the evidence showed that plaintiff and his grantors had held the legal title to the same for more than ten years prior to the

action, maintaining the fence inclosing it, and paying the taxes. *Held*, that the evidence was sufficient to support a verdict for plaintiff.

2. A witness may be permitted to refresh his memory from a writing or memorandum made by himself at the occurrence of the facts to which it relates, but the memorandum is not competent evidence to prove the facts stated, in itself.

3. In ejectment, evidence that plaintiff and his grantor paid the taxes on the land in suit is admissible to show the claim of title, and that it had not been abandoned.

De Haven, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. F. FINN, Judge.

Ejectment by Julius Baum against Joseph W. Reay. Plaintiff had judgment, and defendant appeals. Affirmed.

For report of decision of department 1, see 29 Pac. Rep. 117.

J. M. Seawell, for appellant. *Jarboe & Harrison* and *J. Naphtaly*, for respondent.

PER CURIAM. This cause was heard and decided in department 2. 29 Pac. Rep. 117. We are satisfied with the views therein expressed and the conclusion reached, but in support of the ruling of the court below, in excluding the inventory offered in evidence by the defendant, we cite the following cases: Lightner v. Wike, 4 Serg. & R. 204; Acklen's Ex'r v. Hickman, 63 Ala. 494. The rule in New York has been changed, (Guy v. Mead, 22 N. Y. 466,) but our Code seems to indorse the rule followed in Pennsylvania and Alabama, and which formerly prevailed in New York, (Code Civil Proc. § 2047.)

The judgment and order are affirmed.

DE HAVEN, J. I dissent from the judgment.

HARRISON, J., being disqualified, did not participate in the foregoing decision.

(3 Cal. Unrep. 646)

PIEPER v. PEERS et al. (No. 14,523.)[1]

(Supreme Court of California. Nov. 29, 1892.)

LIABILITY ON APPEAL BOND—DEMAND.

An action cannot be maintained on an appeal bond given to stay a judgment for the delivery of certain hay, or for $299, the value thereof, the bond being conditioned, under Code Civil Proc. § 978, to pay the judgment if the appeal be dismissed, unless it is shown that an execution has been issued since the dismissal of the appeal, or a demand for the property made, or that a delivery thereof cannot be had, since it was necessary that this should appear before the money judgment could be payable.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

Action by Charles H. Pieper against Alexander Peers and Peter Grimley to recover on a bond given to stay an execution pending appeal, on which bond defendants became sureties. From a judgment for plaintiff, defendants appeal. Reversed.

J. H. Campbell, for appellants. *W. P. Venor*, for respondent.

TEMPLE, C. This is an appeal upon the judgment roll. Plaintiff's assignor, Marie Albert, obtained a judgment in a justice's court against one Juan Lucas for the delivery of certain hay, or for $299, the value thereof, if delivery could not be had. Lucas appealed to the superior court, and gave a stay bond on which the defendants herein were sureties. The bond was conditioned, as required by section 978 of the Code of Civil Procedure, "that the said appellant will pay the amount of the judgment appealed from, and all costs, and will obey the order of the court made therein, if the appeal be withdrawn or dismissed," etc. The appeal was dismissed by the appellant therein. It is not alleged or found that any execution had been issued, or that since the dismissal of the appeal a demand for the property had been made upon the defendant, or that a delivery thereof could not be had, but simply "that no part of said hay has been delivered pursuant to said judgment, or any part of the judgment for its value, or any part of said costs been paid." The objection is now made that it is not alleged or found that a delivery of the property could not be had, or that any order was made by the superior court which was disobeyed by the appellant in that case; therefore there was no money judgment which the principal was bound to pay, or in fact could have paid. I see no answer to this objection. The judgment was for the delivery of hay. The alternate money judgment was enforceable only in case the property could not be recovered. Until that fact was determined, the money judgment, as an operative, enforceable judgment, did not exist. The defendant in the judgment could not secure the privilege of paying the money judgment, rather than deliver the property, by simply taking an appeal. Although, therefore, the undertaking is absolute that the sureties are bound for the payment of the amount of the judgment, it cannot be understood that they undertook that their principal would do something which it was not only not his duty to do, but which he could not have done, unless with the consent of the owner of the judgment. It means that the sureties are bound for the payment of the judgment whenever it becomes payable, when not to pay it would be a failure to perform his obligation on the part of the principal. Whether it would be necessary to have an execution and a return made to the effect that a return of the property cannot be had, is a different question. It should at least be alleged that a return of the property could not be had. I think, therefore, that the judgment should be reversed, and a new trial had.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and a new trial ordered. It is further ordered that the court below grant the parties a reasonable time within which to amend their pleadings.

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[1] Rehearing granted.

3 Cal. Unrep. 677

In re TILLMAN'S ESTATE. (No. 15,016.)

Appeal of PENEBSKY.

(Supreme Court of California. Dec. 7, 1892.)

WILLS—CONTEST—GROUNDS OF—CONVEYANCE OF PROPERTY.

Since Civil Code, § 1292, provides that a written will can only be revoked by a writing or by its destruction, a contest interposed to a petition for the probate of a will, which alleged that the property therein disposed of was, after the execution of the will, conveyed to contestant, presents no ground for contest, where it does not also allege that such conveyance declared the will revoked.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

To the petition of George W. Wright for the probate of the will of M. E. Tillman, deceased, A. T. Penebsky filed a contest; and from an order sustaining a demurrer to the contest, and admitting the will to probate, contestant appeals. Affirmed.

Ash & Mathews, for appellant. *W. A. Plunkett*, for respondent.

HAYNES, C. George W. Wright filed a petition for the probate of the will of the decedent. A. T. Penebsky, the sole heir at law of the testatrix, filed a contest, to which the petitioner demurred. The demurrer was sustained, and the will was probated. This appeal is from the order sustaining the demurrer, and from the judgment admitting the will to probate. The property stated in the petition to have been left by decedent consisted of several parcels of real estate, household property of the value of $50, and $800 cash on deposit in the Hibernia Savings & Loan Society. The will of decedent was dated and made February 13, 1891, and a codicil thereto was made August 3, 1891. The sole ground of contest is that said will and codicil were revoked on the 7th day of August, 1891, and that such revocation was made by a deed executed and delivered by the testatrix on that day to contestant, conveying to him all the real estate mentioned in the will, and by the assignment to him of the bank book of said deposit, and that conveyance and assignment were absolute and unconditional, and with the intent and purpose of revoking said will, and that the testatrix intended thereby to convey to contestant all her property, both real and personal. The demurrer was properly sustained. The validity of a will is not affected by the subsequent conveyance of property named in and specifically devised thereby, nor is such conveyance affected by the mere fact that a will had been previously executed, disposing of the same property. As a will does not take effect until the death of the party making it, the effect of a subsequent valid conveyance can only be to take the property conveyed out of the operation of the will, leaving it entirely unaffected as to property not conveyed. If the testatrix was not seised or possessed of any property at the time of her death, there could be no object or purpose in proving her will; but even in such case the contestant could not be affected by such proceeding. Here the will, executed shortly before the death of the testatrix, showed a large amount of real estate and some personal property. The contestant raises no question except as to a subsequent disposition of that property. Suppose that such conveyance had been obtained by fraud or duress sufficient to render it void, and that question had been raised by the petitioner in response to the grounds of contest, the court in that proceeding could not have tried the issue, not only because it was foreign to the proceeding before the court, but because there was no one to appear for and defend the estate; nor would a finding and judgment against the contestant that the deed under which he claims is void have bound or concluded him, as the court had no authority in this proceeding to determine that question. Corker v. Corker, 87 Cal. 643, 25 Pac. Rep. 922. Section 1292 of the Civil Code provides: "Except in the cases in this chapter mentioned, no writen will nor any part thereof can be revoked or altered otherwise than (1) by a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; (2) by tearing, destroying, etc., with intent to revoke."

It is not alleged that the deed executed and delivered to the contestant "declared" a revocation of the will, nor is it alleged that it was executed with the formalities with which a will is required to be executed, and therefore it could not be a revocation of the will; it could only take out of the operation of the will the property conveyed, as a will can only operate upon so much of the property as legally and equitably belonged to the testartix at the time of her death. Bruck v. Tucker, 32 Cal. 426. The assignment of the bank account, as alleged, was insufficient to transfer the household furniture, and it is not alleged that the furniture was a gift to him *causa mortis* or otherwise. Evidence offered to be given by contestant in support of his grounds of contest was properly excluded. If the court erred in either ruling, it could not prejudice appellant, as the probate of the will could not affect his rights under the deed or assignment. Whether the property passed under the deed or under the will is a question that must be determined in some other proceeding. I advise that the judgment and orders appealed from be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

96 Cal. 605

PEOPLE ex rel. WILSHIRE v. NEWMAN.

(No. 14,071.)

(Supreme Court of California. Dec. 2, 1892.)

MUNICIPAL CORPORATIONS—FIRE DEPARTMENT—REGULATION BY ORDINANCE.

Const. art. 11, § 11, which provides that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," does not authorize the board of supervisors of the city and county of San Francisco, by ordinance, to reorganize and regulate the fire department of that municipality, since Act March 28, 1878, (charter of the city and county,) provides for the organization and administration of such department as a branch of the municipal government, and cannot be abrogated by such ordinance.

Department 1. Appeal from superior court, city and county of San Francisco.

Action in the name of the people on relation of W. B. Wilshire against one Newman to try title to the office of member of the board of fire commissioners. Defendant had judgment, and relator appeals. Affirmed.

Geo. A. Johnson, Ex Atty. Gen., and *Wilson & Wilson*, for appellant. *Garber, Bishop & Boalt*, for respondent.

PATERSON, J. This is an action in the nature of *quo warranto*, under section 803 et seq., Code Civil Proc., to determine whether the relator or the defendant is entitled to the office of member of the board of fire commissioners of the city and county of San Francisco. The various acts of the legislature relating to the board of fire commissioners of the city and county of San Francisco, and the effect thereof, are considered in People v. Edwards, 93 Cal. 153, 28 Pac. Rep. 831, and the cases therein referred to. The relator herein relies upon an ordinance, which is fully set out in the complaint, providing for the complete reorganization of the fire department and the appointment of a board of fire commissioners. His title to the office depends upon the validity of that ordinance. On the 16th of March, 1889, the ordinance in question, popularly known as the "Barry Ordinance," was passed by the board of supervisors of the city and county of San Francisco, establishing and regulating the fire department, and providing for a commission, consisting of five members, to be appointed by the board of supervisors. On April 8, 1889, the board appointed the relator and Charles H. Haswell, H. R. Mann, P. F. Dunne, and Maurice Schmitt members of the board, to have the control and management of the fire department. The court below held, and properly, we think, that the board of supervisors had no authority to pass said ordinance. Section 11, art. 11, of the constitution, provides that "any county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." But this delegation of power to make police regulations is authority to make only such regulations as are usual and necessary in the government of municipalities under their respective charters. The act of March 28, 1878, providing, as it does, for the organization and administration of one of the departments of the municipal government, is a part of the charter of the city and county of San Francisco, and cannot be abrogated by any mere police regulation. Under it the fire department is a branch of the municipal government. Whitney v. Board, 14 Cal. 497. In People v. Hammond, 66 Cal. 654, 6 Pac. Rep. 741, it was held that the act of April 1, 1878, relating to the police department, being a part of the charter, was continued in force by the constitution. The act under consideration there holds the same relation to the consolidation act as the statute we are now considering. The provision of the constitution referred to never was intended to clothe the board of supervisors with the power to annul a constituent part of the charter itself, or to overthrow one of the municipal departments. The power conferred by it is not vested in any particular branch of the municipal government, but in the whole municipality. The government of the city and county of San Francisco is distributed into different departments. The board of supervisors represents one of these departments. The board of fire commissioners represents another department. The board of supervisors has no more authority to reorganize the board of fire commissioners than the latter has to reorganize the board of supervisors. The same power that established one board established the other, and one is just as essential and important a part of the municipal government as the other. The regulations provided for by section 11, art. 11, are such as are in accordance with the fundamental or organic law. This must be so; otherwise the board of supervisors could completely revolutionize the entire city government under a grant of power to make "such local police, sanitary, and other regulations as are not in conflict with general laws,"—in effect make a new charter by ordinance, and change the same as often as it desired. The strongest argument against the validity of the act is that in repealing the provision declaring how and by whom two of the officers should be appointed the constitution necessarily destroyed these two offices; and inasmuch as the two were parts of an integral whole, and the provisions relating thereto being compensatory and inseparable, the destruction of the two effected the destruction of all. This contention was fully presented by eminent counsel in People v. Hammond, and a petition for rehearing was filed and denied. After such consideration and determination by the court, we think the point should be treated as finally settled. There is nothing in People v. Perry, 79 Cal. 115, 21 Pac. Rep. 423, inconsistent with what has been said above. In that case we held simply that, as the legislature had failed to fix the term of office of the members of the board of health, they held at the pleasure of the governor. In State v. Brewster, 44 Ohio St. 592, 9 N. E. Rep. 849, cited by respondent, it was admitted by all parties that upon the expiration of

Brewster's term there was a vacancy in the office. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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3 Cal. Unrep. 680

SHERER v. SUPERIOR COURT. (No. 15,-232.)

(Supreme Court of California. Dec. 7, 1892.)

MANDAMUS—PLEADING—PRESUMPTIONS.

Where a petition for a writ of mandate, and the answer of the court, are submitted without evidence, the answer must be taken as true.

In bank.

Application by Sherer for a writ of mandate commanding the superior court to proceed with the trial of a cause in which petitioner is interested. Application denied.

Spencer & Raker, C. C. McClaskey, and *Henry N. Clement*, for petitioner. *Shinn & Shinn*, for respondent.

DE HAVEN, J. This is an application for a writ of mandate commanding the superior court of Lassen county to proceed with the trial of a certain action alleged in the petition to be pending in that court, and which action it is further alleged that court refuses to set for trial. The petition herein was filed November 4, 1892, and the answer of the judge of the superior court, made thereto, shows that upon September 16, 1892, final judgment in the action referred to in the petition was rendered by the said superior court. This, if true, completely negatives the case made in the petition, and, as the matter was submitted to us without any evidence, and upon the petition and answer alone, the averments of the answer are to be taken as true. Application for writ denied.

We concur: BEATTY, C. J.; HARRISON, J.; MCFARLAND, J.; SHARPSTEIN, J.

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96 Cal. 653

SHERER v. SUPERIOR COURT. (No. 15,-231.)

(Supreme Court of California. Dec. 7, 1892.)

CERTIORARI—REVIEW—JUDGMENT BY DEFAULT.

Where a trial court, on motion regularly submitted by plaintiff, struck out defendant's answer, and rendered judgment against him as by default, the action of the court, though erroneous, was within its jurisdiction, and a writ of certiorari would not lie to annul the judgment. Paterson, J., dissenting.

In bank. *Certiorari* to superior court, Lassen county; W. F. MASTEN, Judge.

Application by Sherer for a writ of *certiorari* to annul a judgment rendered against him in the superior court of Lassen county. Application denied.

Spencer & Raker, C. C. McClaskey, and *Henry N. Clement*, for petitioner. *Shinn & Shinn*, for respondent.

DE HAVEN, J. This is an application for a writ of *certiorari* to annul a judgment entered by the superior court of Lassen county, in a certain action pending in that court on appeal from the judgment of a justice of the peace of that county.

The application must be denied. The superior court committed a very grave error in striking out the answer of petitioner filed in that action, and in rendering judgment against him without any further trial, and as if he was in default. But the motion asking the court for such order and judgment was regularly submitted to it, and was clearly within its jurisdiction to decide; and, this being so, its judgment thereon cannot be annulled by means of the writ of *certiorari*. It must be deemed to be the settled law of this state that the writ of *certiorari* brings up for review but one question, and that is whether the inferior tribunal or court exceeded its jurisdiction. It cannot be used to correct errors of law or fact committed by the inferior tribunal within the limits of its jurisdiction. Railroad Co. v. Placer Co., 46 Cal. 668; Buckley v. Superior Court, (Cal.) 31 Pac. Rep. 8. Jurisdiction is the power to hear and determine, and does not depend upon the rightfulness of the decision made. The court in this case had the power, in the regular course of proceeding in the disposition of the case before it was actually called upon, to determine, as a matter of law, whether or not the answer of petitioner was properly filed, and whether he was legally in default in the action; and the fact that the court erred in such decision does not render its judgment void. Application for writ denied.

We concur: BEATTY, C. J.; HARRISON, J.; MCFARLAND, J.; SHARPSTEIN, J.

PATERSON, J., (*dissenting.*) I am unable to agree with the majority in this case. When it appears upon the face of the record that judgment has been arbitrarily rendered in any case against a party, without a trial or hearing, as if he were in default, when he is not, the action of the court—it matters not what court it is—is in excess of its jurisdiction. In my opinion, its judgment is absolutely void, subject to collateral attack, and ought to be annulled on *certiorari*.

(96 Cal. 664)

BURRIS v. ADAMS et al. (No. 14,600.)

(Supreme Court of California. Dec. 9, 1892.)

QUIETING TITLE—PLEADING AND PROOF—FRAUD.

Evidence of fraud on the part of an administratrix in procuring the purchase of property for herself at probate sale is inadmissible, under the usual pleadings, in an action for quieting title, to overthrow the title acquired at such sale, when the fraud, or the facts constituting the fraud, have not been pleaded. Jones v. Hanna, 22 Pac. Rep. 883, 81 Cal. 507, distinguished.

Department 2. Appeal from superior court, Alameda county; JOHN ELLSWORTH, Judge.

Action by Jesse Burris against James Adams and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Louis H. Sharp and *A. E. Bolton*, for appellant. *Hutchinson & Campbell* and *Donald Y. Campbell*, for respondents.

McFarland, J. This is an action to quiet title to the undivided one eighth of certain land. Judgment went for defendants, and plaintiff appeals from the judgment and from an order denying a new trial. The affirmance of the judgment depends upon the correctness of certain rulings of the court below sustaining the validity of a certain probate sale, and sustaining objections to evidence offered by appellant for the purpose of showing the invalidity of certain conveyances made in pursuance of, and after, said sale. The land in contest originally belonged to the estate of James Kennedy, deceased, which was under process of administration during the years 1885, 1886, 1887. The defendant and respondent Mrs. E. A. K. McNeill was administratrix of said estate. On June 1, 1886, the superior court in which said administration was pending made an order in due form for the sale of certain real property of said estate for the payment of debts, expenses, etc.; and in pursuance thereof the administratrix, on December 2, 1886, sold to James Adams for $5,875 certain lands of said estate, including the land in contest in the present action. In pursuance of this sale, which was duly confirmed by the court, the administratrix on December 31, 1886, executed and delivered to said Adams a deed in form sufficient to convey to him all the title of said estate to the land in contest. In October, 1887, a final decree of distribution was duly entered in said estate, and the said Mrs. McNeill discharged as administratrix. The next year, on August 9, 1888, the said James Adams executed to said Mrs. McNeill a deed sufficient in form to convey all his title to the land described in the complaint. With respect to the title under which appellant claims, it is sufficient to say that one Annie Church (afterwards Annie Spaulding) had an interest in the said estate of James Kennedy, and was a distributee named in said decree of distribution made in said estate as aforesaid; and that afterwards, on November 4, 1889, she executed and delivered to appellant a deed sufficient in form to convey to appellant an interest in the land in contest, and which did so convey such interest if she, at the date of said deed, had any such interest. But as said deed was subsequent to the probate sale to Adams and his conveyance to Mrs. McNeill above mentioned, Mrs. Church had no interest in said land at the date of her said deed to appellant, unless the title of Mrs. McNeill, through said probate sale as aforesaid, can, for some reason, be overthrown.

1. Appellant contends that the probate sale was void because the petition for such sale was fatally defective. Many perplexing questions have arisen on collateral attacks on titles acquired through probate sales, but it is settled law here that in such cases a substantial compliance with statutory provisions on the subject are sufficient. Stuart v. Allen, 16 Cal. 501; Richardson v. Butler, 82 Cal. 176, 23 Pac. Rep. 9. And, in a doubtful case, a court will not lean towards the attacking party when he is, as in the case at bar, a mere volunteer, and when his grantor was a distributee in the final decree based upon the validity of the sale, and made no objection to it, and received without question the benefit of the money paid into the estate by the purchaser at the sale. The petition and the order of sale in the case at bar are quite lengthy, and contain many recitals; and we do not deem it necessary to set them forth here, or to notice in detail the objections made to them by appellant. It is enough to say that in our judgment the petition and the recitals of the order of sale (section 1537, Code Civil Proc.) clearly show a substantial and sufficient compliance with the Code, and that the objections of appellant go only to matters that are unimportant and immaterial. The court was fully informed of the facts showing the necessity of the sale.

2. Appellant offered evidence to show that Adams purchased the property at the probate sale at the instance and for the use and benefit of the respondent Mrs. McNeill, and that the deed afterwards made by Adams to said McNeill was in pursuance of a preconcerted arrangement between the two, by which he was to have the property. The court sustained an objection to the evidence upon the ground that there was no averment in the complaint under which such evidence was admissible. We think this ruling of the court was right. The complaint contains only the averments usually employed in an ordinary action to quiet title. Where the cause of action depends upon the proof of fraud, the facts constituting the fraud must be averred; and this rule has even been applied to defendants when the defense was of an affirmative nature. Wetherly v. Straus, 93 Cal. 283, 28 Pac. Rep. 1045. In the case at bar appellant was the moving party. He bought, or had transferred to him, a lawsuit, and his only hope of winning it lay in the possibility of proving fraudulent acts which he did not aver. He knew from the start that the respondent McNeill had a perfect legal title which he could overthrow only by proving her guilty of a certain fraud, and he did not aver the fraud, even in general terms. She had a perfect right to purchase from Adams after she had ceased to be administratrix and the administration had been closed, and there was nothing on the face of the business that was irregular or improper. Appellant expected to succeed by proving the fraudulent violation of a trust, and he failed to aver either such violation, or the existence of the trust itself, for there is no intimation in the complaint that Mrs. McNeill was ever administratrix of any estate, or held any trust relation whatever with respect to the land in contest. Appellant says that he relies on section 1576, Code Civil Proc., which provides that no administrator must purchase or be interested in any sale of property of the estate; but that section is only a declaration of the pre-existing principle of law that a trustee must not deal with himself. The only thing that could upset respondent's title would be proof of a fraudulent conspiracy between her and Adams to conceal the true purchaser, but in the case at bar such proof could not be made without averment of the facts. In Jones v.

Hanna, 81 Cal. 507, 22 Pac. Rep. 883, so much relied on by appellant, not only were the facts and relations of the parties different from those in the case at bar, but in that case no question arose as to the sufficiency of the pleadings, or as to the admissibility of evidence under them. The points discussed arose upon the findings alone. No point is made against the respondent Catherine Kennedy. Judgment and order affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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3 Cal. Unrep. 651

THOMASON v. DE GREAYER et al. (No. 14,802.)

(Supreme Court of California. Nov. 30, 1892.)

REFORMATION OF CONTRACT—FRAUD—ACTION FOR BREACH OF CONTRACT.

1. In an action to have his name inserted as one of the parties to a contract between defendant D. and defendant corporation, plaintiff alleged that his name was omitted through the fraud practiced by D. on the corporation and on plaintiff. *Held*, that the allegations were insufficient to sustain the action, since no facts constituting the fraud were set up.

2. Where two persons agreed to form a partnership for doing certain work before any contract for doing the work was obtained, and the partnership was never launched, and one of the parties carries on the work alone, the only remedy of the one excluded is an action at law for breach of contract. Powell v. Maguire, 43 Cal. 16, followed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by E. R. Thomason against Harry de Greayer and the Ferries & Cliff House Railway Company, a corporation, to reform a contract. From a judgment entered on an order sustaining defendants' separate demurrers to the complaint, plaintiff appeals. Affirmed.

J. C. Bates, for appellant. *Parker & Eells*, for respondents.

BELCHER, C. In July, 1891, the defendant De Greayer entered into a contract with the defendant corporation to pave with basalt stone blocks about five miles of the corporation's track in the city and county of San Francisco. On the 4th of August, 1891, De Greayer commenced doing the work which he had contracted to perform, and continued the same up to September 2d, when the plaintiff commenced this action, asking to have the "contract reformed by inserting his name as one of the contracting parties therein." The defendants demurred separately to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the demurrers were sustained and the action dismissed. The plaintiff appeals from the judgment entered against him. The demurrers were properly sustained. The facts stated in the complaint were insufficient in several respects.

1. The averments that "said De Greayer, by fraud, deceit, and misrepresentations, omitted to have the plaintiff's name inserted in the contract with said corporation defendant for said work," and "that such omission was done through the fraud, deceit, and trickery practiced by said De Greayer on said corporation defendant and said plaintiff, and by mistake of said corporation," were not sufficient. The rule is that when a party relies upon fraud, either to support his cause of action, or in defense, he must set up the facts which constitute the fraud. "It is a well-established doctrine of equity pleading that a general charge of accident, mistake, or fraud is insufficient, though a plaintiff is not bound to set forth in his complaint all the minute facts constituting the grievance of which he complains. General certainty in these matters may be all that is required, still the facts constituting the fraud, where fraud is relied on as authorizing the interposition of the court, must be charged in the complaint." Kent v. Snyder, 30 Cal. 674; Capuro v. Insurance Co., 39 Cal. 123; and see cases cited on this point in Spring Valley Water Works v. City of San Francisco, 82 Cal. 321, 22 Pac. Rep. 910, 1046. Here no facts constituting the alleged fraud were set forth, and the complaint, therefore, failed to state the cause of action.

2. It is alleged that the terms of a copartnership between plaintiff and De Greayer, to do the work of paving, etc., five miles of track for said corporation, were "fully agreed upon" by the parties; but this was before any contract was obtained, and the partnership, therefore, was never "launched." This, being so, the rule declared in Powell v. Maguire, 43 Cal. 11, is applicable. It is stated in the syllabus as follows: "When two persons made an agreement to form a partnership, but such partnership was never launched, and one of the parties proceeded to conduct the enterprise in his own name, at his own cost, and for his exclusive benefit, excluding the other, and repudiating the partnership agreement, held, that an action by the latter to establish his right as a partner, and for an accounting, would not lie; his only remedy in such case being an action at law for breach of contract." The above disposes of the case, and it is not necessary to consider other points. We advise that the judgment be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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96 Cal. 602

KIRSCH v. DERBY. (No. 14,576.)

(Supreme Court of California. Dec. 1, 1892.)

ACTION AGAINST EXECUTOR—PLEADING—SPECIAL DEMURRER.

1. In an action against an executor it is sufficient to allege that the will was duly admitted to probate; that letters testamentary were issued to him; and that he has been and now is the duly appointed, qualified, and acting executor.

2. An objection to a complaint, on the ground of ambiguity or uncertainty, can be taken only by special demurrer.

Department 2. Appeal from superior court, Alameda county; JOHN ELLSWORTH, Judge.

Action by Franz Kirsch against J. S. Derby, executor of the estate of Julia Kirsch, deceased. Judgment for plaintiff on default. Defendant appeals. Affirmed.

The complaint is as follows: "Plaintiff complains of defendant, and for cause of action alleges: (1) That on the 28th day of March, 1890, one Julia Kirsch, who was the wife of plaintiff, died in above named county, and left an instrument purporting to be her last will and testament, wherein she named and appointed one J. S. Derby, above named, the executor of the same. (2) That on the 3d day of April, 1890, said J. S. Derby duly filed said alleged will in the office of the county clerk and clerk of the superior court of said county, together with his petition for the probate thereof and for letters testamentary thereon. (3) That thereafter, to wit, on the 5th day of May, 1890, upon proceedings duly had in that behalf in said superior court, said alleged will was duly admitted to probate by said court, and letters testamentary thereon were thereupon ordered to issue by said court to said J. S. Derby upon his qualifying as required by law. (4) That on or about the 8th day of May, 1890, said J. S. Derby duly qualified as such executor as aforesaid, and letters testamentary as aforesaid were thereupon issued to him by the clerk of said court, and that ever since said 8th day of May he has been and now is the duly appointed, qualified, and acting executor of the said alleged will of said Julia Kirsch, deceased. (5) That on or about the 22d day of May, 1890, the defendant, as such executor as aforesaid, received the sum of $3,725 from the German Savings & Loan Society, (a corporation,) to and for the use of and belonging to plaintiff. (6) That thereafter, to wit, on the 31st day of May, 1890, plaintiff demanded of defendant the payment of said sum of $3,725, but that to so pay the same, or any part thereof, defendant refused, and ever since said day of May has refused, and still and now refuses, and that all of said sum of $3,725 is now due plaintiff by and from defendant. Wherefore plaintiff prays judgment against defendant for said sum of $3,725, and for costs of suit."

Nye & Richardson, for appellant. *Dodge & Fry*, for respondent.

MCFARLAND, J. Defendant made default in the court below, and judgment was rendered for plaintiff. Defendant appeals upon the judgment roll, and the point insisted on for a reversal is that the complaint is defective, because plaintiff, by said complaint, has not properly pleaded either the probate of the will of Julia Kirsch, deceased, or the appointment of defendant as executor. We are satisfied that the probate of the will and the executorship of appellant are sufficiently pleaded, (Weller v. Dickinson, 93 Cal. 108, 28 Pac. Rep. 854; Wise v. Williams, 72 Cal. 547, 14 Pac. Rep. 204; Munro v. Reclamation Co., 84 Cal. 515, 24 Pac. Rep. 303;) but the complaint states sufficient facts for a personal judgment against appellant. If there were any valid objections to the complaint on the ground of ambiguity or uncertainty, such objections could have been taken only by special demurrer. Demartin v. Albert, 68 Cal. 277, 9 Pac. Rep. 157; Blanc v. Klumpke, 29 Cal. 156; Blasingame v. Insurance Co., 75 Cal. 633, 17 Pac. Rep. 925; Heeser v. Miller, 77 Cal. 192, 19 Pac. Rep. 375.

The judgment is affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

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3 Cal. Unrep. 639

MUSSER v. GRAY. (No. 14,326.)

(Supreme Court of California. Nov. 28, 1892.)

JUDGMENT—SATISFACTION.

M. held a judgment against G., which he agreed to release if G. would deliver him a deed to certain property, which he did. Prior to such agreement, G. had made an assignment of all his property for the benefit of his creditors. M. knew that G. had made an assignment, but denied knowing that it included the specified property. G. made no attempt to conceal any fact. *Held*, that an order directing the entry of satisfaction of the judgment was proper.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

Motion by E. P. Gray for an order directing the entry of satisfaction of a judgment against him held by J. W. Musser. From a judgment of the superior court of San Francisco county, affirming a judgment granting the order, Musser appeals. Affirmed.

Mich. Mullany and *Wm. Grant*, for appellant. *A. Everett Ball*, for respondent.

TEMPLE, C. This is an appeal from an order directing the entry of satisfaction of the judgment. The order was made on motion of defendant, on the ground that "said plaintiff has received satisfaction for said judgment, and that said defendant has been duly discharged by the insolvent court from said judgment." The order appealed from does not show upon which of these grounds it is based. It appears that plaintiff recovered a money judgment against defendant, February 18, 1887; that a writ of attachment had been theretofore issued, which had been duly levied upon a certain tract of land claimed by defendant in San Diego county; that after the entry of judgment an execution was issued and levied upon the same land, under which the land was sold to third parties for $37. The further sum of $250 was also collected by the sheriff on said execution, and after deducting his costs he paid to plaintiff's attorney $247.26, properly applicable to the judgment. Nothing more has ever been paid upon the judgment, but in defendant's affidavit, which was one of the papers upon which the motion was based, it is shown that on the 20th of May, 1887, defendant entered into an agreement with plaintiff and one Abbott, who also had a judgment against defendant, for the release and discharge of the judgment, which agreement is as follows: "In consideration of the delivery to Henry Abbott of a deed to the property of E. P. Gray, situate in San Diego county, state of California, we and each of us hereby agree that we will release the said E. P. Gray from any and all obligations to us or either of us owing, except in so far as his indebtedness to us is secured by virtue of an attachment levied upon the said property of the said E. P. Gray in said San Diego county. It being the intent of this agreement that the said parties hereto shall have the right to enforce their claim against the said Gray in so far as the same relates to the property of the said Gray situate in San Diego county, aforesaid, but to release him from any indebtedness to us remaining after realizing upon the said property. [Signed] J. W. MUSSER. HENRY ABBOTT. Dated May 20, 1887. Signed, sealed, and delivered in the presence of W. H. CHICKERING." That the deed mentioned in the agreement, by request of both plaintiff and Abbott, was executed and delivered to W. H. Chickering for them. It is then shown that defendant commenced proceedings to secure his discharge as an insolvent debtor under the laws of this state. Such proceedings were instituted in June, 1888, and a certificate of discharge was issued therein on November 12, 1888. A large portion of the record and of the briefs of counsel are taken up with questions in regard to the insolvency proceedings, but, as the discharge could not justify the action of the court below, the points made in regard to these proceedings need not be considered at length. It does not appear that the claim of plaintiff was proven against the insolvent. Although a creditor loses his debt through such proceedings, that does not make it his duty to surrender and cancel the evidences of his debt, if any he has. On the contrary, the statute expressly makes the order and certificate only *prima facie* evidence of the release of the debtor from his debts, and allows the creditor two years to discover such fraud as will avoid its effect. Such discharge will perhaps prevent the creditor from getting any benefit from his judgment, but it does not impose upon him the duty of entering a satisfaction of it. Unless it did make it the duty of the plaintiff, the court had no right to force him so to enter it.

The only matter, therefore, to be considered is whether the agreement to accept a deed to the land in San Diego county, and release the debt except as to the reserved right to prosecute the attachment, will justify the order. Upon the hearing of the motion a counter affidavit made by plaintiff was read. He admits that he signed the release, but charged that it was obtained through fraud; that defendant had become greatly indebted, and on the 6th of December, 1886, executed and delivered to one Henry P. Wood a deed of assignment of all his property, including the San Diego lands, for the benefit of his creditors, and that said Wood ever since has been and now is the owner of said lands for the purposes of the trust; that he did not know when he signed the release that the San Diego lands were included, and that he derived no benefit from, and acquired no rights under, the deed to him; that defendant's brother and attorney, Giles H. Gray, assumed to represent defendant, who immediately after the execution of the deed to Wood absconded; that Giles H. Gray, acting for his brother, continuously gave out, and made it appear and represented to him, (affiant,) that defendant was the owner of the San Diego lands, and had conveyed them to him, (Giles H.,) and that he would convey them to said Abbott upon the execution of the release by plaintiff and said Abbott to E. P. Gray; that thus he was led and induced to believe said Giles H. Gray could and would convey to Henry Abbott a good title for the San Diego lands, and that affiant would realize and obtain ample money to satisfy the judgment; and acting upon and in pursuance of said representations and deception, and not otherwise, he did enter into the agreement mentioned, but he never received any consideration therefor, but the same is void. These statements are corroborated by an affidavit of one A. S. Hubbard, who claims to own a part of the judgment and of the indebtedness secured thereby. Giles H. Gray made an affidavit corroborating the first affidavit of defendant.

In reply to the counter affidavits of plaintiff and Hubbard, defendant deposed admitting the deed to Wood, but stating that Wood did not comply with the law in regard to such assignments. He filed no inventory as required by section 3461, Civil Code, or affidavit as required by section 3462, Id., and executed no bond as required by section 3467, Id., all of which was well known to plaintiff. That Wood has never been the owner of the San Diego land, in trust or otherwise, and plaintiff acquired through Chickering all the title defendant had to the land. He denies that he absconded or concealed himself. The affidavit of W. H. Chickering was also read. He deposed that he was attorney for Abbott. That an assignment was made to Wood, but that Wood never completed the assignment. That acting under instructions he received the deed for the San Diego lands, and plaintiff and Abbott in consideration of it executed the release. That the transaction was had when real estate was "excited" at San Diego, and it was thought by Abbott and plaintiff that enough could be realized from the property to satisfy their claims. A large portion of the property had been previously sold under foreclosure, but it was thought the decree could be set aside, but the collapse of the boom came so soon that no steps were taken to vacate the foreclosure decree. That there was no attempt made to conceal any facts, and, in the opinion of affiant, defendant and his brother acted in entire good faith. The release was given without reservation, and the deed was received by him in trust for plaintiff and Abbott. In reply to these affidavits, another was read, made by Hubbard, in which he affirms that Wood accepted the deed of assignment, and had the same recorded in this city and county, December 6, 1886, and complied with the law pertaining thereto, executed the bond, assumed the duties, and as assignee sold a large amount of property, and divided the proceeds among some of the creditors of defendant.

Upon this evidence, is the conclusion of the court reasonable? Appellant in effect admits that he knew that Gray had made an assignment for the benefit of his creditors, but denies that he knew that the San Diego property was included. Whether it was included or not he does not seem to have inquired. No such representations as to title are charged as would excuse him from an examination of the records. The court on the evidence was justified in concluding that the assignment to creditors did not constitute a cloud upon the title acquired, and, while it is said that plaintiff derived no benefit from the conveyance, no facts are stated which tend to show that the failure to do so was caused by the assignment. Chickering's affidavit refutes all presumption of intentional deception. I think the order should be affirmed.

We concur: Vanclief, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the order is affirmed.

(3 Cal. Unrep. 653)

ROBERTS v. LEVY. (No. 14,990.)

(Supreme Court of California. Nov. 30, 1892.)

Physician and Surgeon—Claims against Decedent—License.

1. There can be no recovery on a complaint against an administrator, alleging that a demand was made for services as an "expert nurse and medical attendant," when in fact the claim presented was for "medical attendance on deceased during his lifetime."

2. A party cannot recover for services rendered as physician and surgeon unless he has a certificate to practice medicine and surgery, as required by statute.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by J. W. Roberts against Eugene W. Levy, administrator, for medical services. Judgment for defendant. Plaintiff appeals. Affirmed.

W. H. H. Hart, (*Aylett R. Cotton* and *Nowlin & Fassett*, of counsel,) for appellant. *Gunnison & Booth*, (*Walter J. Bartnett*, of counsel,) for respondent.

Garoutte, J. This appeal is prosecuted from a judgment and order denying a motion for a new trial. As appears by the complaint, the action was brought to recover for services rendered by plaintiff as an "expert nurse and surgical and medical attendant" to one Goodwin, now deceased, the respondent being the administrator of his estate. The complaint alleges a presentation and rejection of the claim upon which the action is founded, and a copy of said claim is thereto attached as a part thereof. The claim is made out and sworn to in the name of Dr. J. W. Roberts, and purports to be for "medical attendance on said deceased during his lifetime," etc. Then follows an itemized statement of the number of visits, the character of services rendered, and the charges therefor. As matters of fact the court found the services were rendered by plaintiff as a physician and surgeon, and that at the time of their rendition plaintiff had no certificate to practice medicine and surgery, as is required by the statute, and thereupon rendered judgment for defendant. The complaint is ambiguous and uncertain in this: that the claim presented to the administrator appears to have been for medical services, while the complaint proper alleges a demand for services of an expert nurse and medical and surgical attendant; but no special demurrer was interposed, and the evidence at the trial appears to have been directed to the point as to whether the plaintiff rendered the services in the character of an expert nurse or as a medical practitioner. Viewing the case from either standpoint, the plaintiff must fail to recover. If his complaint and evidence is addressed to the theory that he was an "expert nurse and surgical and medical attendant," then his case is not supported by the claim presented to the administrator. If plaintiff stands upon the claim for medical services which was presented to the administrator, then his failure to procure a certificate to practice medicine as required by the statute defeats his right of recovery. This was so decided in Gardner v. Tatum, 81 Cal. 370, 22 Pac. Rep. 880. Thus, under either aspect of the case, plaintiff is met with insurmountable difficulties. Various exceptions were taken to the rulings of the court in admitting and rejecting testimony as to the capacity in which plaintiff acted, but, owing to the views already expressed, such exceptions become immaterial. Under the complaint, viewed favorably to plaintiff, he could only recover for medical services, and, considering the proof was ample in this regard, still this failure to possess himself of a certificate to practice was fatal to his cause, and his exceptions to the rulings of the court upon other matters are of no benefit to him.

Let the judgment and order be affirmed.

We concur: Paterson, J.; Harrison, J.

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3 Cal. Unrep. 655)

JENKINS v. GAMEWELL FIRE ALARM TEL. CO. et al. (No. 14,249.)

(Supreme Court of California. Nov. 30, 1892.)

Judgment by Default—Affidavit to Set Aside—Affidavit of Merits.

1. An affidavit to set aside a judgment by default is not sufficient where it shows that defendants served notice of appearance on plaintiff's attorneys, but does not show that they agreed to extend defendants' time to answer, or that defendants supposed their time had been extended.

2. An affidavit of merits, stating facts on information and belief, is insufficient, as being hearsay.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by A. L. Jenkins against the Gamewell Fire Alarm Telegraph Company and others. From an order setting aside a judgment by default, plaintiff appeals.

Dorn & Dorn and *Maxwell & McEnerny*, for appellant. *H. B. M. Miller*, for respondents.

GAROUTTE, J. Appeal from an order setting aside a judgment by default, defendants having failed to answer within the time allowed by law. Conceding the facts to be as stated in respondents' affidavit, still no showing of excusable neglect is made. There is nothing in the affidavit to indicate that plaintiff's attorneys either expressly or impliedly agreed to extend defendants' time to answer, or that defendants supposed their time had been extended. In referring to the discretion of the trial court in these matters, it was said in Bailey v. Taaffe, 29 Cal. 424: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. * * * If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other." This is no question of conflict of evidence, but defendants' affidavit, standing alone, fails to reach the mark.

The affidavit of merits is also insufficient. It states that one of the defendants has fully and fairly stated the facts of the case to affiant, (defendants' attorney,) and he believes that said defendants have a good and substantial defense, etc. Affiant's information as to the facts of the case is purely hearsay. Bailey v. Taaffe, supra, with sound reason holds such an affidavit of no avail.

Let the order be reversed.

We concur: PATERSON, J.; HARRISON, J.

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3 Cal. Unrep. 656

FRANKE v. FRANKE. (No. 14,532.)

(Supreme Court of California. Nov. 30, 1892.)

MARRIAGE—PROCEEDING TO ANNUL—FRAUD.

1. Where a man marries a woman whom he has debauched before marriage, and whom he knew to be pregnant at the time of marriage, he cannot have the marriage annulled on the ground that he was deceived by the false assurances of the wife that he was the father of the child, and that she had been chaste to all others, under Civil Code, § 82, providing for annulling marriages where the consent of either party was obtained by fraud.

2. The fact that the woman was pregnant at the time of her marriage is not ground for setting the marriage aside under Civil Code, §§ 58, 82, for physical incapacity.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; JOHN ELLSWORTH, Judge.

Action by Rudolph Franke against Wilhelmine Augusta Franke to annul marriage. From a judgment for plaintiff, defendant appeals. Reversed.

R. M. F. Soto, *Carroll Cook*, and *J. E. Foulds*, for appellant. *A. A. Moore* and *Reed & Nusbaumer*, for respondent.

VANCLIEF, C. Action to annul marriage, on the ground that plaintiff's consent to marry was obtained by fraud, and upon the further and distinct ground that the defendant was physically incapable of entering into the marriage state. The cause having been tried by the court, judgment was rendered in favor of plaintiff, from which, and from an order denying her motion for a new trial, the defendant has appealed.

The complaint, after stating the marriage on the 15th day of September, 1889, generally and meagerly alleges the cause of action as follows: "(3) For the purpose of inducing the plaintiff to consent to the said marriage, the defendant falsely and fraudulently represented that she was chaste and virtuous, and physically competent to marry plaintiff, and concealed from plaintiff her real condition, claiming then to be pregnant by plaintiff, but chaste and virtuous as to all other men, and that, save plaintiff, she had never had sexual intercourse or connection with any man. All which representations were false and fraudulent. (4) That defendant was not then and there physically competent to marry plaintiff, but was at the time of said marriage pregnant by some other man than plaintiff. (5) That plaintiff relied upon said representations, and was induced to consent to the said marriage by the said representations, and, if the same had not been made, and said concealment practiced, he would have never consented to the said marriage. (6) That upon the discovery of the falsity of the said representations the plaintiff ceased to cohabit with the defendant, and has never since cohabited with her." The answer of the defendant specially denies that she made the false and fraudulent representations charged, and denies that she was physically incompetent to marry the plaintiff; admits that she was pregnant by the plaintiff at and before the marriage, and denies that she was so by any other man, and alleges that before the marriage she fully informed the plaintiff of her true condition.

The court found as follows: "(1) That on the 15th day of September, 1889, at the city and county of San Francisco, state of California, plaintiff and defendant intermarried. (2) That on or about the 20th day of April, 1889, plaintiff and defendant had voluntary sexual intercourse with each other, and that on or about the 14th day of August, 1889, and at divers other times in said month before the date of said marriage, defendant and defendant's then attorney, James Herrmann, represented to plaintiff that defendant was pregnant and with child by plaintiff, and that she was chaste and virtuous as to all other men, and that she was physically competent to marry plaintiff. (3) That plaintiff, to satisfy himself of the truth or falsity of these representations, did, before his said marriage with said defendant, act as a careful and prudent man should act, and in all respects used due and proper care. (4) That at and after the making of said representations, and at and after the marriage of said plaintiff and defendant, defendant concealed from plaintiff her true condition. That defendant, at and prior to the making of said representations, and at the time of her marriage with said plaintiff, was pregnant, not by plaintiff, but by a man other than plaintiff. (5) That plaintiff, at and after the time of his marriage with defendant, believed in and relied upon the said representations, and in consequence of said representations and belief plaintiff was deceived into and induced to consent to said marriage; and if said representations had not been made, and said concealment of her true condition practiced by defendant upon plaintiff, plaintiff would not have intermarried with defendant. That the said representations, and each and all of them, were untrue and false and fraudulent, and at the time said representations were made by defendant to plaintiff defendant well knew that they were untrue, false, and fraudulent. (6) That defendant, by reason of the fact that she was pregnant by a man other than plaintiff, was at the time she married plaintiff physically incompetent to marry him, and that her concealment from plaintiff of her true condition was a fraud upon plaintiff. (7) That plaintiff did not discover the fraud which had been practiced upon him by defendant until on or about the 28th day of October, 1889, and that immediately upon such discovery he ceased to cohabit with defendant, has never since cohabited with her, and acted promptly and with the highest good faith to procure an annulment of his marriage."

It is claimed by appellant that the evidence is insufficient to justify the findings of fact in several material particulars, and also that the findings do not warrant the judgment. The only evidence of sexual intercourse between the parties before their marriage is the testimony of the plaintiff, which is not fully nor quite fairly represented by the findings, either as to the first time nor the number of times it occurred, or as to the period during which it continued, since these circumstances were material, as we shall see, as bearing upon plaintiff's antenuptial knowledge of defendant's character for chastity. The plaintiff testified that in March, 1889, he was a widower, 40 years of age, residing in Oakland, Alameda county, with his family of five children,—a son aged 14 years, a daughter aged 11 years, and three younger children. That the defendant then resided with her parents in San Francisco, and (as appears by other testimony) was only 17 years of age. That for some time plaintiff had been acquainted with her parents, but had not known the defendant until she came to his house in Oakland, to visit his children, in March, 1889. He did not meet her again until the 18th or 19th day of April following, when she again visited his children, and remained at his house all night. After playing cards with her and his children until about 9 o'clock that evening, he directed her and his children to retire to bed, which they did, she going to a bedroom with some of the children, and he remaining in the sitting room on a sofa, where he fell asleep. About an hour after defendant had gone to her bedroom, she returned to the room where he was sleeping on the sofa, and awoke him by tickling his nose with a feather duster. He then told her "that was dangerous business, and that she had better go to bed, and have nothing to do with it." She persisted, however, "fooling around him and playing," and the result was that both went to his bedroom, and there, for the first time, had sexual intercourse, which was repeated the next day about 11 o'clock A. M. Thereafter she visited at his house about once a week, staying all night, and going to his bed. He does not remember how often these visits occurred, but thinks 10 or 12 times. They must have continued through the month of May and a part of June. He further testified that on the first occasion he told her he "was afraid of the business," and that she said: "You needn't be afraid; that is all right; I have got my protector," (meaning her beau.) As a matter of precaution, however, he used what he called "a protector," to prevent conception, which he seems to have had at hand on the first occasion, but which he says was not successful about the third time it was used, and within the month of April. The use of this instrument is one of the reasons assigned by him for doubting, at the time of the marriage, that he was the father of the child.

On August 22, 1889, the defendant—then Miss Bruhn, and still a minor—by her guardian, Peter F. Bruhn, her father, commenced an action against the plaintiff herein to recover $50,000 damages for seduction, alleged to have been accomplished on the 18th day of March, 1889. It appears that plaintiff herein had notice that defendant was pregnant, and claimed that he was the father of the child, before the action for seduction was commenced, but it does not appear by what means he was notified, nor that any demand had been made upon him either to marry or pay damages before the commencement of that action. Nor does it appear that he was ever requested by defendant or her parents to marry her. He testified that he called upon her at her father's house a day or two after the action for seduction was commenced, and complained that no effort had been made to settle the matter quietly with him before commencing the action, and that she then said she had not advised the action, and that her father had commenced it without her approval. He then told her in the presence of her mother that if he was the father of the child, he was willing to marry her, and "that they had no business to go to law about it." Plaintiff further testified that the defendant first told him that he and no other man was the father of the child at her lawyer's office, on the day they got their marriage license, (September 15th,) and that her lawyer—Mr. Herrmann—then made her swear to it; and that her lawyer promised that if the time of the birth of the child should not correspond with plaintiff's reckoning, he (the lawyer) "would get plaintiff free without a cent." It also appears that while the seduction suit was pending the plaintiff therein and her lawyer offered to settle and dismiss the suit for $1,300 if plaintiff was not content to marry. He preferred to marry, though, he said, he always doubted that he was the father, rather than "throw money away" in payment of alleged damages. The child was born October 27th, six months and nine days after the first admitted act of coition, and one month and twelve days after the marriage, and, in the opinion of medical witnesses, had the appearance of a child not prematurely born. These circumstances, with the testimony of plaintiff as to the time of his first intercourse with defendant, must be regarded as sufficient to justify the findings that plaintiff was not the father of the child, and that defendant's representations before marriage, that she had been virtuous as to all other men than plaintiff, were willfully false. Yet, considering her age and inexperience, she may not have known before marriage that plaintiff was not the father, though for good reason she may have doubted that he was. But assuming, as we must, that the finding that he was not the father is true, she willfully asserted what she did not know to be true, and what she had good reason to doubt, at least; and to this extent the finding that "she well knew" that her representation that plaintiff was the father "was false and fraudulent" should be qualified. The finding that plaintiff and defendant had sexual intercourse "on or about the 20th day of April, 1889," should also be qualified and characterized by the circumstances of the intercourse, shown by the testimony of the plaintiff; otherwise, material traits and features of the character of that intercourse are hidden from view. The comparative ages and experience of the parties, his relation to her as a visitor of his children at his house, the conduct of both parties on the first occasion, the frequency of the intercourse, the length of time it continued, and the absence of any pretense of virtue on her part while it continued, are material, as tending to show her then apparent character for virtue, the extent to which he was *particeps criminis* in her incontinence, and that he had not sufficient reason to be deceived by her false representations made to him for the first time on the day he procured the marriage license.

But, accepting the findings as they appear in the record, I think they do not warrant the judgment on the ground of fraud. The Civil Code, § 82, provides that a marriage may be annulled on the ground "that the consent of either party was obtained by fraud." The only case in this state in which a marriage has been annulled on this ground is that of Baker v. Baker, 13 Cal. 88. In that case the defendant (wife) was pregnant by a stranger at the time of marriage, but the husband had no sexual intercourse with her, or any other reason to suspect her chastity, before marriage, and did not know or suspect that she was pregnant at the time of marriage; whereas, in this case, the plaintiff participated in the incontinence of his wife before marriage, and also knew her to be pregnant at the time of marriage, and even then doubted, as well he might, that he was the father. Our Civil Code does not define the kind or degree of fraud required to annul a marriage, but no one will contend that every kind and degree of fraud which would be sufficient to annul an ordinary contract would also be sufficient to annul a marriage contract, consent to which had been induced by it. Under these circumstances, it is proper to consult the decisions of the highest courts of other states construing similar statutes. Bish. Mar. & Div. § 496. Statutes of other states similar to sections 58 and 82 of our Civil Code, authorizing the nullification of marriage on the ground of fraud simply, without defining the kind or degree of the fraud, have been uniformly construed as being merely jurisdictional, and to mean that kind of fraud defined by the unwritten law applicable to marriage contracts, (Bish. Mar. & Div. §§ 475 and 478; Foss v. Foss, 12 Allen, 26; Scroggins v. Scroggins, 3 Dev. 535;) and under such statutes it has been held almost uniformly that where a man marries a woman whom he has debauched before marriage, and whom he knew to be pregnant with child at the time of marriage, the marriage will not be annulled on the ground that he was deceived by the false assurances of the wife before marriage that he was the father of the child, and that she had been chaste with all other men. Having experienced and participated in her incontinence before marriage, he is thereby sufficiently apprised of her want of chastity to deprive him of the right to complain that he was deceived by her false assurances that he was the only participant in her illicit intercourse. Reynolds v. Reynolds, 3 Allen, 609; Foss v. Foss, 12 Allen, 26; Crehore v. Crehore, 97 Mass. 330; Scroggins v. Scroggins, 3 Dev. 535; Long v. Long, 77 N. C. 305; Carris v. Carris, 24 N. J. Eq. 517; Seilheimer v. Seilheimer, 40 N. J. Eq. 412, 2 Atl. Rep. 376; Varney v. Varney, 52 Wis. 120, 8 N. W. Rep. 739; Bish. Mar. & Div. § 483 et seq.

The only authority for any exception to the rule, as above stated, which I have been able to find, is to be found in the extreme cases of Barden v. Barden, 3 Dev. 548, and Scott v. Shufeldt, 5 Paige, 43, in each of which the parties were white, and the child begotten before marriage was a mulatto. Each of these cases was decided upon the facts stated in the complaint, and upon a demurrer. In the first, RUFFIN, J., who delivered the opinion of the court, expressly characterized his concurrence in it as "a concession to the deep-rooted and virtuous prejudices of the community upon the subject." Another distinguishing attribute upon which the exception is said to have been grounded is that "the blood of the woman, as physiologists tell us, has been tainted by mingling with that of the first (mulatto) child, and she is incapable of bearing children that will not show the mixture of African blood." See dissenting opinion of RODMAN, J., in Long v. Long, 77 N. C. 304. In each of those cases the mulatto child had been born before the marriage, but the putative father, in one case, had not seen it, and in the other had not discovered that it was a mulatto, until after marriage. In the New York case (Scott v. Shufeldt) the court said: "If the child had not been born at the time of the marriage, the complainant would have had some difficulty in showing that he had been intentionally deceived and defrauded by the defendant, as she might possibly have supposed the child to be his, although she had also had connection with a negro about the same time." Possibly other extremely hard cases may occur sufficiently distinguishable from the cases above cited to justify additional exceptions to the rule, but such cases need not be anticipated, since this case certainly is not one of them.

So far as plaintiff's alleged grievance is founded upon fraud, the substance of it is, according to his own testimony, that at the mature age of 40 years, after a matrimonial experience during which 5 children were born to him, he was seduced by a girl aged 17 years,—the daughter of a neighbor,—while visiting his children at his own house, and therefore virtually under his protection, and whom, indeed, he says, he endeavored to protect from the natural consequence of her indiscretion, so far as he could, in his then helpless condition, by the use of "a protector," which it seems he had prudently provided for such an occasion. Nevertheless she afterwards claimed that such natural consequence had not been averted, and brought suit against him for seduction, falsely charging that he was the father of her unborn child, and praying judgment for damages. That, rather than "give money away" in settlement of that suit, he elected to marry her on her assurance that he was the father, and the further assurance of her attorney that if the time of the birth of the child should not correspond with plaintiff's reckoning, the attorney would get him free "without a cent;" though at the time of the marriage he doubted that he was the father of the child, and although by postponing the nuptials two months he might have verified his reckoning. The whole substance of the fraud proved consisted of her false representations that she had been chaste with all other men than plaintiff, which, under the circumstances of this case, partly on grounds of public policy, has been deemed insufficient in degree to warrant the annullment of a marriage. The reasons for the rule are fully set forth in the case above cited.

The finding that defendant was physically incompetent to marry the plaintiff is not justified by the evidence, as there is no evidence tending to prove that she was diseased or defective in physical organization. This ground for annullment of marriage, as expressed in sections 58 and 82 of the Civil Code, is entirely distinct from that of fraud. It consists solely of such physical defect or incurable disease existing at the time of marriage as will prevent sexual coition. Bish. Mar. & Div. §§ 757, 766, 768. The case of Baker v. Baker, 13 Cal. 88, has no bearing whatever upon the question of physical incapacity as a cause for the annullment of a marriage. That was an action for a divorce on the sole ground of fraud, and the judgment of the appellate court was placed upon that ground alone, in accordance with the fifth subdivision of section 4 of the act of March 25, 1851, (Wood's Dig. [1st Ed.] p. 491,) which section also made "natural impotence, existing at the time of marriage," a cause of divorce; but there was no pretense of such impotence in that case; nor was there any statute in this state, prior to the decision in that case, providing for the annullment of a marriage on the ground of physical incapacity. The case of Baker v. Baker was considered in Carris v. Carris, supra, 24 N. J. Eq. 522, and construed as being consistent with the decision in the latter case. I think the judgment should be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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3 Cal. Unrep. 706)

Ex parte STRONG. (No. 15,255.)

(Supreme Court of California. Dec. 12, 1892.)

HABEAS CORPUS—FAILURE TO BRING TO TRIAL.

Though defendant is entitled to have the information filed against him dismissed under Pen. Code, § 1382, which provides for such dismissal "if a defendant, whose trial has not been postponed on his application, is not brought to trial within 60 days after the finding of the indictment or filing of the information," he is not entitled to a discharge on habeas corpus until the information is dismissed.

Application of John Strong for a discharge from imprisonment on *habeas corpus*. Denied.

C. W. Thomas, *J. Craig*, and *J. E. Strong*, for petitioner. *R. E. Hopkins*, Dist. Atty., for respondent.

PER CURIAM. This is an application for a writ of *habeas corpus* based upon the following allegations: The petitioner was accused by information filed September 8, 1892, of the crime of assault with a deadly weapon. More than 90 days have since elapsed, but he has not been brought to trial. He has made no application for a postponement, and there is no excuse for the delay. He has asked the superior court in which the accusation is pending to order the prosecution to be dismissed, and that motion has been denied. These allegations, if true, show that it was the duty of the superior court to dismiss the prosecution, (Pen. Code, § 1382;)[1] but until the information is dismissed the imprisonment is lawful. Writ denied.

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[1] The section provides that "the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: (1) When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him within thirty days thereafter; (2) if a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment or filing of the information."

96 Cal. 612

CALANCHINI v. BRANSTETTER. (No. 14,648.)

(Supreme Court of California. Dec. 2, 1892.)

SPECIFIC PERFORMANCE—BONA FIDE PURCHASER.

Plaintiff alleged that C., his grantor, and B., defendant's grantor, their boundary being disputed, agreed on a temporary boundary; and that, when the true boundary was found, the one in possession of land belonging to the other should have the option either to buy such land at its value in the unreclaimed condition, or surrender it on being paid the cost of reclaiming, and sought to compel defendant to sell a strip of land found to be in plaintiff's possession after a survey. B. testified that he agreed to pay C., after the true boundary was established, by the acre for all he cleared over the true line. C. testified that he always claimed the land to the temporary line agreed on, and never told plaintiff of the agreement. Defendant had no notice of any agreement except the one testified to by B. *Held*, that plaintiff's possession was insufficient to constitute notice of such agreement to defendant.

Department 1. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Action by Philip Calanchini against Lewis P. Branstetter to enforce specifically an oral agreement to sell land. Plaintiff had judgment, and defendant appeals. Reversed.

S. M. Buck, (*W. C. Belcher*, of counsel,) for appellant. *P. F. Hart* and *J. D. H. Chamberlin*, for respondent.

PER CURIAM. This is the second appeal in this case. The first (84 Cal. 249, 24 Pac. Rep. 149) was by the plaintiff from a judgment against him, in which a new trial was awarded. This appeal is by the defendant from a judgment against him, and from an order refusing him a new trial. Upon the last trial the court adopted the former findings of fact, adding one or two others. The evidence upon the first trial was for convenience read on the second trial, although there was some little additional testimony. The facts of the case are substantially as stated in the opinion rendered on the former appeal. In some respects, however, they are presented in a different aspect, owing to the fact that the first appeal was by the plaintiff, and this is by the defendant. At the first trial the facts were found generally as claimed by the plaintiff, but were held not to warrant a judgment in his favor. Defendant, being then respondent, could not object to the sufficiency of the evidence to sustain the findings, or bring up any evidence except such as related to the points made by plaintiff in his motion for a new trial. While, therefore, the opinion rendered upon the first appeal has become the law of the case, and will control here, so far as it appears that the same points are presented upon the same facts, there are in this appeal many questions not then considered, and some that were then passed upon are now presented in a new light. In 1882 the grantor of plaintiff, Chamberlin, was the owner of a tract of 40 acres of swamp and overflowed land, adjoining and south of a similar tract owned by Baldwin, from whom defendant derives his title. The land was wet and thickly covered with brush, so that it was difficult to make an accurate survey of it. The boundary between the tracts was a quarter section line. The owners of adjoining tracts of similar lands had fenced along what was believed to be this quarter section line, and it was easy to determine about where the line, as fenced, would divide the said tracts if it were extended. Chamberlin, however, desiring to reclaim his land, caused a survey to be made which located the boundary some 18 or 20 rods south of the line indicated by neighboring fences. This was in July, 1882. Both Chamberlin and Baldwin were present when the survey was made. No marks or stakes or other evidence of the government survey were found on the line between these tracts. Chamberlin then stoutly maintained that the boundary indicated by the neighboring fences was the true boundary, while Baldwin claimed according to the survey. A compromise was then effected, and it was agreed that the line indicated by the neighboring fences should temporarily divide their possessions. The agreement was oral, and Chamberlin and Baldwin differ materially as to its terms; from this difference this litigation has arisen. This suit is founded upon Chamberlin's version, which is that it was agreed that, when the true line was found, whichever was found to have in possession land belonging to the other should have the option either to buy such land at its value then in its unreclaimed condition, or to surrender it upon being paid the cost of reclaiming. Baldwin, on the other hand, testified that, when the land was cleared so that the line could be accurately surveyed, it was agreed simply, to use his own language, that "I would pay him by the acre for all he cut over the line after the line was regularly established." He denies that Chamberlin was to have the privilege of purchasing. After the compromise, the parties proceeded to dig a trench and build a fence along the agreed line, and in the following spring (1883) Chamberlin reclaimed his land up to the conventional line, which included the demanded premises. November 3, 1883, Baldwin conveyed his land to Rachel Branstetter. July 3, 1884, Chamberlin sold and conveyed his tract to plaintiff, describing it as the N. W. ¼ of the S. W. ¼ of section 7, etc. This did not in terms include the land in controversy, and the contract was not assigned to plaintiff. In fact, Calanchini was not told of the agreement. On the contrary, Chamberlin told him that the fence was on the line, and that his title under the patent covered all the land. Defendant acquired the Baldwin tract December 31, 1884, paying therefor $70 per acre. He had no actual knowledge of the alleged oral agreement, except that he heard Baldwin's version. He did not know that any different claim was asserted, either by Chamberlin or Calanchini, and supposed that his right to the land when the boundary was settled, upon paying the cost of clearing, was admitted. Shortly after his purchase defendant had the land surveyed, and then the original government corners with evidence of the original survey in marks upon the ground was found. Branstetter then called upon Calanchini, informed him of the survey and of the true boundary, and demanded possession of his land, offering to pay the cost of improvements made upon the land. Calanchini denied that he had in possession any land belonging to Branstetter, and all knowledge of any contract in regard to it. He claimed that he had bought from Chamberlin up to the fence.

Defendant then called upon Chamberlin, and offered to pay him for clearing the land, according to the contract between Chamberlin and Baldwin, as he understood it. There is some difference between the witnesses as to what transpired there, but it is certain that no hint was given then by Chamberlin that he understood the oral contract differently. No claim of a right to purchase was asserted by either Chamberlin or Calanchini. The court found as a fact that the agreement was as claimed by Chamberlin, and "that both the said Rachel Branstetter and defendant took the conveyance of said land with notice of the agreement made between said Baldwin and Chamberlin." Whether defendant was a purchaser in good faith and for value was an issue in the case, and this finding is attacked as not supported by the evidence. Defendant testified that he had never heard of any such agreement, and there is no evidence which tends to show that he had. On the contrary, the facts seem to indicate that it was impossible that he should have had actual knowledge, for Baldwin testified that he had never heard of the agreement for an option to purchase, and Chamberlin seems equally positive that he never mentioned it.

Was plaintiff's possession, then, sufficient to impart notice? Plainly not. Plaintiff was then a stranger to the claim, having no interest in the alleged agreement, and, had he been asked, could not have told of it, for he had never heard of any such alleged agreement himself. For both reasons such possession does not constitute notice. Wade, Notice, § 289; Willard v. Tayloe, 8 Wall. 557; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. Rep. 356.

Chamberlin was not then in possession, and made no claim to the land, and not to have inquired of him was not negligence. Had such inquiries been made, however, it is evident, from Chamberlin's testimony at the trial, that they would have been unavailing. His testimony was that, from the time that he took possession, he never admitted that any of the land in controversy belonged to Baldwin; that he always claimed the land, and supposed that he could hold it adversely to the world, until it was decided in court that it belonged to the defendant; that, until the suit of the present defendant against the plaintiff herein, he never admitted that he was liable to pay for any portion of this land, or claimed any rights under the so-called agreement. This finding is therefore not sustained by the evidence, and for this reason the judgment and order must be reversed. As the cause must be tried anew, it is proper to notice an exception taken to the ruling of the court upon the admission of certain evidence. On the trial of the cause the plaintiff offered in evidence the judgment roll in the case of Branstetter v. Calanchini for the purpose of proving the oral agreement alleged in his complaint. The defendant objected to the introduction of this evidence as incompetent, for certain reasons represented by him at length, and now assigns as error the action of the court in overruling his objections. The ruling of the court upon the offer of this evidence was erroneous, but, as the defendant himself afterwards offered the same judgment roll in evidence as a bar to the present action, he waived the right to question the action of the court in previously admitting it.

The judgment and order are reversed, and a new trial ordered.

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3 Cal. Unrep. 681)

In re BERTON'S ESTATE. (No. 15,035.)

(Supreme Court of California. Dec. 7, 1892.)

WILL—CONSTRUCTION—EDUCATION OF CHILDREN—DISTRIBUTION.

Testatrix, after leaving a sum of money to each of her two children, a son and a daughter, divided the estate equally between the children and the husband. In case of the death of the husband before the children's majority, his share was to go to the children. The son was to receive his share at the age of 25, and the daughter at 20, if she married; the children's education "to be paid for out of the interests of my estate." *Held*, that the charge for education was upon the whole estate, and that, even conceding the legacies to be vested legacies, distribution could not be had until the charge was satisfied.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

In the matter of the estate of Bertha Berton, deceased. Flavien Berton, executor, appeals from an order denying his petition for distribution. Affirmed.

Sidney V. Smith, for appellant. *Napthaly, Friedenrich & Ackerman*, for respondent.

TEMPLE, C. This appeal is from an order of the probate court denying the petition of appellant, as executor of the will of the deceased, for a distribution of the estate. The petition was filed at the same time as the account for final settlement of his accounts as executor. Due notice was given, and at the time appointed the final account was approved and settled. Due proof was made of notice to creditors that the time for the presentation of claims had elapsed, and that all claims against the estate, and the expenses of administration, and all taxes levied on the estate, had been paid, and that there was left in the hands of the executor for distribution, $84,450.94. The testatrix left two children, a son and a daughter. The record shows that the son was then, when the final account was settled, 19 years of age, and the daughter over 18. The will bears date April 18, 1887. The executor was appointed May 3, 1888. The final settlement was November 12, 1891. It is said that distribution was refused on the ground that the will had not then been fully executed; that, according to its terms, the estate could not then be distributed.

The material portion of the will reads as follows: "I desire to give to my only two beloved children, Michael Albert Tschurr, born in San Francisco, and now residing with my beloved father, Michael Corai, in Zug-Graubunden, Switzerland, and my daughter, Anna Paulina Catharina Tschurr, born and now residing in San Francisco, the summe of ten thousand dollars each, share and share alike; this is to be theyr separate part of my estate, which I give to them. I further give and bequeath the balance of my estate, of which I may die seised or possessed, or to which I shall be entitled at the time of my decease, to my beloved husband, Flavien Berton, of the city and county of San Francisco, my beloved son, Michael Albert Tschurr, and my beloved daughter, Anna Paulina Catharina Tschurr, share and share alike. Each to receive one third of my estate after my two named children will have received theyr ten thousand dollars each. My beloved son shall receive his share of my estate at the time he attains the age of twenty-five years. It is my wish that my only daughter should not mary before she attains the age of twenty years. At that time, if she maries, she to receive all her part of my estate, this to be forever her own separate property outside of five thousand dollars, which shall be her mother's wedding gift. Her husband never to have any right to the balance of her estate, but the interests, her estate to be and remain her own separate property, at the time of her decease to go to her children, or if there are no children, one half to be given to her husband, the other half to her brother or his hevers. Should it please God to call one of my children from this earth before they should be maried or have family, theyr share to go share and share alike to theyr stepfather or brother or sister. It is my will that my children above named, being the children of my dearly beloved husband, Christian Tschurr, deceased, be well educated, theyr education to be paid out of the interests of my estate. My son to choos the proffession he wishes or has talent for. I do nominate, constitute and apoint my beloved husband, Flavien Berton, of the city and county of San Francisco, to be the executor of this, my last will and testament. I have full confidence that he will do all in his power to promote the wellfare of my two named children, and in this confidence he shall not be obliged to give any bonds whatever. He shall have full power to sell at public or private sale, at such time as he may deem best, all the property, real or personal, of which I may die seised or possessed, and to which I may be entitled at the time of my decease. Should my dear husband, Flavien Berton, be called from this earth before my two children attain theyr majority, his share of my estate to go back to my said two children. Should he remary, he to have only fife thousand dollars of my estate, the balance to go back to my two children, share and share alike. My beloved husband's father, Jean Berton, residing at St. Sorlin Drom, France, I wish in case of our decease to get one hundred dollars jearly for the time of his life, this contribution to be paid out of the interests of my estate and to cease at the time of his decease."

The appellant claims that the bequest to the husband vested at once, and the condition that the property shall go back to the children of the testatrix, in the event of his death before the children reach the age of majority, is a condition subsequent. It is obvious, from a mere reading of the will, that when the property shall be finally distributed under it, many fine and perhaps difficult points can be raised in regard to the effect of some of the language used. As yet the probate court has not construed its provisions further than to say that the estate is not now in a condition to be taken from the executor's hands, and it would hardly be proper to go further here than is necessary to determine that question. To determine that, it does not seem necessary to say whether the legacies are vested or not. Although, if the only provisions of the will bearing upon the question were those discussed by the appellant, the solution of the matter would not be difficult; but there are several other provisions. The language of the first two clauses of the will is the same in regard to the surviving husband and the children, and yet the third paragraph provides that the son shall receive his share when he attains the age of 25 years, and the daughter when she attains the age of 20, if she marries. Another clause, further on, provides that her children shall be well educated, their education to be paid for out of the interests of her estate. There is no provision made for the support of the children before their legacies were to be received by them, unless it is implied in this provision as to their education. Nor is there any express direction or authority given the executor to invest the money belonging to the estate, so that there may be any interest from her estate. Still it is quite evident that the testatrix intended that the property might be for some time in the hands of the executor. The legacy to the son was not to be received by him until he attained the age of 25 years. He must have been about 15 when the will was executed. It does not appear when she died, but the executor was appointed about one year after the date of the will. She must have contemplated that about 10 years might elapse before her son reached the age of 25. No trustee is provided for, except the executor, who becomes such merely as executor. Evidently the charge for the education of the children is upon the whole estate. It would be impracticable, and might defeat the purpose of the charge, to distribute the property subject to the burden. The boy was not to have his share anyway, and there is no express provision for him in the mean time except this. The amount which might be required could not be settled in advance, and it was necessary that it should be promptly and certainly forthcoming. It cannot be held that she meant to leave the education of her children subject to the chance that the necessary contributions could be collected from the distributees, who might become insolvent, or be beyond the jurisdiction of the court.

Even conceding that the legacies were all vested, and that payment only was postponed, it seems obvious that the executor should retain possession until this charge is fully satisfied. As it does not appear that this time has yet arrived, I advise that the order be affirmed.

We concur: FOOTE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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3 Cal. Unrep. 704

MILLER v. BENSINGER. (No. 14,174.)

(Supreme Court of California. Dec. 9, 1892.)

EJECTMENT—ADVERSE POSSESSION—EVIDENCE.

In ejectment for a strip of land a few inches in width between adjoining lots, where it appeared that defendant had been for about 25 years in possession of the strip, which was by a survey included in his deed, when another survey was made, showing the strip to belong to plaintiff's lot, defendant's testimony that his occupancy was under a claim of right to hold the same adversely to plaintiff and the whole world is sufficient to support a finding for defendant as by prescription, though it also appeared that after the latter survey defendant offered to surrender the strip if plaintiff would pay the expense of moving the house which extended onto it.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Ejectment by Sarah Miller against Daniel Bensinger. Defendant had judgment, and plaintiff appeals. Affirmed.

Scrivner & Schell, for appellant. *M. Cooney*, for respondent.

FOOTE, C. This is an action in ejectment for the recovery of a strip of land less than two feet in width, extending along the side of a lot occupied by the defendant. Judgment was given for the latter, from which, and an order denying a new trial, the plaintiff appeals.

It appears that the parties bought adjoining lots, under a certain survey. That about 25 years after the defendant took possession under his deed, occupied, fenced, and built upon what he supposed to be his lot of land, and which included that in controversy here, it appeared under a new survey for the city and county of San Francisco, where the land is situated, that he had in possession a lot of land wider by not quite two feet than his deed called for; and that the lot in possession of the plaintiff was 30 feet wide, less the same number of inches. Hence the plaintiff claimed that the defendant was by mistake in possession of a part of her lot, and sued for it.

The only question at issue, as we think, is whether the evidence supports the findings of fact in reference to the defense of the statute of limitations under sections 318, 319, Code Civil Proc., set up by defendant. There is no dispute that all the necessary ingredients of this defense exist, save that the appellant contends that the occupation of the defendant is not shown by the evidence to have been taken and held with the intention to do so adversely to the plaintiff and all the world. The plaintiff strenuously argues that the defendant only intended to occupy the number of feet in width of land that his deed called for, and that, when the survey showed that he had in possession more than this quantity, then he acknowledged that the land in controversy belonged to the plaintiff, by offering to give possession of it to her if she would pay for the removal of his house, which stood upon it. We do not think that the offer of defendant amounted to anything more than an exhibition of a willingness to buy his peace and avoid a lawsuit. Furlong v. Cooney, 72 Cal., at page 329, 14 Pac. Rep. 15. He was asked, among others, these questions, and made answers thereto as follows: "Question. Now, what was the nature of your occupation there? Was it in your own right? The Court: That is admitted. Mr. Scrivner: Yes. Q. In other words, you were holding adverse to all the world? The Court: In his own right, he was holding. Whatever possession he had was in his own right. Mr. Cooney: Adverse to the world, to everybody? Answer. Yes, sir. Mr. Scrivner: Adverse in one sense. Mr. Cooney: He claimed it. Mr. Scrivner: I don't admit that he claimed it. The Court: Whatever possession he had there was held for himself. Mr. Scrivner: Yes. Mr. Cooney: Adversely to everybody? A. Yes, (by witness.) Mr. Scrivner: Well, it is before the judge." It will be seen that the defendant himself said that he claimed adversely to the whole world, which showed an intention to hold adversely to the plaintiff. In the face of this statement, which the defendant nowhere else varies from on this point, we see no error on the part of the court below in believing and finding that the defendant held the land intentionally adversely to plaintiff and the whole world. The findings are supported by the evidence, and the judgment and order should be affirmed, and we so advise.

I concur: VANCLIEF, C

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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3 Cal. Unrep. 685)

In re HENSING'S ESTATE. (No. 14,943.)

(Supreme Court of California. Dec. 8, 1892.)

ACCOUNTING BY TRUSTEE.

In a probate proceeding it appeared that by a decree of distribution made under a will Z. received, in trust for the grandchildren of testatrix, money to be paid when the eldest attained her majority. On the same date as the will the same testatrix conveyed to Z. a lot of land in trust for A., F., and O., grandchildren of testatrix, to be conveyed when the eldest became of age. There were living at date of will and conveyance, five grandchildren, — M., A., F., C., and A., but no O., as mentioned in the conveyance. After M., the eldest, attained her majority, Z. conveyed the lot held by him in trust to the four grandchildren mentioned in the deed of trust, including O., who never existed, and on the same day deposited in a bank in his own name, as trustee for the five grandchildren, a part of the money held by him in

trust, as M., the eldest, desired Z. to retain her share, and the other children had no guardian. Subsequently Z. filed his account, charging himself 6 per cent. interest on the trust fund down to the time of deposit, and 7 per cent. on the amount retained by him after the deposit, and credited himself out of the whole fund with taxes paid, street assessments, and costs of conveyancing on the lot owned by only three of the grandchildren, and also credited himself with the amount in bank. *Held*, that Z. should be charged with the amount received by the decree of distribution, with interest at 7 per cent. until the deposit in the bank; after which time with the interest earned in the bank, and with the amount deposited in the bank. The amount paid by him for taxes, street assessments, and conveyancing should be credited him, and taken out of the shares, distributed to the three grandchildren who own the lot, and in whose interest these sums were expended.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge

Proceeding by Manuel Eyre, guardian *ad litem*, against Herman Zwieg, trustee, in the settlement of the estate of Augusta Hensing, deceased. From a decree in favor of plaintiff, defendant appeals. Reversed.

A. H. Loughborough, for appellant *Manuel Eyre*, for appellee.

FOOTE, C. Under the terms of a will made by Augusta Hensing, dated August 14, 1876, a decree of distribution was made by the probate court of San Francisco, December 19, 1879, distributing the sum of $806.19 to Herman Zwieg, in trust to invest the same, and pay the income of the same to Anna Louise Hinden, the daughter of the testatrix, during the lifetime of one Valentine Hinden, the husband of Anna Louise Hinden, and upon the death of the husband to pay the principal of that sum to Anna Louise Hinden; but, in the event that she did not survive her husband, the money bequeathed in trust should be invested by the trustee, Zwieg, for the use and benefit of the surviving children of Anna Louise Hinden by her said husband, Valentine, and that the income, or so much thereof as should be necessary, should be expended for the support and education of the children until the oldest should attain the age of majority, and that then the money bequeathed, or so much thereof as should remain, should be equally divided between the children or such of them as might survive. At the same date as the will, the same testatrix conveyed a lot of ground to Zwieg, in trust for Margaret, Alfred, Minna, and Otto Hinden, grandchildren of the grantor in the deed, and upon trust to convey the same to them on the 25th of September, 1889; that being the day after the day when Margaret, the oldest of these grandchildren, should attain the age of majority. Anna Louise Hinden died in January, 1881, leaving her husband, Valentine Hinden, surviving, and five children, called Margaret, Alfred, Minna, Camille, and Alice, all of whom were born prior to the execution of the deed in trust and the making of the will. There never was any child named Otto Hinden, and therefore the deed in trust of the lot was for the benefit of the three children mentioned in it, viz., Margaret, Minna, and Alfred, leaving out Camille and Alice, as is claimed, by some mistake. The will mentioned none of the children by name, nor did the decree of distribution, so that under that decree the five children born before the making of the will, viz., Margaret, Alfred, Camille, Alice, and Minna, took equally of the fund distributed. Under the deed, however, only three of them had an interest in the lot, viz., Margaret, Alfred, and Minna. Zwieg, the trustee, the fund being small, and he acting in good faith, used the money himself, and paid the interest, at 6 per cent. per annum, to Mrs. Hinden as long as she lived, and afterwards expended a small part of the interest on the expenses of the children. He also paid taxes on the lot conveyed to him for the benefit of three of the children amounting to $49.70, and a street assessment amounting to $208.28, certain costs of conveyance, etc., amounting to $10, or thereabouts. Upon the 5th of October, 1889, he deposited a portion of the money—$1,100—in a savings bank of good repute, in his name, as trustee for all the five children, and on that day he executed a deed to the children, including Otto, who never existed, (the conveyancer following the terms of the deed from the original grantor in the deed in trust.) Thus the deed made vested the title to the lot in Margaret, Alfred, and Minna, leaving out Alice and Camille, of the five children interested in the fund included in the decree of distribution. According to the terms of both trusts, the trustee was required to pay over the money to the five children, and execute the conveyance to the three children, on the 25th of September, 1889. But it is claimed that Margaret, who was then of age, asked that he retain her share of the money, and the other children had no guardian. Zwieg was cited on the 15th of April, 1891, under section 1699 of the Code of Civil Procedure, (St. 1889, p. 337,) by a petition of the minors, by Manuel Eyre, guardian *ad litem*, to appear and render an account. He filed his account, and charged himself interest on the fund in hand at 7 per cent. per annum, semiannually, and claimed no commissions or counsel fees. He claimed credit, as against the whole fund, for the taxes, assessments, and conveyancing fees, etc., in respect to the lot, which was, however, owned by only three of the children, and also for the amount in bank. The court sustained the objection to the disbursements for taxes, assessments, and costs of conveyance, etc., and gave no credit for the amount deposited in bank, and charged the appellant here, Zwieg, with the original sum of $806.19, with interest at the rate of 7 per cent. per annum, compounding semiannually, to the date of the order in this cause, made August 14, 1891, we suppose because in his account the trustee had charged himself with interest at that rate, as being perhaps profit realized by him out of the money.

As we view the matter, the court, in allowing this account, should have charged Zwieg with the money received under the decree, with interest at 7 per cent. per annum, with semiannual rests, under the rule he had prescribed for himself, up to the date when the $1,100 was put in a savings bank; for after that he was responsible for interest on that sum up to August 14, 1891, only to the amount earned from the bank, but he also remained responsible for the $1,100. Of course, the sums paid Mrs. Hinden in her lifetime, and for the children's expenses, should be deducted, as they were. But we do not think the trustee should be disallowed entirely the moneys he paid out for taxes, assessments, and conveyances respecting the lot of the three children. One third of these sums should be deducted from each of their shares of the money to be distributed to them, and not be a charge upon the portions of the other two children, not named in the deed to the lot. Therefore the trustee should receive credit for those sums as against the shares of the three children who own the lot, as he paid these sums out to protect their interests. For these reasons the decree made in the premises should be reversed, and the court below directed to enter a decree in accordance with the views here expressed, and we so advise.

We concur: Haynes, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the decree is reversed, and the court below is directed to enter a decree in accordance with the views herein expressed.

(96 Cal. 596)

PEOPLE v. LANE. (No. 20,969.)

(Supreme Court of California. Dec. 1, 1892.)

Appeal in Criminal Cases—Stay.

Where a defendant, after sentence, takes an appeal therefrom, and makes application to the superior court for a certificate of probable cause to stay proceedings pending the appeal, but such application is denied, he may, under Pen. Code, § 1243, renew the application in the supreme court; and, since it cannot be heard there without the bill of exceptions in the case, it is the duty of the superior court, on application therefor, to grant a temporary stay during the time allowed by law for the settlement of the bill of exceptions, and during such further time as may be necessary for its settlement, provided the defendant exercises proper diligence.

In chambers.

Application by William R. Lane for a temporary stay of proceedings pending the settlement of a bill of exceptions by which to renew his application for a writ of probable cause before the supreme court, which writ the superior court has denied. Stay ordered.

C. A. Webb, for petitioner.

Beatty, C. J. The defendant in this case was convicted of the crime of murder, and on the 22d day of November, 1892, was sentenced to the state prison for life. After appealing to the supreme court, his counsel, on November 23d, for the purpose of staying proceedings pending the appeal, applied to the superior court for a certificate of probable cause. Pen. Code, § 1243. His application was denied. He then applied for a temporary stay of proceedings pending settlement of his bill of exceptions, in order that he might renew his application for a certificate of probable cause before a justice of this court. This was also refused, and he now applies here for such temporary stay. The defendant, being refused a certificate of probable cause by the judge of the superior court, has a clear, statutory right to renew his application here. Pen. Code, § 1243. Such application cannot be heard until the bill of exceptions is settled, (In re Adams, 81 Cal. 163, 22 Pac. Rep. 547,) and the defendant is entitled to 10 days after judgment, and such further time as the court may grant, for preparing and presenting a draft of his bill. At the time the application for a temporary stay was refused, the 10 days allowed by law had not elapsed, and the superior judge subsequently granted an extension of 60 days to settle the bill of exceptions. It was the plain duty of the superior court to stay the proceedings during the time allowed by law for preparing the bill of exceptions, and for such further time as might be necessary for its settlement, provided the defendant exercised proper diligence in its preparation. In re Adams, 81 Cal. 165, 22 Pac. Rep. 547. The 60 days' time granted by the court for the settlement of the bill certainly implies that the defendant is reasonably entitled to some extension of the statutory time for presenting his bill, and that 60 days is a reasonable time for its settlement. If so, it is difficult to perceive upon what theory the temporary stay was denied. It is ordered that proceedings against defendant be stayed pending the settlement of the bill of exceptions and his application here for a certificate of probable cause. As it does not appear that the superior court has made any definite order fixing a time within which the defendant must prepare a draft of a bill, that matter is remitted to its discretion, with leave to the people to set aside this order if the defendant does not present his bill in time.

3 Cal. Unrep. 652

PILSTER v. HIGHTON. (No. 14,510.)

(Supreme Court of California. Nov. 26, 1892.)

Action on Note—Pleading.

A complaint on a note alleging its date and execution, and promise to pay 90 days therefrom by defendant maker, and a transfer by indorsement to plaintiff, and nonpayment by defendant, states a sufficient cause of action.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Henry Pilster against Henry E. Highton. Judgment for plaintiff. Defendant appeals. Affirmed.

The following is the complaint referred to in the opinion: "The plaintiff complains, and alleges: (1) That on the 1st day of March, 1890, at San Francisco, state of California, the defendant, by his promissory note, promised to pay to Otto Kloppenburg or order $330.45, with interest, ninety days after date; (2) that the same was, by the indorsement of the said Otto Kloppenburg, transferred to the plaintiff; (3) that the defendant has not paid the same nor any part thereof. Wherefore plaintiff demands judgment against defendant for the sum of $330.45, with interest from March 1, 1890, and for the costs of this action. W. W. McNair, Attorney for plaintiff." Indorsed: "Filed February 7, 1891. Wm. J. Blattner, Clerk. By J. J. Grief, Deputy Clerk."

Walter H. Linforth, for appellant. *W. W. McNair*, for respondent.

Per Curiam. This is an action upon a promissory note. The complaint was demurred to upon the grounds that it did not state facts sufficient to constitute a cause of action, and was ambiguous and uncertain. The demurrer was overruled, and the defendant given 10 days to answer. He declined to answer, and thereupon judgment was entered against him, from which he appeals. The complaint was inartistically drawn, but we think it must be held sufficient. Judgment affirmed.

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96 Cal. 510

VULCAN POWDER CO. v. HERCULES POWDER CO. et al. (No. 13,079.)

(Supreme Court of California. Nov. 29, 1892.)

CONTRACTS—RESTRAINT OF TRADE—PATENT RIGHTS.

1. A contract between several companies, under which it is agreed not to sell goods within certain territorial limits for a specified time, and that no company shall sell more than a certain per cent. of the whole amount sold by all the companies, is void, under Civil Code, §§ 1673-1675, which provide that every contract, by which one is restrained from exercising a business or calling, is void to that extent, except that one who has sold the good will of a business may agree not to carry on a similar business within a specified county or town, and that, in anticipation of dissolution of a partnership, a partner may agree not to carry on a similar business in the town or city where the partnership was located.

2. The fact that such contract provides for the interchange of the use of certain patents owned by some of the companies does not take it out of the statute.

3. The contract being illegal, one of the parties thereto cannot enforce against the others provisions under it which are the means of insuring its success.

In bank. Appeal from superior court, city and county of San Francisco.

Action on a contract by the Vulcan Powder Company against the Hercules Powder Company and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Van Ness & Roche, for appellant. *Pillsbury & Blanding*, for respondents.

McFarland, J. On June 2, 1884, a written contract was entered into by and between the Giant Powder Company, party of the first part, the California Powder Works, party of the second part, and the Safety Nitro Powder Company, the Vulcan Powder Company, and the California Vigorit Powder Company, parties of the third part, all corporations existing under the laws of this state. The contract was about the manufacture and sale of nitroglycerine powders called "dynamite." This action was brought by the said Vulcan Powder Company, one of said parties of the third part, against all of the other parties to enforce certain parts of said contract. The defendant the California Powder Works demurred to the complaint upon the ground, among others, that the contract was in restraint of trade, and therefore against public policy and void. The demurrer was sustained by the trial court, and judgment rendered in favor of said defendant. Plaintiff appeals from the judgment.

At common law, originally, all contracts which in any degree tended to the restraint of trade were void; but afterwards the rule was relaxed so as to countenance contracts for the partial restraint of trade,—that is, contracts in which the restraint was confined to reasonable limits of time or place, and which were founded upon sufficient consideration, etc. Quite a full statement of the rule at common law is to be found in Wright v. Ryder, 36 Cal. 356. The rule, however, was uncertain, and led to much perplexing legislation; and the law upon the subject in this state is now declared in section 1673 of the Civil Code. That section is as follows: "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." The next two sections merely provide that one who sells the good will of a business may agree not to carry on a similar business within a specified county or city; and that, in anticipation of a dissolution of a partnership, a partner may agree not to carry on a similar business within the city or town where the partnership business is transacted. Neither of these two exceptions applies to the case at bar; and, if the contract here sued on is obnoxious to said section 1673, then the demurrer was properly sustained, and the judgment should be affirmed.

Passing for the present a point of appellant based upon certain patent rights, it is clear that the contract is in restraint of trade and void. It is quite long, but, for the purposes of the question now before us, it is necessary to notice only some of its provisions. The contract, which is for a term of three years, provides that neither of the parties thereto shall make any shipment of dynamite to any part of the United States lying east of the eastern boundaries of Montana, Wyoming, Colorado, and New Mexico. With respect to the territories lying west of said boundaries, it provides that "except under the provisions of this instrument, none of the parties hereto shall be or become interested, directly or indirectly, in the manufacture or sale of dynamite powder." It provides that each party shall sell only a certain per cent. "of the aggregate quantity of dynamite sold by all the parties hereto," the per cent. to be sold by some of the parties being larger than that allowed to be sold by others; and that, "when any party shall exceed the said proportion, the party selling the excess, as ascertained by the quarterly statement hereinafter more particularly referred to, shall pay over to the other parties the profits on such excess." It provides that the profits on such excess shall be ascertained by a standing committee, to whom each party shall make quarterly reports, by computing the difference between the "manufacturing cost" of such excess—said cost to be fixed by said committee—and the average price realized by all the parties. It provides that said standing committee "shall have power to fix the prices at which dynamite shall be sold in the states and territories embraced within the agreement;" and that "these prices shall be known as the 'selling prices;' and upon them all the parties hereto shall be required to settle with the standing committee." It provides that the prices and the "manufacturing cost" may be "changed at the discretion of the standing committee;" that each party shall account to said committee for all dynamite sold; and that said committee may impose fines on any party violating the contract, and may exercise other powers not necessary to be here mentioned; and it provides that the contract may be terminated at any time if "other party or parties shall begin the manufacturing and selling dynamite within the territory named in competition to the parties hereto." The above-stated provisions of the contract are clearly in restraint of trade and against public policy; and this conclusion is too obvious to need argument, authorities, or elucidation.

2. Appellant contends that the principle that contracts in restraint of trade are void does not apply to the contract here sued on, because it deals with certain patent rights. The facts on which this point is based are these: It appears from the contract that three of the contracting parties were the owners of certain letters patent for invention of methods or processes for making dynamite. The other two parties, viz., the plaintiff herein and the Vigorit Powder Company, did not have any such patent. There is a good deal of recitation in the contract about these patents, and mention is made of an "interchange of rights" under them. It is recited that the parties are desirous of being released from all claims for any infringement, "real or alleged," of said patents, and of obtaining license from each other to manufacture under said patents; and "in consideration of the premises, and of certain valuable considerations," (not stated,) they enter into the contract. As the plaintiff and the Vigorit Company had no patent, it is obvious that the consideration moving from them was their covenant to refrain from competition in the dynamite business, and that they had no patent rights to "interchange." In some text-books and decisions it has been stated, generally, that the rule about contracts in restraint of trade being void does not apply to patent rights; but, as applied in the adjudicated cases, it means only that a trader may sell a patent right, or a secret in his trade or art, and restrain himself generally from the use of it, or from other acts which would lessen the value of the patent sold. And, of course, as a patent is a sort of monopoly, the owner may manufacture under it or not, as he pleases; and may make either a partial or entire assignment of it; and may protect his assignee, not only by an agreement not to use the patent, (which would be unnecessary, because such use would be an infringement,) but by a covenant not to interfere in any way with the profits to be derived from the assigned patent. The cases cited by appellant (Twist, etc., Co. v. Morse, 103 Mass. 73; Taylor v. Blanchard, 13 Allen, 370; Stearns v. Barrett, 11 Amer. Dec. 227; Mackinnon P. Co. v. Fountain Ink Co., 48 N. Y. Super. Ct. 447; Jarvis v. Peck, 10 Paige, 118) go no further than this. Indeed, most of those cases go upon the old rule that there may be a contract in partial restraint of trade, independent of the right of the patentee, and upon the principle applied in said section 1673 of our Civil Code to the sale of the good will of a business. But no case has been cited in which it has been held that several persons or companies can legally enter into a business combination to control the manufacture or sale or price of a staple of commerce merely because some of the contracting parties have letters patent for certain grades of that staple. Indeed, the contract before us is not confined to dynamite produced under the processes of the named patents. It speaks in places of "dynamite" generally, and provides that the contract may be terminated if "other party or parties shall begin the business of manufacturing and selling dynamite within the territory named, in competition to the parties hereto;" thus recognizing the probability of other persons, not having the patents named, entering into the business of making and selling the very commodity that is the subject of the contract.

3. Appellant contends that, even though the contract be void, still this action can be maintained. The contract provides that each of the parties shall make periodical verified reports of the amount of dynamite sold by it to the standing committee, and that each party shall have the right to make quarterly examinations of the books of account, papers, and vouchers of each of the other parties; and the gist of the complaint is that the defendants have made false reports of the amount of dynamite sold by them, and refuse to allow an examination of the books, etc. The object of the action is to compel defendants to allow such examination of their books and papers, and for a judgment against them for such amount of money as may be found to be due from them to plaintiff according to the provisions of the contract. The rule upon the subject is expressed in the maxim, *ex turpi causa non oritur actio*,—no cause of action can arise out of an illegal contract,—and a court will leave the parties to such a contract exactly where it finds them. Courts have held in a few instances—against the current of authority—that, where money or other property has accumulated under an illegal contract, equity will not refuse to dispose of such property as between the parties. Appellant has cited some of such decisions. But in the case at bar the provisions sought to be enforced by the action are the very means established by the parties to the contract for the purpose of making sure their illegal agreements. They are insep-

arably interwoven with the whole texture of the contract, and partake of its general character. To grant the prayer of the complaint would be to put into operation the only machinery by which one of the parties to the contract could enforce it against the others. They must be left where they are.

The judgment is affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.; GAROUTTE, J.; PATERSON, J.; HARRISON, J.

(96 Cal. xviii)

VULCAN POWDER CO. v. CALIFORNIA VIGORIT POWDER CO. et al. (No. 13,080.)

(Supreme Court of California. Nov. 29, 1892.)

In bank. Appeal from superior court, city and county of San Francisco.

Suit on a contract by the Vulcan Powder Company against the California Vigorit Powder Company and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Van Ness & Roche, for appellant. *Pillsbury & Blanding*, for respondents.

PER CURIAM. This case being in all material respects the same as Vulcan Powder Co. v. Hercules Powder Co., 31 Pac. Rep. 581, (No. 13,079, this day decided,) for the reasons given in the opinion in that case, the judgment herein is affirmed.

(96 Cal. 641)

ACHESON v. WESTERN UNION TEL. CO. (No. 14,526.)

(Supreme Court of California. Dec. 3, 1892.)

CONTRACT—PLEADING—CONSIDERATION—NOMINAL DAMAGE.

1. The consideration on which a contract, not in writing, is based, must be pleaded.

2. A complaint, alleging mistake in the transmission of a telegram, so that plaintiffs were prevented from buying certain goods, and asking a certain sum as special damage, without alleging any facts going to show such damage, will sustain a judgment only for nominal damages.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Robert Acheson against the Western Union Telegraph Company to recover for mistake in the transmission of a message. Judgment for plaintiff. Defendant appeals. Reversed.

R. B. Carpenter, for appellant. *A. Heynemann*, for respondent.

PER CURIAM. Appeal from a judgment entered by the clerk upon default. Defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, which was overruled, and the default was entered for want of an answer. The sole question is whether the complaint is sufficient to sustain the judgment. The complaint in the first paragraph alleged the incorporation of defendant, "and that said corporation is, and was at all the times hereinafter mentioned, engaged in the business of telegraphing for hire." The second paragraph alleged the partnership of Philip Wolf & Co. The third paragraph contained the following allegations: "That on the 20th day of December, 1889, the said firm of Philip Wolf & Co. presented to the defendant at its office in San Francisco, state of California, and said defendant undertook to forward the same, a message of the following tenor," etc.; setting out that and several other messages between said firm and their agent at Independence and other places in Oregon, relating to the purchase of hops, though that did not appear in any of the telegrams. The message upon which this action is based was sent by Berheim (the agent) from Independence, Or., December 23, 1889, to said firm at San Francisco, and, as written, was as follows: "Have refusal Hill lot eight hours tannery taciturn answer Portland." As transmitted, the word "hours" was converted into the word "hows." The cypher word "tannery" means "eight" and "taciturn" means "one half." The fifth paragraph is as follows: "That, by reason of the gross carelessness and negligence of the defendant in so forwarding the telegram containing the error of 'hows' for 'hours,' the said Messrs. Philip Wolf & Co. were prevented from buying and purchasing a lot of hops, consisting of 152 bales, averaging 180 pounds per bale, at eight and one half cents per pound, and amounting to $2,325.60; and that by reason of the gross carelessness and negligence of said defendant the said Philip Wolf & Co. were damaged in the sum of six hundred and eighty-four dollars." Wolf & Co., after presenting their claim to defendant, assigned it to plaintiff.

1. The demurrer should have been sustained. No consideration is alleged for the defendant's undertaking to transmit the message. "Contracts, to be valid, must be formed upon a consideration, and, except as to those that import it, the consideration must be proved, and consequently should be stated." Bliss, Code Pl. § 268. The exceptions at common law were contracts under seal, and, under the statute, all contracts in writing. The agreement to forward the message in question is not alleged to have been in writing, and therefore a consideration should have been alleged.

2. The judgment is for the full amount prayed for, and the averments of the complaint do not sustain such a judgment. The gist of the action is for the recovery of special damages, and there is no allegation of special damage. Nominal damages only were recoverable on the complaint. If plaintiff suffered special damage by the failure to purchase certain hops, there should have been averments under which evidence of such special damage, and the facts upon which it rested, could have been introduced. No damage, unless nominal, necessarily resulted from the alleged breach of contract. There is nothing to show that plaintiff suffered any loss, because he did not buy the hops at the named price. He may have saved money by not making the purchase. Of course, this attack on the judgment by appeal is direct, and not collateral. The judgment is reversed, with directions to the court below to sustain the demurrer, with leave to plaintiff to amend his complaint, if so advised.

96 Cal. 522

In re MOORE'S ESTATE. (No. 14,966.)

(Supreme Court of California. Nov. 30, 1892.)

ACCOUNTING BY ADMINISTRATOR — NEGLIGENCE—COMMISSIONS—ADVANCEMENTS TO WIDOW—SETTING APART HOMESTEAD.

1. A ranch belonging to an administrator's intestate was leased to B. for a year, and the cows were pastured during the winter on a farm belonging to the administrator, B. agreeing to pay $300 therefor,—one half to the administrator and one half to his tenant. B. failed to make the payment, and the administrator advanced to his tenant the amount due him for the pasturage. *Held*, that this amount should not have been allowed to the administrator as a credit in the settlement of his account.

2. The court below found that the reasonable rent for a ranch in 1888 was $100 a month; that the administrator failed to collect the rent for four months; that he could have rented the ranch one year for $400 more than he received; also that he failed to collect the interest on a certain note by not pushing the collection until the maker became insolvent; and, therefore, that he should be charged with these respective amounts. *Held*, that the administrator was improperly charged with these amounts in the absence of any finding that the failure to collect them was due to lack of ordinary diligence in the management of the estate.

3. During one year the ranch was leased for $1,800, but, though there was evidence that $1,650 of this was paid to the administrator, yet he was charged with only $677.85 on account thereof. *Held*, that he should have been charged with the full amount received, and the fact that no specific exception was taken to this item was not a waiver of the right of the heirs to have it corrected, if afterwards found to be erroneous.

4. Commissions in excess of the statutory percentage cannot be allowed an administrator under Code Civil Proc. § 1618, providing that in fixing commissions the court may make such further allowance as it may deem just and reasonable, unless a petition is made for an extra allowance, or the court finds as a fact that extraordinary service has been rendered, for which there should be such extra compensation.

5. Where an administrator advances a sum of money to the widow of his intestate out of the funds of the estate, he may be reimbursed for such amount, on the settlement of his accounts, from the distributive share due such widow, whether it consists of money or real estate.

6. A number of years after intestate's death his widow asked that a homestead be set apart, which was done, the order setting it aside giving the widow an undivided one half thereof, and three children an undivided one sixth each. The land thus set apart was the separate property of the intestate. *Held* that, if the court erred in setting apart any portion absolutely to the widow, the order was not void, and, since no appeal was ever taken therefrom, the title to the homestead is, as against the heirs of the intestate, in the persons named in the decree, and therefore such land cannot be distributed in the settlement of the estate. Paterson, J., dissenting.

In bank. Appeal from superior court, Santa Cruz county; JOHN REYNOLDS, Judge.

Proceedings for the settlement of the accounts of Thomas W. Moore, administrator of William H. Moore, deceased, and for the distribution of the estate. From the order settling the accounts, and from the decree of distribution, all the parties affected appeal. Reversed.

A. S. Kittredge, Chas. B. Younger, Warren Olney, and *Olney, Chickering & Thomas*, for appellants. *Frank M. Stone*, for respondents.

DE HAVEN, J. William H. Moore died intestate in Santa Cruz county in 1871, leaving a widow, Helen M. Moore, and five children. In March, 1872, Thomas W. Moore, a brother of the deceased, was appointed administrator of his estate, and on July 27, 1891, an order and decree were made settling the final account of the administrator, and also making a final distribution of the estate. All of the parties affected by this order and decree appeal.

1. In the year 1877 the "Moore ranch," belonging to the estate of the deceased, together with the cows thereon, was leased to one Bradley. The season was very dry, and the ranch did not produce feed enough to keep the cows during the ensuing winter, and they were pastured on a farm belonging to the administrator, Bradley agreeing to pay $300 therefor, one half of which would belong to the administrator, and the balance to his tenant. It seems that Bradley failed to make the payment, and the administrator advanced to his tenant the portion to which he was entitled for the pasturage of the cows, and the court allowed this payment to the administrator as a credit in the settlement of his account. In so doing the court erred. The cows were pastured for Bradley, and not for the estate; and the administrator, in paying his tenant, advanced the amount paid for the benefit of Bradley, and is not entitled to look to the estate for its repayment.

2. The court also found: "The reasonable rent for said Moore ranch belonging to said estate during the year 1888 was $100 per month. Said administrator failed to collect the rent of the said ranch from May 1st to September 1st of said year, to wit, for four months, and will therefore be charged the sum of $400 in his said account. The said administrator could have rented the said ranch for $400 more than he received from Fred. W. Moore in the year 1879–80, and he will therefore be charged with that amount. At the time of the death of said deceased he owned the note of one Rodriguez for $1,000. The administrator collected the principal of said note, but did not collect the interest thereon, amounting to the sum of $202.50, for the reason that he did not push the collection thereof until after the said Rodriguez became insolvent. He will therefore be charged with said amount of $202.50, making a total charged to him under this article of $1,202.50." The facts as thus found did not warrant the court in charging the administrator with either of the items referred to in the finding. It is not found that the failure to collect the rent of the Moore ranch for the period named, or the failure to lease the same for a larger rent, was due to the neglect of the administrator to use ordinary care and diligence in the management of the business of the estate, or that he did not act in good faith, and for what he deemed for the best interest of the estate; and, in the absence of such a finding, the administrator should not have been charged with these sums. This results from the well-settled rule that

the only measure of an administrator's duty is to act with fidelity, and with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature. So, too, in regard to the Rodriguez note. There is no finding that the balance due upon this note was lost by the negligence of the administrator. The failure to "push the collection of the note" may have been negligence, but it is not necessarily so. It frequently happens that indulgence to a debtor is a matter of prudence on the part of the creditor, and the court does not find as a fact that the administrator in this instance failed to exercise a reasonable judgment in failing to enforce the collection of the note by process of law. It is true that when an administrator receives a note, and the maker thereof is solvent, but afterwards becomes insolvent, the burden of proof is on him to show that with due diligence he could not have collected it. Williams v. Petticrew, 62 Mo. 460. But, while this is the rule as to the burden of proof, it does not help the finding of the court under consideration. The defect in the finding is that it fails to pass upon the question whether the administrator was guilty or free from negligence.

3. It appears that during one year the "Moore ranch" was leased to one Frederick Moore for $1,800, of which sum $1,650 was paid to the administrator. There is evidence tending to show that this amount was paid to the administrator, and our attention has not been called to any evidence in conflict therewith, and yet the administrator is only charged with $677.85 on account thereof. He should have been charged with the full amount he received, as shown by the evidence. The fact that no specific exception was taken to this item of the account, and that the attention of the court below was not called to the evidence showing that the administrator had not charged himself with the full amount which he received from this source, while it suggests a reason for the failure of the court below to detect the error in the account of the administrator as filed, is still not a waiver of the right of those entitled to succeed to the estate to have the same corrected if it should appear to be such, in the course of the further proceedings to be had in the settlement of his account.

4. The court allowed the administrator $5,765.33 as commissions. This sum is in excess of the statutory percentage to which he would have been entitled as a matter of course, calculated upon the whole amount of the estate which he accounted for; and, in so far as it exceeds the percentage fixed by the statute, is erroneous. We do not overlook the fact that, in addition to the fixed commissions allowed to the administrator by law, the court is authorized to make such further allowance as it "may deem just and reasonable for any extraordinary service." Code Civil Proc. § 1618. But the administrator did not petition the court below for such extra allowance, and the court did not find as a fact that he rendered any extraordinary service for which he should receive such extra compensation.

5. The court below found that the sum of $6,000 was paid and advanced by the administrator "in good faith from the funds of the estate to Helen M. Moore, the widow of said deceased, who received the same with the knowledge that said money was a part of the funds of said estate," and as a conclusion of law therefrom the court held that the administrator should not be allowed credit for said sum in his account with the estate, but that he should be charged interest thereon from the date of its payment, at the rate of 7 per cent. per annum, and that the said sum of $6,000 "should be deemed and treated as an advancement out of the funds of said estate to said widow, Helen M. Moore, as a distributee of the estate of said deceased," and that she should be charged with interest thereon from the date of its payment at 7 per cent. per annum; and that the said sum of $6,000, with the interest thereon, amounting in the aggregate to the sum of $11,959.60, should be credited to the administrator "upon distribution of said estate as against any interest or distributive share said Helen M. Moore may have in said estate, and the amount thereof" should be paid by her to said administrator, "and he is entitled * * * to retain her distributive share of any moneys of said estate as part payment thereof," and that, as to any balance that may remain unpaid after the application of the share of said Helen M. Moore in the moneys in the hands of the administrator subject to distribution, the court "as a probate court has no power to declare a lien therefor upon the distributive share of Helen M. Moore in the real and personal property of said estate." The decree of distribution was in accordance with this finding of the court and its conclusion of law, and both the widow and the administrator appeal therefrom. The widow, Helen M. Moore, contends that the finding of the court that she was paid the sum referred to out of the funds of the estate, as an advancement to her, is against the evidence, and that the court erred in charging the same against her distributive share of the moneys of the estate. She does not deny that she received the money, but she insists that it was paid to her as the result of a personal transaction between herself and the administrator, and over which the probate court has no jurisdiction in this proceeding. It is unnecessary to go into any extended discussion of the evidence. It is sufficient for us to say that, in our judgment, it was such as to fully support the finding of the court that the sum of $6,000 was paid to the widow out of the funds of the estate, and that she received the same knowing that it was paid to her by the administrator upon the understanding and agreement that she was to accept it as her share of the estate. It makes no difference that the agreement upon which she received the money was not such as to be legally binding upon her, and that she has since successfully repudiated it. She has retained the money, and upon the most obvious principles of justice this fact must be taken into account in the final distri-

bution of the estate. In settling the accounts of the administrator, and in ascertaining the distributive shares of those entitled to succeed to the estate of a deceased person, and in adjudging what shall satisfy the decree of distribution, the superior court, in the exercise of its probate jurisdiction, proceeds upon principles of equity, and may so frame its judgments as to do exact justice in regard to all matters properly entering into the account of the administrator, and which in the application of equitable rules affect the distributive shares of the estate. In Re Niles, 113 N. Y. 547, 21 N. E. Rep. 687, the court say: "This matter of the administration of assets of the estate is peculiarly within the cognizance of equity and a surrogate's court, in adjusting the accounts of executors or administrators, is governed by principles of equity as well as law. Upson v. Badeau, 3 Bradf. Sur. 15. In the exercise of the statutory powers conferred upon him to direct and control the conduct and settle the accounts of administrators and executors, the surrogate is not fettered, nor is he prevented by any rule of law from doing exact justice to the parties. He is supposed to administer justice in each case within his jurisdiction, according as the equities of the case demand, within the confines only of statutory provisions." In accordance with this principle it was held in the case of Hyland v. Baxter, 98 N. Y. 610, that the surrogate's court had jurisdiction in the settlement of an administrator's account to allow, as against the distributive shares of minors, moneys which had been advanced by the administrator for their maintenance, without any previous order of the court. In that case the court said: "It is true that an administrator in making advances acts without authority, and at his peril, but this is true in every case where a parent, or one *in loco parentis*, or a trustee or guardian, makes advances not previously sanctioned by the court, or by the instrument creating the trust, and comes to the court for relief. The fact that the question is an equitable one, and depends upon equitable principles, is not a ground of objection to the jurisdiction. The surrogate's court is a court of limited powers and jurisdiction, but it has jurisdiction to determine questions, either legal or equitable, arising in the course of proceedings in the execution of powers expressly conferred, and which must be decided therein." And in 2 Woerner on the Law of Administration, (section 519,) after stating that distributive shares of minors should be charged with the money advanced for their support by the executor or administrator, it is said: "The same rule holds good in respect of payments to adult distributees and legatees. The accountant is entitled to credit against these to the full extent of payments made to them, whether ordered by the court or not." We have no doubt that this is the correct rule, and that, when advances have been made by an administrator out of the funds of the estate to one entitled to share in its distribution, the probate court, exercising the broad equitable powers which are conferred upon it as incident to its jurisdiction to settle the accounts of administrators and to distribute estates administered upon, may allow the administrator to reimburse himself from the distributive share of the person to whom such advancement was made. It follows from what has been said that the court did not err in ascertaining the amount already paid by the administrator to the widow from the funds of the estate, and in decreeing that he might reimburse himself to the extent of her share of the moneys of the estate in his hands.

6. The superior court, as we have seen, held that the amount of cash distributed to the widow might be applied by the administrator upon the amount found by the court to be due him on account of the advances made by him, but as to the balance due, after applying this money in his hands, the court held that it had no power to give him any relief. We think that in so holding the court was in error. The administrator was entitled to a decree that the amount advanced by him to the widow was a charge against her entire distributive share of the estate, whether the same consisted of money or real estate or both. If her share of the money of said estate distributed was not sufficient to pay such advances, the court should have made the distribution of her share of the real estate as subject to the payment of the amount found to be due from her to the administrator by the decree. The court had the right to so decree, as incident to its general power to state the account between the parties in accordance with justice and equity, and in the settlement of which account on such a basis the court would necessarily have to ascertain what the widow had already received from the administrator on account of her distributive share of the estate.

7. In August, 1877, the widow applied for a homestead to be set apart to her from the estate, and on April 26, 1881, the court made an order setting aside as a homestead 35 acres of land, with the dwelling house and improvements thereon, "the undivided one half thereof to said widow," and an undivided one sixth to each of three children named. The land thus set apart as a homestead was the separate property of the deceased; and, if it should be conceded that the court erred in setting apart any portion of it absolutely to the widow, still it was only an error committed in the exercise of its jurisdiction, and the order was not void. No appeal was ever taken from this order, and it is now in full force. This being so, the court erred in distributing, as part of the estate, the land so set apart as a homestead. By force of the decree setting it aside the title to the homestead is, as against the heirs of the deceased, in the parties named in that decree.

There are many other assignments of error, but to notice them would unnecessarily extend the length of this opinion. It is all-sufficient for the purposes of this case to say that, except in the particulars above pointed out, we find no error in rulings of the court. The decree settling the amount of the administrator and distributing the estate is reversed, and the court below is directed to find the facts in relation to the matters discussed in paragraphs 2 and 3 of the foregoing opinion, and thereupon settle the account of the administrator and make distribution of the estate in accordance with the views above expressed. The administrator should be allowed a reasonable sum on account of attorneys' fees incurred by him on this appeal. It was proper to charge the administrator with interest upon the sum advanced by him to the widow, and he is entitled to charge the amount of such interest against the portion of the estate to be distributed to her. The order and decree appealed from are reversed.

We concur: McFarland, J.; Sharpstein, J.; Harrison, J.

Paterson, J., (*concurring.*) I concur in the order reversing the judgment, and agree to every proposition stated by Mr. Justice De Haven except the one relating to the homestead. I am of opinion that, it being conceded that the property out of which it was carved was separate property of deceased, the court could not—had no power to—set aside a homestead in fee. That, the fact being admitted, and shown by the record, no appeal from the order was necessary. The court can now say, and should say on final distribution, that the homestead was set apart only for a limited period. That, the time for distribution having arrived, the land must be treated as part of the estate.

(96 Cal. 645)

OBERSTELLER v. COMMERCIAL ASSUR. CO. (No. 14,735.)

(Supreme Court of California. Dec. 7, 1892.)

Insurance—Condition in Policy—Fraud on Part of Insured.

Plaintiff held a policy of insurance on certain property, which was destroyed by fire. The policy provided that it should be void "in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after the loss." After the fire, and prior to an action on the policy, plaintiff presented a proof of loss, subscribed and sworn to, claiming a loss of $1,845.75; and at the trial he testified that the value of the property lost was $2,000. *Held*, that the fact that the jury found a verdict in favor of plaintiff for only $500 is not conclusively a finding of fraud on his part, and does not authorize a judgment for defendant on the verdict.

Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Obersteller against the Commercial Assurance Company to obtain the amount of a policy of insurance on property destroyed by fire. Judgment for plaintiff. Defendant appeals. Affirmed.

Haggin & Van Ness, for appellant. *Horace W. Philbrook* and *Otto Tum Suden*, for respondent.

Sharpstein, J. This appeal is from a judgment recovered by the plaintiff against the defendant in an action upon a policy of insurance issued by defendant to plaintiff against loss or damage by fire of certain property, to wit: $600 on household furniture, useful and ornamental; $400 on pictures, paintings, and fire screens; and $200 on wearing apparel of self and family,—an amount not exceeding $1,200. One provision of the policy is that it shall be void "in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after loss." Defendant, in his answer, denied that plaintiff on his part performed all the conditions of said policy, and, further answering, alleged that subsequent to the fire, and prior to the commencement of this action, plaintiff presented to defendant a written statement, subscribed and sworn to, in which he asserted that the damage by the fire to the property insured was $1,845.75, and thereupon demanded payment of the sum of $1,200, the full amount for which said property was insured by defendant; and defendant alleged that said statement was false and fraudulent, in that the damage to said property by said fire did not exceed the sum of $350. On the trial the plaintiff, in his own behalf, testified that the property insured and lost by the fire was of the value of $2,000. Defendant introduced evidence which tended to prove that the value thereof did not exceed $350. The court instructed the jury that if they should render a verdict in favor of the plaintiff, then they should find upon the following particular questions of fact: "*First.* At the time of the fire in the complaint alleged, to wit, the fire in the Chenery street house, what was the cash market value of the furniture in said Chenery street house? *Second.* At the time of the fire alleged in the complaint, to wit, the fire in the Chenery street house, what was the cash market value of the pictures, paintings, and fire screens in said Chenery street house? *Third.* At the time of the fire in the complaint alleged, to wit, the fire in the Chenery street house, what was the cash market value of the wearing apparel in said Chenery street house?" The jury returned a general verdict in favor of the plaintiff for $500. In addition to the general verdict the jury answered the interrogatories propounded to them, as above stated, as follows: "*First.* At the time of the fire in the complaint alleged, to wit, the fire in the Chenery street house, what was the cash market value of the household furniture in said Chenery street house? Answer. $250. *Second.* At the time of the fire in the complaint alleged, to wit, the fire in the Chenery street house, what was the cash market value of the pictures, paintings, and fire screens in said Chenery street house? Answer. $150. *Third.* At the time of the fire in the complaint alleged, to wit, the fire in the Chenery street house, what was the cash market value of the wearing apparel in the Chenery street house? Answer. $100." Immediately upon the entry of the general and special verdicts of the jury, defendant moved the court for judgment for defendant, on the ground that the verdict conclusively finds fraud upon the part of plaintiff, which was not granted, and judgment was entered for the sum of $500.

The Code provides: "When a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." Code Civil Proc. § 625. This proceeding is not authorized in any other case, and the general and special verdicts in this case are entirely consistent. The special verdict finds the total value of the property insured and destroyed to be the sum of $500, and the general verdict is for that sum. If, in their special verdict, the jury had found the value of the property to be less than $500, and had rendered a general verdict for that or a greater sum, it would as clearly be within the provision above quoted as it now as clearly is not. All that can now be said is that the jury found that plaintiff's loss was not so great as he represented it to be. That was favorable to the defendant. We think that finding was not conclusively a finding of fraud on the part of the plaintiff. Standing alone, it shows that he overestimated his property. Whether or not that vitiated the policy of insurance was a question not involved in the motion for judgment for the defendant upon the verdict. That motion, as we have before stated, could not be granted on any other ground than the one specified in the Code, viz., inconsistency between the general and special verdicts. The motion was properly denied. Judgment affirmed.

We concur: De Haven, J.; McFarland, J.

SAN GABRIEL VALLEY LAND & WATER CO. v. WITMER BROS. CO. (No. 14,324.)

(Supreme Court of California. Dec. 2, 1892.)

Rights of Mortgagors—Taxes on Mortgagee's Interest—Payment.

1. In an action to recover taxes assessed to defendant on its mortgage interest, but which plaintiff, as owner, paid to prevent becoming delinquent, the validity of the tax was questioned on the ground that the description of the mortgaged land varied from that contained in the mortgage. The mortgage, dated March 8, 1887, described the land according to the government survey. The land had afterwards been divided by plaintiff into blocks and town lots, and the subsequent assessment described the land as such blocks and lots. It was agreed that the land assessed constituted the identical land described in the mortgage, and no more, and that the assessment was in substantial conformity with the statute, and in proper form for the assessment of a mortgage interest in town lots. *Held*, that the description was sufficient. 29 Pac. Rep. 500, affirmed.

2. Pol. Code, § 3627, which gives the owner of the property the privilege of deducting the amount of the taxes so paid from the mortgage, is permissive, and not mandatory, and does not prohibit an action to recover the same. Beatty, C. J., and Harrison and Paterson, JJ., dissenting. 29 Pac. Rep. 500, affirmed.

3. Under Pol. Code, §§ 3627, 3628, which required the mortgage to be assessed to the person who owned it on the first Monday of March, where defendant owned the mortgage on that day, the subsequent assignment thereof did not relieve defendant of its liability for the payment of the taxes. Beatty, C. J., and Harrison and Paterson, JJ., dissenting. 29 Pac. Rep. 500, affirmed.

4. Pol. Code, §§ 1837, 2654, required road taxes and special school taxes to be levied by the supervisors, and to appear on the assessment book, and section 3789 made such book prima facie evidence of the assessment, and of the amount of unpaid taxes, and of the fact that all the forms of law in relation to the assessment and levy had been complied with. *Held*, that where the assessment book, in due form, was in evidence, and there was no evidence tending to overcome such prima facie evidence, there was sufficient proof of the validity of such road and school taxes. 29 Pac. Rep. 500, affirmed.

On rehearing. Affirmed.

Per Curiam. After further consideration, we adhere to the opinion heretofore prepared by Commissioner Vanclief, and adopted by the court at the former hearing, (29 Pac. Rep. 500,) and for the reasons stated in that opinion the judgment and order appealed from are affirmed.

Harrison, J. I dissent upon the reasons stated by me at the former decision of the case.

Beatty, C. J. I dissent. The case turns altogether upon the meaning of section 4, art. 13, of the constitution, which reads as follows: "Sec. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other *quasi* corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected is situated. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security. If paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and, to the extent of such payment, a full discharge thereof: provided, that, if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year." This section of the constitution not only defines the reciprocal rights and obligations of mortgagor and mortgagee with respect to the payment of the taxes assessed or assessable against their respective interests in the mortgaged premises, but was evidently intended to provide a simple and effective remedy for their enforcement. As security for the collection of the whole tax on both interests, the state reserves to itself a first lien upon the land,—a lien superior to the mortgage lien. To secure the mortgagee for taxes paid on the mortgagor's interest, the effect of these provisions is a virtual transfer to him of the claim and lien of the state by tacking it to the mortgage. But, the whole section being intended mainly for the benefit of the mortgagor, we find, as we should naturally expect to find, that especial pains have been taken to secure the enforcement of his right. His land being subjected to a lien in favor of the state, not only for the tax which it is his duty to pay, but also for the tax which it is the duty of the mortgagee to pay, he must, for his own protection, see that both are discharged. It is therefore provided that he may pay the tax on the mortgagee's interest, and that such payment shall count as a payment on, and as a full discharge *pro tanto* of, the mortgage debt. This is an ample and perfect remedy and protection to the mortgagor when he desires to pay off his mortgage at any time after the accrued taxes have become payable. He has only to pay the tax assessed to the mortgagee, and deduct the sum so paid from the amount of his debt. But there was another case to be provided for. It was foreseen that payment of mortgages would frequently be made after the taxes had accrued and become a lien, and before they were payable, or their amount ascertained by the order establishing the rate and making the levy. The taxes for each fiscal year accrue on the first Monday of March, preceding, (Const. art. 13, § 8,) and, when assessed, take effect and become a lien from that date, (Pol. Code, § 3718;) but, the rate to be levied being dependent upon the amount of the assessment, the levy cannot be made until assessments have been equalized, and the roll completed. The statute accordingly designates the first Monday of October as the date for making the levy. Pol. Code, § 3714. In other words, there is an interval of at least seven months in each year, as the law stands, after the mortgagee's tax has accrued, and before it is payable. And this case, as I have said, was foreseen by the framers of the constitution, and express provision made in the last clause of the section above quoted for the protection of the mortgagor who pays off his mortgage during such interval. Without this provision, he would, no doubt, have had another remedy in case of neglect by the mortgagee to pay the tax assessed upon the security; that is, he could have paid the tax himself, and have recovered it back in an action against the mortgagee for money paid. The authorities cited in the commissioner's opinion fully sustain this proposition. But this remedy would always be expensive and vexatious, and often ineffectual, by reason of the insolvency of the mortgagee, and therefore the constitution gave a simpler, an entirely inexpensive, and perfectly efficacious, remedy, by allowing the mortgagor in such case to retain out of the amount due on the mortgage the amount of the accrued taxes, computed according to the tax levy of the previous year.

The question is whether this remedy is exclusive; whether, in other words, the new remedy so given has the effect of abrogating the remedy which the law would have afforded in the absence of any such constitutional or statutory provision; and this, in my opinion, depends upon whether the change of remedy also involves a change of right. If a remedy exists for the enforcement of a right, the provision of a new remedy for the enforcement of the same right by a statute permissive in its terms does not abrogate the existing remedy. But if the statute changes the right,—if it gives a new and different right in place of the old one, and at the same time provides a new remedy, perfectly adapted to the complete enforcement of such new right,—the statutory remedy then becomes exclusive. What, then, is the effect upon the rights of the parties to a mortgage of the proviso at the end of section 4, art. 13, of the constitution? Does it or does it not change the right of the mortgagor? It is clear, in my opinion, that it does. Without it a mortgagor paying his debt after assessment and before levy would, in case of the failure or refusal of the mortgagee to pay the tax subsequently levied on his security, have the right to free his land of the lien by paying such tax himself, and then to recover the sum so paid in an action against the mortgagee. In other words, the measure of the reciprocal right and obligation of the parties would be the tax levy for the current year. But the proviso under consideration creates a different right, and necessarily a different obligation. It empowers the mortgagor to retain the amount of the mortgagee's assessment, computed according to the rate levied the previous year. This may be more or may be less than the actual levy for the current year. It will seldom be the same, and may sometimes be very considerably greater or less. Whatever it is, however, the mortgagor may retain it, and the mortgagee must submit to the deduction. Though both parties may have the best reason to believe that the rate of levy for the current year will not be half that of the previous year, the mortgagor may nevertheless retain an amount computed according to the old rate, and it is not pretended that the mortgagee can, after the new levy, recover the difference. If this is so,—if the mortgagee must submit without redress to all the burdens of a rule enacted for the advantage of the mortgagor,—it would seem that he ought also to enjoy its benefit. The mortgagor, if he can always take according to the previous year's levy when he finds his advantage in so doing, ought not to be allowed to take according to the levy for the current year when that happens to be to his advantage. The rule, to be fair, ought to be invariable, and, in my opinion, it is. What the mortgagee must give the mortgagor must take. It was never intended to establish two standards of compensation, to either of which the mortgagor may resort, as his interest may dictate. On the contrary, it is much more reasonable to hold that the constitution fixes one exact measure of the rights and obligations of the parties, which is equally binding upon both.

If this conclusion is well founded, it follows that the question first above stated must be answered in the negative for two reasons: The mortgagor paying his debt after assessment and before levy cannot neglect to retain the taxes computed according to the levy of the previous year, and afterwards maintain an action to recover the taxes subsequently assessed and paid—*First*, because such subsequently assessed tax is not the sum which he is entitled to receive; and, *second*, because the constitution has given him an exclusive remedy for the enforcement of the right (to retain an amount computed according to the previous year's levy) which it has substituted for that which he would otherwise have had. The reasons for this conclusion are greatly strengthened by its expediency. It is not only advantageous to the parties; it is emphatically to the interest of the public to avoid and discourage unnecessary litigation. The mortgagor, having in his own hands the absolute power to protect himself, should not be allowed to deliberately disregard the constitutional provisions for his security in order to vex the public tribunals with a gratuitous lawsuit. The mortgagor who purposely neglects to avail himself of the proviso under consideration is entitled to no more favor than one who has actually paid taxes on the mortgagee's interest before he pays his debt, and yet deliberately omits to deduct the amount so paid for the purpose of suing to recover it back. Each case in fact stands upon precisely the same footing. In each the mortgagor at the time of paying his debt knows that there is a certain fixed sum which he is entitled to deduct from the total amount secured,—a sum in no way dependent as to its amount upon future contingencies. Why should he be allowed in one case any more than in the other, after making a purely voluntary payment of such sum, to maintain an action to recover it back? It will be observed that I speak of a voluntary and deliberate payment, and I do so for the reason that such is the case before us. If the payment of the whole amount of the debt without deduction of the taxes had been induced by any fraud or duress or mistake, or if the deduction had been waived in consideration of a promise by the appellant to pay the tax subsequently levied, the case would have been essentially different.

In the case of Blythe v. Luning, 7 Sawy. 504, 14 Fed. Rep. 281, the mortgagor paid the whole debt under protest, and under what seems to have been regarded as a species of duress, the mortgagee refusing to satisfy the mortgage upon any other terms, and thereby preventing the mortgagor from making use of his property. The conduct of the mortgagee in that case may well have justified the decision, and I should myself be disposed to uphold an action based upon the same or analogous grounds. If the mortgagor is forced to pay by duress; if he pays in ignorance of his rights, or is induced by any fraud or promise to pay without making the deduction,—I should say that he was entitled to recover, not the sum which he afterwards actually pays on account of the mortgagee's taxes, but the sum which he overpaid by the mistake, etc., or the sum which the mortgagee has agreed to pay in consideration of his forbearance. I cannot, however, bring myself to the view that the constitution gives a double right to the mortgagor, by which he is enabled to take out a sum computed according to the levy of the previous year if he so desires, or, if it appears more profitable, waive his right of deduction for the chance of recovering a larger sum by action. The constitution was not designed to encourage that kind of speculation.

These views, if correct, are decisive of the present appeal, and a discussion of the second question above stated might be dispensed with. But it will throw some additional light upon the meaning of the constitution to consider the effect of its provisions upon the rights and duties of an assignee of the mortgage who holds it at the time of payment by assignment made subsequent to the assessment. It is plain that in such case the assignment does not impair the right of the mortgagor to deduct the tax at the time of paying his debt, and the parties to the assignment necessarily treat with reference to the known right of the mortgagor and the corresponding liability of the holder of the mortgage. The assignee will not pay, and the assignor cannot expect to receive, more than the amount of the debt, less the amount which the mortgagor has the right to deduct. The necessary effect of the constitution, therefore, is not only to compel the person who holds the mortgage at the time of payment to submit to a deduction of his accrued tax, but also to compel each successive owner of the security to pay such tax to his assignee at the time of the transfer. This being so, it would be a manifest injustice to compel him to pay it a second time, but this is precisely what the respondent is seeking to do if the fact is such as, in the absence of evidence to the contrary, it must be presumed to be. The appellant has already paid its tax to its assignee. The assignee necessarily assumed the duty of paying it to respondent, and respondent had the absolute right and power to compel it to pay. Instead of standing on its right, it releases the assignee, and seeks to compel the appellant to pay twice. Thus, upon the theory that the mortgagor may at his option deduct the mortgagee's tax computed according to the levy of the previous year, or sue for the actual amount subsequently levied, a rule sufficiently unequal and unfair between the original parties to the mortgage is made to operate with still greater injustice between parties by assignment. The only answer to this proposition is that the assignor can protect himself by exacting a special agreement on the part of the assignee to refund the amount of the accrued tax in case the mortgagor shall not elect to deduct it at the time of payment. It is true that he might protect himself in this way, but to hold that he must do so is to assume that the framers of the constitution intended to plant in every assignment of a mortgage the seeds of future litigation. In the face of a provision evidently designed to secure absolutely the rights of the parties without litigation, it ought not to be held that a part of the scheme was to make a transaction so usual, so legitimate, and often so necessary, as the assignment of a mortgage, impossible, except upon conditions involving a new subject of contention.

A great part of the argument of the respondent to sustain his claim against the assignor of the mortgage is devoted to the proposition that the tax levied upon the mortgagee's interest becomes and remains a personal liability to the state. The question whether a tax is a debt or personal liability of the person assessed depends altogether upon the statutory provisions for the time being; but the question here is not as to the construction of our revenue laws, but is wholly as to the meaning of a clause of the constitution. It is plain that the constitution compels the holder of the mortgage to pay the accrued tax, or what is treated as its equivalent, to the mortgagor at the time the mortgage debt is paid. He is at the same time compelled to satisfy and discharge the mortgage. Can it be supposed that the framers of the constitution, while making it compulsory upon him to pay his tax to the mortgagor, and surrender his security, intended still to hold him personally liable to the state for the same tax? Such a conclusion is little short of absurd, and it seems equally so to suppose that such personal liability was intended to be contingent upon the choice of the mortgagor to deduct or not to deduct the accrued tax at the time of paying his debt. On the contrary, it seems to me clear that, as to this particular tax at least, the constitution intends that the state shall rely for its enforcement upon its lien on the mortgaged premises,—a security which is more than sufficient in every case. Upon this view of the constitution, the rights of all parties, including the state, are amply secured without the necessity of any legal proceedings. Upon the opposite view,—the view that the mortgagor has an option as to the amount he shall take, and the time when and person from whom he shall take it,—all is uncertainty and confusion. There should be no hesitation in adopting the view which leads to certainty, security, and substantial justice in preference to that which involves uncertainty, insecurity, and inevitable injustice. My conclusion is that, if a mortgagor intentionally and deliberately omits to deduct the tax accrued upon the mortgagee's interest at the time of payment, he cannot afterwards maintain an action to recover it. If he pays his debt without deduction of the tax by mistake or fraud or under duress, he may have an action to recover back the overpayment, but in such case his right of action is against the party to whom the overpayment was made,—in this case the State Loan & Trust Company. The judgment and order of the superior court should be reversed.

We concur: PATERSON, J.

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95 Cal. 521

BLONDEAU v. SNYDER et al. (No. 14,670.)

(Supreme Court of California. Aug. 5, 1892.)

FORECLOSURE—PERSONAL JUDGMENT—CORRECTION.

A complaint in foreclosure alleged conveyance of the mortgaged premises to defendant, subject to the mortgage, but without anything further tending to show personal liability. The prayer, however, included a demand for personal judgment, and this was specified also in the summons. *Held*, that a judgment finding defendant personally liable, though erroneous, was not void, and could be corrected only on appeal or motion, within the time limited by Code Civil Proc. § 473.

Department 2. Appeal from superior court, San Diego county; E. S. TORRANCE, Judge.

Action by Bernard S. Blondeau against Frances Snyder and others. Judgment for plaintiff. Order afterwards striking out certain portions of the judgment, from which plaintiff appeals.

Hendrick & Younkin and *T. J. Capps*, for appellant. *Wellborn, Stevens & Wellborn*, for respondents.

DE HAVEN, J. Appeal from an order made May 15, 1891, striking out certain portions of a judgment rendered November 14, 1888. The defendants were personally served with summons in the action in which the judgment was rendered. The action was one for the foreclosure of a mortgage executed by one B. F. Snyder in his lifetime, and it was alleged in the complaint that Snyder in his lifetime "conveyed the real estate specified in said mortgage to one Rosa A. Woodford, subject to said mortgage, who is now the legal owner of said real property." The prayer of the complaint was that the mortgage be foreclosed and the real estate sold, "and the proceeds applied to the payment of said sums of money and costs of this action, and that the said plaintiff may have judgment and execution against the said defendant for any deficiency," etc. The summons followed the prayer of the complaint, and gave notice that the action was brought to obtain a decree of foreclosure of the mortgage and for a sale of the premises, and, if the proceeds of the sale were insufficient, to obtain a judgment against the defendant Snyder "and Rosa A. Woodford for the balance remaining due," etc., and that upon their default the plaintiff would apply to the court for the relief demanded. The action was dismissed as to defendant Snyder, and the defendant Woodford did not appear, and her default was entered. The court, in its decree, found "that there is now due and owing to the plaintiff * * * from the defendant Rosa A. Woodford, upon the promissory notes and for money expended under the terms of said mortgage, as set forth and described in plaintiff's complaint, the sum of $2,116.65, and that the defendant Rosa A. Woodford is liable for the amount thereof." This portion of the judgment was stricken out by the order appealed from, and it is claimed by respondent that, as the complaint did not state any facts showing a personal liability upon the part of Rosa A. Woodford for the payment of said notes, the court was without jurisdiction to find such liability by its judgment, and that the judgment was and is in this respect absolutely void. This contention cannot be sustained. The judgment in this respect was within the relief demanded in the complaint and specified in the summons, and the court had jurisdiction, and, indeed, was required to determine in that action whether, upon the facts alleged, the plaintiff therein was entitled to the relief which he demanded in his complaint. The court undoubtedly committed an error in finding such personal liability, but its judgment was not for this reason void. The error could have been corrected upon appeal from the judgment, or upon a proper showing by motion, if it had been made within the time limited by section 473 of the Code of Civil Procedure; but it is now too late to do so by motion. The entry in the judgment docket, as to the defendant Snyder, was unauthorized, and as to her the order will be affirmed. As to the defendant Rosa A. Woodford, the order appealed from is reversed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

3 Cal. Unrep. 708

WILKES v. TIBBETS et al. (No. 19,091.)

(Supreme Court of California. Dec. 21, 1892.)

Review on Appeal—Matters not Apparent of Record.

Where the transcript shows that the findings of fact cover all the issues raised by the pleadings, and the judgment follows and is in conformity with the findings and conclusions of law drawn therefrom, affidavits, though contained in the transcript, claiming that a litigant had been erroneously denied a jury trial by the court, will not be regarded on appeal, where it does not appear that the affidavits were served on the adverse party, or were filed in court or certified to as having been used at the hearing on a motion for a new trial.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by C. R. Wilkes against Luther C. Tibbets and another. From a judgment against them, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

L. C. Tibbets, in pro. per., and *A. B. Paris* for appellants. *W. A. Purington* and *J. Ludewig Koethen*, (*Walter L. Koethen*, of counsel,) for respondent.

Belcher, C. This is an appeal by the defendants from a judgment entered against them, and an order denying their motion for a new trial. The transcript contains the judgment roll, a notice of intention to move for a new trial, an order denying a new trial, and certain affidavits. The findings recite that: "This cause came on regularly for trial on the 20th day of May, 1891, before the court without a jury; a jury trial having been waived by the parties." And the judgment recites that, "a trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury." The findings of fact cover all the issues raised by the pleadings, and the judgment follows and is in conformity with the findings and conclusions of law drawn therefrom.

The notice of intention to move for a new trial states that the motion will be made upon the following grounds: (1) Irregularity in the proceedings of the court; (2) order of court and abuse of discretion by which defendants were prevented from having a fair trial; (3) surprise, which ordinary prudence could not have guarded against; (4) errors in findings; (5) error in the judgment. The notice further states that the motion will be made upon affidavits. The affidavits are to the effect that, before the case came on for trial, the defendant Luther C. Tibbets duly demanded a jury trial, and that a *venire* was issued, and 16 jurors were summoned and were in attendance on the day set for the trial; that when the case was called for trial the said defendant asked to have a jury impaneled, but the court refused to comply with his request, and ordered him to pay the amount of the jurors' fees, $21, into court before he could be allowed to make his defense to the action; that he paid the said $21 into court, and the jurors were then discharged by the court, against the will, and without the consent, and in opposition to the demand of defendant; and that the said order of the court was an abuse of discretion, by which the defendants were prevented from having a fair trial. It is further stated that the court erred in making several of its findings, and that the facts found were not true; also, that it erred in its judgment, in stating that a trial by jury was expressly waived by the respective parties. Appellants contend that, in view of the facts shown by these affidavits, the judgment should be reversed, and the cause remanded for a new trial. Conceding, without deciding, that the point can be made on affidavits that a litigant has been erroneously denied a jury trial, still a conclusive answer to appellants' contention is that, while the affidavits here relied on are found in the transcript, it does not appear that they were ever served on the adverse party or filed in court, nor are they in any way certified to or identified as having been used on the hearing of the motion. This being so, they cannot be looked to here for any purpose, but must be wholly disregarded. Johnson v. Muir, 43 Cal. 542; Baker v. Snyder, 58 Cal. 617. The judgment and order appealed from should be affirmed.

We concur: Haynes, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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97 Cal. 62

ROBINSON v. TEMPLAR LODGE No. 17, I. O. O. F. (No. 14,285.)

(Supreme Court of California. Dec. 20, 1892.)

Odd Fellows' Association—Sick Benefits—Decision of Appellate Tribunal.

In an action against a lodge of Odd Fellows to recover a sick benefit, the complaint alleged that, in the government of subordinate lodges of the Independent Order of Odd Fellows, there are various appellate tribunals to review the action of subordinate lodges in failing to pay sick benefits, and that plaintiff, upon the failure of defendant lodge to pay him sick benefits, invoked the jurisdiction of said tribunals, and litigated his claim before them, and that they adjudged that plaintiff was not entitled to his claim, or any part thereof. *Held* that, by this allegation, the submission to this tribunal was a submission to arbitration and its decision and award, which, in the absence of fraud or mistake, is binding on plaintiff.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action by one Robinson against Templar Lodge No. 17, I. O. O. F., to recover a sick benefit. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Geo. D. Collins, for appellant. *James G. Maguire* and *Davis Louderback*, for respondent.

DE HAVEN, J. This is an action to recover "sick benefits." The superior court sustained a demurrer to the complaint, and thereupon rendered judgment in favor of defendant. The complaint alleges that defendant is a subordinate lodge of the Independent Order of Odd Fellows, of the state of California; that it is an unincorporated association of individuals, organized for the purpose of benevolence and mutual assistance, that in the year 1863 the plaintiff became, and ever since has been, a member in good standing of said lodge, and that "said defendant made and executed a written contract with plaintiff, whereby, in case plaintiff became sick while he was a member of said lodge, and was thereby rendered incapable of earning a livelihood, he was to receive and become entitled to the sum of $10 per week, * * * to be paid him by said lodge, as and for sick benefits, during such time as he was a member of said lodge, in good standing, and continued sick." The complaint then alleges that upon March 6, 1878, plaintiff became sick, and has since that date, continuously, by reason of sickness, been rendered incapable of earning a livelihood, and that defendant has failed to pay to him the said sum of $10 per week benefits since July 2, 1879, and on June 20, 1883, defendant "arbitrarily removed plaintiff's name from its sick list." After thus stating what plaintiff claims to have been the contract between himself and defendant, and its breach, the complaint proceeds to allege that, in the government of subordinate lodges of the Independent Order of Odd Fellows, "said order has established various tribunals, appellate in character, to review and revise the action of subordinate lodges, including defendant, in failing to pay sick benefits to members, and provided that all members of defendant lodge should have the right to resort to said tribunal for redress in case of failure of defendant to pay sick benefits, * * * and that plaintiff, immediately upon the failure of defendant to pay him sick benefits, invoked the jurisdiction of said tribunals for the purpose of obtaining relief respecting the failure of defendant to pay sick benefits," and "litigated his claim to sick benefits before the tribunals of said order, and as a result thereof plaintiff was unable to obtain any relief whatever respecting said sick benefits, and the payments thereof; that the said tribunals of said order adjudged and determined on the 16th day of June, 1890, that the plaintiff was not entitled to the payment of his said claim for such benefits, or any part thereof."

It is not alleged that the defendant here has any provision in its by-laws to the effect that the benefits which it agrees to pay to its members in case of sickness shall not be payable except upon the favorable report or recommendation of some committee of the order specially authorized by its constitution or by-laws to investigate such claims for benefits. But on the contrary it will be noticed that by the terms of the contract between plaintiff and defendant, as stated in the complaint, the plaintiff was under no obligation to resort in the first instance to the tribunals established by the laws of the order under which defendant was organized, or even to make any demand upon defendant for the benefits claimed, other than by the commencement of an action therefor in some court of competent jurisdiction. It is, however, alleged in the complaint, as we construe it, that plaintiff did voluntarily submit his claim against defendant to the decision of the tribunals of the order of which he became a member when he joined the defendant lodge, and that such tribunals "adjudged and determined" that he was not entitled to the payment of the benefits now claimed, or to any part thereof. The question, therefore, is, what effect has this determination upon the right of plaintiff to maintain the action? It does not appear that plaintiff made any express agreement to be bound by the determination of the tribunals referred to; but we think that, when he voluntarily submitted to them for decision the differences which existed between himself and defendant, there was an implied agreement upon his part to be bound by their judgment or award, in the absence of any fraud or mistake or other cause which in equity would entitle him to avoid the same. "Where a matter is submitted to arbitrators, it is not necessary that there should be any express agreement to abide by the award when made; for the law implies such an agreement from the very fact of submission." Valentine v. Valentine, 2 Barb. Ch. 430. It would seem from the allegations of the complaint that the tribunals whose jurisdiction plaintiff invoked are established for the purpose of settling all matters of difference which may arise between a subordinate lodge and any of its members, growing out of a refusal upon the part of the lodge to pay benefits claimed, if the member consents to submit such matter to them for settlement; and it seems clear to us that plaintiff's voluntary submission of his claim for benefits to their decision was in the nature of a submission to arbitration, and their decision in the nature of an award, and should be considered equally conclusive. It is not alleged that there was any misconduct upon the part of those to whom he submitted the justice of his claims, or that there was any fraud or mistake in the award itself, or that, for any reason, the matters in difference between himself and defendant were not fully and fairly tried. Judgment affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

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95 Cal. 471

PEOPLE ex rel. ATKINSON v. JOHNSON, County Auditor. (No. 19,011.)

(Supreme Court of California. Aug. 3, 1892.)

CONSTITUTIONAL LAW — DELEGATION OF DUTY BY LEGISLATURE — COUNTY OFFICERS — COMPENSATION—MOTION FOR JUDGMENT.

1. Act March 31, 1891, allowing boards of supervisors to fix the compensation of constables in certain counties, is void under article 11, § 5, of the constitution, as a delegation of the duty of regulating the compensation of such officers, expressly confided to the legislature. Dougherty v. Austin, (Cal.) 29 Pac. Rep. 1092, followed.

2. Whether said act is void, under article 11, § 9, in allowing an increase in the compensation of such officers after their election, or during their terms of office, does not arise in a case where the answer alleges that the compensation had been in fact diminished, and plaintiff has moved for judgment on the pleadings, since the effect of this is to admit the averments of the answer.

Department 2. Appeal from superior court, Santa Barbara county; W. B. COPE, Judge.

Action on relation of Richard E. Atkinson to enjoin J. T. Johnson, county auditor of the county of Santa Barbara, from issuing certain warrants under an ordinance of the board of supervisors. Plaintiff moved for judgment on the pleadings, which was granted. Defendant appeals. Affirmed.

A. E. Putnam and *Richards & Carrier*, for appellant. *W. H. H. Hart*, Atty. Gen., and *J. W. Taggart*, for respondent.

PER CURIAM. The question involved in this case is the validity of an ordinance of the board of supervisors of Santa Barbara county, made April 10, 1891, fixing the salaries of the constables of the various townships of the county for their services in criminal cases. In each of the townships 1, 3, and 8 the annual salary for such services was fixed at $24, in No. 2 at $480, and in each of the remaining townships specific sums, varying in amounts. This order was made pursuant to subdivision 14 of section 183 of "An act to establish a uniform system of county and township governments" approved March 31, 1891, (Laws 1891, p. 377,) which subdivision reads as follows: "(14) Constables. A salary to be fixed by the board of supervisors, and paid monthly out of the salary fund, as the salaries of the county officers are paid, such salary to be in full compensation for all services of any kind, nature, or description required of them by law in criminal cases; and said constables shall be allowed to charge and receive for their own use such fees as are now or may hereafter be allowed by law for all services performed by them in civil cases. The provisions of this subdivision shall take effect from and after the approval of this act." Section 183, of which the foregoing subdivision is a part, relates only to counties of the twenty-first class, to which class the county of Santa Barbara belongs. Alonzo Crabb and C. H. Kelton were duly elected constables of township No. 2, in said county, for the term of two years, beginning on the 5th day of January, 1891,—three months and five days before the date of the order. Prior to the commencement of the action, the defendant, as county auditor, had drawn several warrants to each of said constables for monthly installments of $40 each, and this suit was brought to enjoin the further issuance of warrants under said order. The complaint, in addition to the foregoing facts, alleged that the compensation for services rendered by constables in criminal cases in said county was fixed by section 23 of an act entitled "An act to regulate fees of office and salaries of certain officers, and to repeal certain other acts in relation thereto," approved March 5, 1870; that the fees to which said constables were legally entitled were less than the said sum of $40 per month; that the board of supervisors had no authority of law to make said order; and that it was in violation of sections 5 and 9 of article 11 of the constitution of the state of California, and, therefore, null and void. The defendant interposed a general demurrer to the complaint, which was properly overruled, and thereupon filed an answer admitting the making of said order by the board of supervisors, averring that they had authority to make it; that said constables were entitled to the compensation thereby fixed; and further alleging that said compensation was less than that they had theretofore received, or would have been entitled to receive under the act of 1870. Plaintiff moved for judgment on the pleadings, which was granted, and defendant appeals.

There is no question that the order of the board of supervisors conformed to subdivision 14 of section 183 of the said act of 1891, and therefore the sole question is as to the constitutionality of that subdivision of said section. The answer having raised an issue as to whether the compensation of these officers was increased or diminished by the order, the answer alleging affirmatively that it was less, plaintiff's motion for judgment on the pleadings admitted this averment of the answer. Fleming v. Wells, 65 Cal. 339, 4 Pac. Rep. 197; Ward v. Flood, 48 Cal. 46; Taylor v. Palmer, 31 Cal. 257. It follows, therefore, that the order in question cannot be held violative of section 9 of article 11 of the constitution, which prohibits an increase of salary of an officer after his election or during his term of office. Said subdivision 14 of section 183 of said act, upon the constitutionality of which the validity of said order depends, is, however, clearly obnoxious to section 5 of article 11 of the constitution, as alleged in the complaint. This section of the constitution is as follows: "The legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of boards of supervisors, sheriffs, county clerks, district attorneys, and such other township and municipal officers as public convenience may require, and shall prescribe their dutes, and fix their terms of office. It shall regulate the compensation of all such officers in proportion to duties, and for this purpose may classify the counties by population. * * *" In the recent case of Dougherty v. Austin, (Cal.) 29 Pac. Rep. 1092, in which the opinion upon rehearing was filed May 30, 1892, this provision was carefully considered and very fully discussed. In that case the question arose upon an order made by the board of supervisors of Marin county, providing for the appointment of a deputy county clerk at a salary of $50 per month, payable out of the county treasury, which order was made under section 211 of the county government act, as amended in 1887, (St. 1887, p. 207.) That case, it is true, also involved the consideration of section 9 of article 11, which, as we have seen, does not arise in this case; but in all other respects the questions in that case and in this are the same. In Dougherty v. Austin, it was held that section 5 of article 11 above quoted, imposed upon the legislature the duty of regulating the compensation of the officers there named or designated in proportion to duties; that this provision was mandatory, and could not be delegated to the board of supervisors; and, under the authority of that case, subdivision 14 of said section 183 must be held to be in conflict with section 5 of article 11 of the constitution, and therefore void.

Judgment affirmed.

McFARLAND, J., did not take part in the decision.

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3 Cal. Unrep. 520

NAFTZGER v. GREGG et al. (No. 14,705.)*
SAME v. MONTAGUE et al. (No. 14,704.)

(Supreme Court of California. Aug. 4, 1892.)

ACTION ON NOTES—PLEADING—RES JUDICATA.

1. In an action on two notes the answer admitted the allegations in the complaint, but set out a contract for a deed to defendant from plaintiff, with the averment that the execution of the contract and the making of the notes were parts of the same transaction, and that the contract was the only consideration for the notes, and that no deed had been tendered by plaintiff. *Held*, that the complaint was defective, and presented no cause of action, in that it did not set out the contract, and allege performance by plaintiff of its conditions.

2. Where a judgment for defendant has been rendered in an action on notes because the complaint did not set out the contract under which the notes were given, and allege performance of its conditions, which performance was necessary for a recovery upon the notes, and where there is no issue tendered in the complaint or answer as to the performance of this condition, this judgment is no bar to an action on the notes and the contract.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Two actions by A. N. Naftzger against W. F. Montague and others on two promissory notes. From a judgment for defendants in both actions, plaintiff appeals. Affirmed as to one action and reversed as to the other.

E. B. Stanton and *Chapman & Hendrick* for appellant. *Goodcell & McIntyre*, for respondents.

VANCLIEF, C. The above-entitled causes between the same parties and relating to the same subject-matter will be considered together for convenience, if not of necessity. As No. 14,705 was first tried, it will be first stated. It is an action upon two promissory notes made by the defendants, each for $2,500, dated September 8, 1887, one payable one year, and the other two years, after date. It was commenced March 10, 1890. The complaint is in two counts in the usual form, and is, on its face, sufficient. The answer of the defendants expressly admits each and every allegation of the complaint, but alleges that there was no consideration for said notes, or either of them, other than a written contract of even date with the notes, whereby the plaintiff agreed to sell and convey to the defendants, and the defendants agreed to buy from plaintiff, a certain lot or parcel of land, and to pay therefor $7,000,—$2,000 upon the execution of the contract, $2,500 in one year, and $2,500 in two years, from date of contract; the deferred payments being evidenced by the two notes described in the complaint. A copy of the contract is exhibited as a part of the answer, and contains the following: "In the event of a failure to comply with the terms hereof by the said parties of the second part, [defendants,] the said party of the first part shall be released from all obligations in law or equity to convey said property, and said parties of the second part shall forfeit all right thereto; and the said party of the first part, on receiving such payments at the time and in the manner above mentioned, agrees to execute and deliver to the parties of the second part, or to their assigns, a good and sufficient deed conveying said land free and clear of all incumbrances made, done, or suffered by the said party of the first part; * * * and that time is of the essence of this contract." The answer further alleges that the defendants paid $2,000 at the time the contract was executed, and that "the plaintiff has not executed to the defendants the deed provided for in said contract, or any deed of conveyance of said land, or any part thereof." The court found as facts the execution of the contract; that defendants paid thereon, at the time it was executed, $2,000; that the notes in suit were given at the same time, as a part of the same transaction; and that "the plaintiff has not executed to the defendants the deed provided for in said contract, or any deed of conveyance of said land, or any part thereof;" and as conclusions of law found "that the plaintiff is not entitled to any relief in this action," and "that the defendants are entitled to judgment against the plaintiff for their costs;" and rendered judgment accordingly on July 29, 1890. The plaintiff appealed from this judgment on July 9, 1891, upon the judgment roll, without a bill of exceptions.

No. 14,704 is an action (commenced October 11, 1890) upon the same two promissory notes to recover the amount alleged to be due thereon, and to enforce the vendor's lien upon the lot described in the contract of sale. The complaint differs from that in the former action (No. 14,705) only in that it sets out the contract of sale, alleges that the notes were made to secure the unpaid purchase money, and "that, after the maturity of said promissory notes, and before the commencement of this action, the plaintiff tendered to said defendants a good and sufficient deed conveying to the defendants the said premises described in the said agreement, free and clear of all incumbrances made, done, or suffered by the plaintiff, * * * and at the same time demanded of said defendants payment of the said promissory notes; but that said defendants then refused, and ever since have refused, to accept the said deed, and then refused, and ever since have refused, to pay the said promissory notes, or any part thereof;" and "that at the time of the maturity of said promissory notes the plaintiff was, and ever since has been, and still is, ready, willing, and able to carry out and perform his said agreement on his part, and to deliver to said defendants a good and sufficient deed conveying said premises to said defendants free and clear of all incumbrances made, done, or suffered by the plaintiff; and he hereby offers to deliver such deed upon payment of said notes." In their answer to this complaint the defendants "admit each and every averment thereof, except that as to the averment that the plaintiff was and is the owner of the land described in said amended complaint these defendants are not sufficiently informed to enable them to answer the same, and therefore they deny that the plaintiff was at any of the times mentioned in the complaint, or that he now is, the owner of said land, or able to convey a good title thereto to defendants." For a further answer they pleaded the former judgment in the above-entitled cause, No. 14,705, as a bar to this action. The plaintiff demurred to each branch of the answer on the ground that it stated no defense. The demurrer was overruled, and the cause was tried by the court. The court found as facts that the former action was between the same parties and for the same cause, and that it was therein adjudged and determined that the averments of the answer therein were true, that the plaintiff had failed to perform said contract of sale on his part, and that he was not entitled to any relief against the defendants on account of said notes or the purchase price of said land; and as a conclusion of law found that by the judgment in the former action the plaintiff is estopped from maintaining this action; and accordingly rendered final judgment in favor of defendants on July 7, 1891. From this judgment plaintiff appealed on July 9, 1891, upon the judgment roll containing a bill of exceptions.

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*Affirmed in banc. See 99 Cal. 83, 33 P. 757.

1. On the appeal from the former judgment (No. 14,705) the appellant contends, in substance, that no defense to the action was either pleaded by defendants or found by the court, and that plaintiff was entitled to judgment upon the pleadings and findings of fact. It is true that the averment in the answer that the plaintiff had not executed to defendants the deed provided for in the contract, and the finding of the court that this averment was true, were entirely immaterial, since the plaintiff was under no obligation to execute the deed until the purchase money was tendered or paid, and could not be put in default without a tender of the purchase money by the defendants. Englander v. Rogers, 41 Cal. 420; Newton v. Hull, 90 Cal. 487, 27 Pac. Rep. 429. But the setting out of the contract, and the averment that the execution of the contract and the making of the notes were parts of the same transaction, and that the contract was the only consideration for the notes, were material, since it thereby appeared that "the covenants of the vendor and vendee were mutual and dependent, and neither could put the other in default, except by tendering a performance in his own part, unless the other party either waived the tender, or by his conduct rendered it unnecessary." Englander v. Rogers, supra. And also that the complaint was defective in that it did not set out the contract of sale, nor aver that plaintiff had tendered to defendants a deed of the land. The averment of this new matter in the answer was a complete defense to the *prima facie* cause of action stated in the complaint, and the finding by the court that this new matter was true supports the judgment. It may be that the plaintiff might have obtained leave to amend his complaint by adding the averment that he had tendered a deed before the commencement of the action, if the fact had been so. But, for some reason which does not appear, he did not so amend his complaint. There was no averment in the pleading of either party, and consequently no finding, as to whether or not the plaintiff had tendered a deed; yet facts were pleaded by defendants, and found by the court, from which it resulted as a legal conclusion that the plaintiff had no cause of action. The plaintiff had failed to set forth that part of the contract which required him to tender a deed as a necessary condition of his right to recover on his notes, and also failed to state that he had performed that condition; and the new matter stated in the answer only partially supplied the deficiency, as it contained nothing in respect to a tender of the deed. It devolved upon the plaintiff to allege and prove that he had tendered a deed; otherwise it did not appear that the defendants were in default. The authorities, in addition to those above cited, which I think warrant this conclusion, are numerous, and a large collection of them may be found in 2 Bing. Real Prop. p. 716, c. 12 et seq.

2. On the appeal from the subsequent judgment (No. 14,704) the appellant contends, first, that his demurrer should have been sustained to that part of the answer which denies that plaintiff was the owner of the land he agreed to sell to defendants, or able to convey a good title thereto, and puts the denial on the ground that "these defendants are not sufficiently informed to enable them to answer the same." Section

437, Code Civil Proc., provides: "If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground." It seems obvious that the denial in this case is not in substantial compliance with the Code, since it does not state that defendants have no belief on the subject sufficient to enable them to answer. But I think the point is of no importance, for the reason that the court made no finding upon the issue attempted to be made by this denial, and placed its decision solely upon the ground that the former judgment is a bar to this action. But the principal point relied upon for a reversal of this judgment is that the evidence does not justify the finding "that the cause of action alleged in the complaint was adjudicated and determined by the prior judgment," and I think this point should be sustained. The only evidence having any tendency to prove this finding was the judgment roll in the former action; and, as we have seen, the only material issues taken or tendered by the answer in that action related to the execution of the contract of sale, and the relation of that contract to the notes upon which that action was brought, it being alleged in the answer that the notes and the contract were executed at the same time, as parts of the same transaction, and that the contract was the only consideration for the notes, so that the notes and the contract were mutually dependent upon each other, and really constituted only one contract. Upon the issue thus tendered the court properly found for the defendants, and there is no exception to this finding. By the exhibition of the contract as a part of the answer not denied it was made to appear that, in order to put the defendants in default as to payment of the notes, the plaintiff was bound to tender (though not to execute) a deed for the land. As to whether the plaintiff tendered a deed before the commencement of that action, there is no allegation in the pleadings, and consequently no issue and no finding. Still, upon the findings that were made, the plaintiff, as above shown, was not entitled to recover on the notes; not, however, because it was determined by the court that he had not tendered a deed, but only because his complaint was defective in that it did not set out the whole contract, and allege that plaintiff had tendered the deed. But, as this defect did not appear upon the face of the complaint, it could not have been reached by demurrer. It therefore became necessary for the defendants to set forth the omitted branch of the contract, as they did; and they might have gone further, and averred that plaintiff had not tendered a deed, and thus have tendered an issue upon which the decision of the court would have been conclusive as to whether the plaintiff had tendered a deed. Gilmore v. Insurance Co., 55 Cal. 123; Schenck v. Insurance Co., 71 Cal. 28, 11 Pac. Rep. 807. But in addition to setting out the omitted part of the contract, the defendants only averred that the plaintiff had not executed the deed. This averment was immaterial. In the former action there was no issue, no admission by the pleadings, nor any finding by the court, as to whether plaintiff had tendered a deed. Nor was it necessary to the judgment rendered in that action that there should have been a finding, either express or implied, upon that question. Counsel for respondents contend, however, that under the pleadings that question might have been tried and determined, and that the judgment is conclusive upon all questions which might have been tried, although not expressly decided. But the judgment roll in the former action furnishes no ground for an implication or presumption that there was any trial or determination as to whether plaintiff tendered a deed. As to that matter the pleadings and the findings are silent, and no decision in regard to it was necessary to sustain the judgment rendered. Under these circumstances, there is not only no presumption that the question was tried, but the record shows that it could not properly have been tried. Meredith v. Ass'n, 56 Cal. 178. I think the former judgment (No. 14,705) should be affirmed, but that the latter judgment (No. 14,704) should be reversed, and the cause remanded for a new trial.

We concur: Haynes, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion it is ordered that the judgment in Naftzger vs. Gregg et al. (No. 14,705) be affirmed, and that the judgment in Naftzger vs. Montague et al. (No. 14,704) be reversed, and said last-named cause be remanded for a new trial.

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3 Cal. Unrep. 622

CAHILL v. COLGAN, State Comptroller.

(No. 14,836.)

(Supreme Court of California. Nov. 22, 1892.)

CLAIMS AGAINST THE STATE—APPROVAL BY BOARD OF EXAMINERS—APPROPRIATION BY LEGISLATURE—POWERS AND DUTIES OF STATE COMPTROLLER.

1. Where the state board of examiners have approved a claim, a subsequent change in the members of the board will not necessitate an approval by the new board to make the claim effective, the board being, in contemplation of law, the same board.

2. Pol. Code, § 672, provides that the state comptroller shall not draw his warrant for any claim unless it has been approved by the board of examiners, or has been "exempted" from the operation of this section. *Held*, that when a claim has been approved by the board, no exemption from the operation of this section need be shown to authorize the comptroller to draw his warrant for it.

3. Where a petition recites that a claim was presented to the board of examiners, approved as chargeable to the state for expenses in a suit in which the state was a party in interest, transmitted with such approval to the legislature, and that the legislature appropriated money "to pay said claim" under an act entitled "An act making an appropriation to pay costs and expenses of suits in which the state is a party in interest," and authorized the comptroller to draw his warrant for the amount appropriated, such a recital sufficiently identifies the claim as the one for which the appropriation was made.

4. Where, in a petition for a claim which has been approved by the board of examiners, the petition states that the amount and "value"

of such services was $504, the word "value" is surplusage, and requires no proof.

5. The approval of a claim by the board of examiners, and an appropriation of money to pay it by the legislature, is conclusive as to the validity of the claim as against the comptroller.

6. Where a judgment contained the recital that it "duly appeared" to the court that the prayer should be granted, the presumption is that the court had sufficient evidence to justify the judgment.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; VAN FLEET, Judge.

Application by P. H. Cahill for a writ of mandate to E. P. Colgan, as state comptroller, commanding him to draw his warrant on the state treasurer in favor of plaintiff for $504. From a judgment awarding a peremptory writ, defendant appeals. Affirmed.

Atty. Gen. Hart, for appellant. *J. C. Campbell* and *A. J. & Elwood Bruner*, for respondent.

VANCLIEF, C. The court overruled a general and special demurrer to the petition for the writ, and thereupon the defendant answered. The court then sustained a general demurrer to the answer, and, defendant declining to amend his answer, judgment awarding a peremptory writ, as prayed for, was rendered. The defendant appeals from the judgment on the judgment roll, and contends that the court erred in overruling defendant's demurrer to the petition, and also in sustaining plaintiff's demurrer to the answer.

The substance of the petition is as follows: That in July, 1889, the people of the state, by the attorney general, commenced an action in the superior court of San Francisco against the American Sugar Refinery Company, a corporation, to dissolve said corporation, and to recover a penalty, in which, on January 1, 1890, a judgment was rendered in favor of the people dissolving the corporation, and for a penalty or fine of $5,000 and costs. That on February 1, 1890, the plaintiff in said action applied to the court in which said judgment had been rendered for the appointment of a receiver in said action, to take charge of all the property of the defendant corporation. That upon such application a receiver was appointed, who duly qualified and took possession of all the property of the corporation defendant. That the petitioner herein rendered services for the plaintiff in that action in caring for said property while in the custody of said receiver, of the value of $504, which has not been paid; and that on July 7, 1890, petitioner filed his claim for said sum with the state board of examiners of the state of California in the words and figures following: "State of California, city and county of San Francisco—ss.: P. H. Cahill, being duly sworn, deposes and says: I was employed by the receiver of the American Sugar Refinery Company in that certain action entitled The People of the State of California vs. The American Sugar Refinery Company, a corporation, then pending in the superior court of San Francisco, on the seventeenth day of February, 1890, as watchman at the American Sugar Refinery, owned by said defendant corporation of this state, then in the hands of a receiver. That I worked from the eighteenth day of February, 1890, up to and including the ninth day of June, 1890, a total of one hundred and thirteen days, at the price of $5 per day, for which said work there is now due me the sum of $504, after deducting all payments made. That the work was faithfully performed in good faith, and that the sum of $504 is now due and owing me. P. H. CAHILL. Subscribed and sworn to before me this seventh day of June, 1890. DANIEL HANLON, Notary Public." That said board of examiners duly examined said claim and approved the same, and attached thereto the following certificate: "Form No. 126. Office of State Board of Examiners. Sacramento, ——, 1890. The annexed claim for $504, presented by P. H. Cahill for labor, is hereby approved by the state board of examiners for the sum of $504, chargeable to the appropriation for costs and expenses of suits in which the state is a party in interest, forty-first fiscal year, now exhausted, and, by virtue of the authority conferred upon this board by section 663 of the Political Code, do hereby transmit this claim to the honorable senate and assembly of the state of California, in the twenty-ninth session convened, with this statement of approval, and the recommendation that an appropriation be made to pay the same. R. W. WATERMAN, Governor, W. C. HENDRICKS, Secr'y of State, G. A. JOHNSON, Attorney General, State Board of Examiners." That on April 6, 1891, the legislature passed an act appropriating money to pay said claim, and others of like nature, and the money is in the treasury of the state, subject to the payment of said claim. That on May 8, 1891, the petitioner presented said claim, together with the allowance and approval of the state board of examiners aforesaid, and the said act of the legislature, to E. P. Colgan, comptroller aforesaid, and requested and demanded that he draw his warrant on the treasurer for the same, and that he then refused, and still refuses, to draw any warrant for the payment of said claim, or any part thereof.

The answer of the defendant denies that there was any judgment for costs in the suit of the people against the American Sugar Refinery Company; denies that the plaintiff in the last-mentioned action, by its attorneys, or either of them, applied to the superior court for the appointment of a receiver, but admits that a receiver was appointed in said action by the judge of said court; denies that the petitioner, Cahill, rendered services for the people of the state in said cause, and avers that whatever services he rendered were rendered to the receiver appointed in said cause, and were not worth more than three dollars per day; denies that plaintiff's claim is included with those for which the appropriation was made by the act of the legislature. The answer then avers, substantially, the following affirmative matters: (1) That in the case of Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. Rep. 121, the supreme court decided that the appointment of the receiver in People v. American S. R. Co. was null and void. (2) That P. Reddy, the receiver, filed his accounts in the superior court in the case of People vs. American S. R. Co., which accounts were passed upon and allowed by that court, including the item of $504 claimed by the petitioner, Cahill, but that such allowance was made without notice to the plaintiff or its attorneys in that action; and that thereafter the plaintiff in that action (the people) appealed to the supreme court from the order settling the accounts of the receiver, and from the order allowing Cahill $504, and that such appeal is now pending; and that since said appeal and the passage of the appropriation act of the legislature the board of examiners have refused to allow the claim of Cahill pending said appeal, by reason whereof "the state of California was never liable to said P. H. Cahill or to P. Reddy in the sum of $504, or any other sum; and therefore the passage of said act for the purpose of compensating said P. H. Cahill is a gift and donation, and in violation of the constitution of the state of California." (3) That the costs incurred by the receiver exceeded $24,000. That the complaint in People vs. American S. R. Co. did not pray for the appointment of a receiver, or for general relief. That the order to show cause for the appointment of a receiver was issued upon the court's own motion, and counsel in said cause did not have any authority to incur any liability on the part of the state of California, or to make any costs in reference to the appointment of a receiver; and, "for the purposes of a defense to this action and proceeding, this respondent hereby refers to the judgment roll in the case of People of the State of California vs. American Sugar Refinery Company." The answer contains other matters of mere argument and conclusions of law, which need not be stated or considered for the purpose of testing its sufficiency.

1. Did the court err in overruling the respondent's demurrer to the petition? The first ground upon which it is contended that the demurrer should have been sustained is that the petition fails to show that the present state board of examiners has passed or acted upon petitioner's claim, or approved the same. Conceding that this court may judicially know that the members of the board, at the time this proceeding was commenced, were not the same persons who composed it at the time petitioner's claim was approved, it is nevertheless, in contemplation of law, the same board. Counsel have cited no law or case, and I have found none, to the effect that a mere change of the constituent members of the board invalidates acts of the board done before such change, or necessitates a re-enactment or an approval of them after such change, in order to make them effective. See Osterhoudt v. Rigney, 98 N. Y. 222. It is further contended that the petition does not show that petitioner's claim is exempt from the provisions of section 672 of the Political Code, but the contrary. That section of the Political Code forbids the comptroller to draw his warrant for any claim, "unless it has been approved by the board," or has been exempted from the operation of that section. Since the petition shows that petitioner's claim had been approved by the board, it needed no exemption from the operation of that section to authorize the comptroller to draw his warrant for it. This objection to the petition is probably grounded on the assumption that an approval of a claim continued in force only so long as the members of the approving board remain the same, which, as above shown, is unwarranted. It is further claimed that the petition does not identify the claim as one of those for which the appropriation was made. The petition states that petitioner presented his claim to the board of examiners; that the board approved it as a claim chargeable to the state for costs and expenses of a suit in which the state was a party in interest, during the forty-first fiscal year, the appropriation for which was then exhausted; that the board transmitted this claim, with such approval, to the senate and assembly of the ensuing session, and recommended that an appropriation be made to pay the same; that the legislature, at its next session, on the 6th day of April, 1891, in accordance with the recommendation of said board of examiners, did appropriate money "to pay said claim of petitioner, together with other claims of like nature, and that the money is in the treasury of the state, subject to the payment of said claim, and subject to the comptroller's warrant for the payment of the same." The appropriation act referred to is entitled "An act making an appropriation to pay the deficiency in the appropriation for costs and expenses of suits in which the state is a party in interest, for the forty-first fiscal year." It appropriates $1,059.40 "out of any money in the state treasury, not otherwise appropriated, to pay the deficiency in the appropriation for costs and expenses of suits in which the state is a party in interest (as approved by the state board of examiners) for the forty-first fiscal year." The second section authorizes the comptroller to draw his warrant for the amount appropriated and directs the treasurer to pay the same. The act was approved April 6, 1891, and took effect immediately. Reading the petition in connection with the appropriation act, to which it refers, I think it sufficiently identifies the claim as one for which the appropriation was made. Presumably the claim as approved, with the recommendation of the board that an appropriation be made to pay the same, was transmitted to the comptroller immediately after its approval, as required by section 661 of the Political Code, and remained on file in his office as an approved claim, for which he was commanded, by the section referred to, to draw his warrant in the order of its number, (126,) if, as alleged in the petition, there was money in the treasury applicable to its payment. No reason is apparent why the comptroller should have doubted that petitioner's claim was one of the claims for the payment of which the appropriation was made.

It is further claimed that the petition

is defective, in that it does not show that petitioner's services were reasonably worth the sum claimed. No statement of the value of the services, in addition to what appears in the claim approved by the board of examiners, was necessary. Conceding, for the purposes of this case, that the comptroller may go behind and question the approval of a claim by the board of examiners and the appropriation act of the legislature in certain exceptional cases, this is not one of such cases. Here there is no question as to whether the claim or the approval thereof was fraudulent, or the result of a mistake; nor whether the board had lawful authority to audit the claim; nor whether the act of appropriation was constitutional. The sole question under this head is, did the board of examiners, in the honest exercise of undoubted authority, err in estimating the value of the services for which the claim was made? As to this question, the decision of the board of examiners was conclusive upon the comptroller. Section 436 of the Political Code provides: "All warrants for claims which have been audited by the board of examiners, and filed in his office, must be drawn in the order of the numbers placed upon them by that board." Section 661 of the same Code: "If the board approve such claim, they must indorse thereon over their signatures, 'Approved for the sum of ——— dollars,' and transmit the same to the office of the comptroller of state, and the comptroller must draw his warrant for the amount so approved in favor of the claimant or his assigns, in the order in which the same was approved." It is to be observed, however, that the petition does (unnecessarily) state that "the amount and value of said services was $504." This, taken in connection with the approval of the claim by the board of examiners as set forth in the petition, is mere surplusage, requiring no proof. I think the court did not err in sustaining the demurrer to the answer of the defendant.

2. The answer denies no material fact stated in the petition, and fails to state facts sufficient to constitute a defense to this proceeding. The allegations in the petition that the plaintiff, in the suit of People vs. Havemeyer, applied to the superior court for the appointment of a receiver, and that there was a judgment for costs in that suit, were immaterial, except as matter of inducement, merely introductory and explanatory of the essential grounds of the proceeding, namely, the approval of petitioner's claim by the board of examiners and the appropriation of money to pay it by the legislature. Gould, Pl. 42; City v. Lamson. 9 Wall. 478. The validity of neither the approval of the claim by the board, nor the act of appropriation by the legislature, depended upon the truth of these allegations, and it is at least doubtful whether they were material or relevant matters for consideration by the board of examiners, since the petitioner's claim may have been lawful and just, even though there was no judgment for costs in the suit of People vs. Havemeyer, and no application to the court for a receiver therein. But, however this may be, the approval of the claim by the board of examiners and the appropriation of money to pay it by the legislature must be considered conclusive of the validity of petitioner's claim as against the comptroller, under the pleadings in this proceeding. The board of examiners has unlimited power to investigate the merits of all claims presented for allowance, and may act upon facts within the personal knowledge of its members, as well as upon evidence from other sources. Pol. Code, §§ 658, 666. It was the duty of the attorney general, as a member, to impart to the board his personal knowledge of all material facts in regard to the suit of People vs. Havemeyer, which suit had been prosecuted by him; and he must be presumed to have performed this duty. In the matter of approving and rejecting claims against the state, the board of examiners acts judicially, and its decisions in cases of which it has jurisdiction are not subject to collateral attack. In his work on Judgments (section 532) Mr. Black says: "When the statutes commit to a board of county commissioners, or supervisors, or auditors, or to a town council, the duty of examining and auditing claims against the municipality, their action in auditing, adjusting, or rejecting such a claim is judicial in its nature, and their decision is binding and conclusive, unless reversed on appeal;" citing, among other cases, Osterhoudt v. Rigney, 98 N. Y. 222; Colusa County v. De Jarnett, 55 Cal. 373; Placer Co. v. Campbell, (Cal.) 11 Pac. Rep. 602. In Osterhoudt v. Rigney, 98 N. Y. 222, the court said: "The acts of a board of audit, within its jurisdiction, in the absence of fraud or collusion, are final and conclusive, and cannot be questioned in a collateral proceeding. Whether the claim is a proper town or county charge, in a case where it is doubtful, and rests upon disputed evidence, and what amount shall be allowed when not fixed by statute, are questions which the statute commits to the determination of the board of audit; and, however much it may err in judgment upon the facts, so long as it keeps within its jurisdiction, and acts in good faith, its audit cannot be overhauled, but is final, as well as to the taxpayers as to the claimant." See, also, Robinson v. Supervisors, 16 Cal. 209; Miller v. Sacramento County, 25 Cal. 94; Emery v. Bradford, 29 Cal. 84; Scheerer v. Edgar, 76 Cal. 569, 18 Pac. Rep. 681; Bernal v. Lynch, 36 Cal. 135; Black, Judgm. § 250. The affirmative allegations of the answer do not constitute a defense.

What the supreme court decided as to the appointment of a receiver is a matter of law, and therefore not pleadable as a fact. But conceding, as a matter of law, that the appointment of the receiver was void, it does not necessarily follow that petitioner's claim against the state for services in watching and caring for the property while in the custody of the receiver was not a lawful claim to the extent allowed by the board of examiners, and confirmed by the act of appropriation. For the purpose of sustaining this proceeding it is sufficient to say that the state, as plaintiff in the suit in which the receiver was appointed, may have been responsible for costs and other consequences of the appointment of the receiver, even though such appointment was void, as being in excess of the jurisdiction of the court. Code Civil Proc. § 1038; Adams v. Haskell, 6 Cal. 476; McDermott v. Isbell, 4 Cal. 114; Argenti v. San Francisco, 30 Cal. 467; Lawrence v. Booth, 46 Cal. 187; Beach, Rec. § 313. Granting this, it may be presumed that the board of examiners found a state of facts justifying its conclusion that the petitioner's claim was a proper charge against the state, since its jurisdiction is apparent, and no fraud, collusion, or bad faith is alleged. It is not perceived how the order of the court allowing the receiver's accounts in the suit of People v. Havemeyer, or the alleged appeal from that order, can prejudice or affect the claim of the petitioner in this proceeding, who is not a party to that suit nor to that appeal.

In their reply brief, counsel for appellant make the point that the judgment was taken without any evidence on the part of the petitioner, and is erroneous for this reason. In answer to this it is sufficient to say that it does not appear that the court did not hear evidence, and the presumption is that the court heard whatever evidence was necessary to justify the judgment. The judgment contains the following recital: "And, respondent refusing to amend his answer, and it duly appearing to the court that the prayer of the petitioner should be granted," etc.

The point that the attorney general had no authority to incur any state liability for costs in the matter of the receiver, and therefore that the appropriation by the legislature to pay such costs was a gift, is not sufficiently plausible to merit special consideration, in view of the late decisions in the cases of Stevenson v. Colgan, 91 Cal. 649, 27 Pac. Rep. 1089, and Rankin v. Colgan, 92 Cal. 605, 28 Pac. Rep. 673. I think the judgment should be affirmed.

We concur: Haynes, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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96 Cal. 609

BOGART v. WOODRUFF et ux. (No. 14,742.)

(Supreme Court of California. Dec. 2, 1892.)

Actions against Married Women—Misnomer.

1. Code Civil Proc. § 370, provides that, when a married woman is a party to an action, her husband must be joined with her. Section 434 provides that if no objection be taken to the defect of parties defendant, either by demurrer or answer, defendant must be deemed to have waived the same. Civil Code, § 158, provides that a wife may enter into any engagement respecting property which she might if unmarried. *Held*, that a judgment by default against a wife, in an action on a note in which she is sole defendant, is binding on her to the extent of her separate estate, where she failed to raise the objection that her husband was not joined with her.

2. An objection that a married woman is sued by her maiden name is without merit, where she is sufficiently identified by such name.

Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by Sarah B. Bogart against James Woodruff and Catalina Woodruff on a judgment rendered against Catalina Woodruff, in favor of plaintiff, in a suit on a note. Judgment for defendants. Plaintiff appeals. Modified.

J. A. Cooper and *J. E. Pemberton*, for appellant. *J. M. Manuon*, for respondents.

Per Curiam. The female defendant, before her marriage with the other defendant, being indebted to plaintiff, gave her promissory note to secure such indebtedness. About eight months after the marriage the plaintiff brought suit upon the note before a justice of the peace, against the wife alone, in her maiden name. She was then, and ever since the marriage had been, living with her husband. The summons was served upon her; and, as she did not appear and defend, judgment went against her, by default, June 25, 1885. This action, against both husband and wife, was commenced June 16, 1890, upon that judgment. The court found in accordance with the foregoing statement of facts, and that no part of the judgment against the wife had been paid, and from such facts, as a conclusion of law, that the defendants were entitled to judgment. The conclusion of the learned judge seems to have been based upon the proposition that the judgment against the wife, on which this suit was brought, was void for two reasons: *First*, because of the misnomer; and *second*, because the husband was a necessary party, without whom, in such an action, the court could not obtain jurisdiction of the person of the wife.

The Civil Code, § 158, provides that the wife may enter into any engagement or transaction respecting property which she might if unmarried; and, under the provisions of this section, it has been held that a promissory note of the wife, made after marriage, is a transaction by her respecting property, and that a judgment can be rendered against her upon such promissory note. Marlow v. Barlew, 53 Cal. 456; Alexander v. Bouton, 55 Cal. 15; Goad v. Moulton, 67 Cal. 536, 8 Pac. Rep. 63. But, as the community property is not liable for the contracts of the wife made after marriage, (Civil Code, § 167,) such judgment can be satisfied only out of her separate estate, as may also a judgment against her upon a contract made before her marriage. A judgment is one form of a contract; and by virtue of the provisions of section 158, Civil Code, a married woman may suffer a judgment to be rendered against her, as well as she may execute a promissory note. Such judgment, however, can be enforced only against her separate estate, as can a judgment upon her promissory note, and upon such judgment an action may be brought in the same mode as upon her promissory note. Section 370, Code Civil Proc., provides that, when a married woman is a party, her husband must be joined with her, except in certain specified cases, which are inapplicable to the present suit. The husband is a necessary party defendant, and the failure of the plaintiff to make him a defendant would defeat his right of recovery, if the objection be properly presented. One of the grounds of demurrer to the complaint is that there is a defect of parties defendant, and it is further provided that, if no objection be taken to the defect of parties defendant either by demurrer or answer, the defendant must be deemed to have waived the same. Code Civil Proc. § 434. If the wife suffers a judgment to be rendered against her in an action in which she is a sole defendant, without making any objection to the nonjoinder of her husband, whether such judgment is rendered after a trial on the merits or by default, she is bound by the judgment to the extent of her separate estate, and cannot thereafter, in an action upon such judgment, make the objection of such nonjoinder which should have been presented in the former action. Any attempt, however, to enforce that judgment against the community property, or the property of the husband, could be resisted by him, as he has not had his day in court. In an action thereon, as in an action upon the promissory note of the wife, the judgment should provide that it be enforced out of her separate estate.

The objection upon the misnomer of the wife is without merit, as she was sufficiently identified by the name under which she was sued. The judgment appealed from should be set aside, and a judgment entered against the wife, enforceable, however, only against her separate property; and it is so ordered.

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96 Cal. 501

REED v. LYON et al. (No. 14,709.)

(Supreme Court of California. Nov. 29, 1892.)

TAX SALE—REDEMPTION—NOTICE—EFFECT OF DEED—PRESUMPTION OF REGULARITY.

1. Pol. Code, § 3785, provides that the purchaser at a tax sale shall serve notice to redeem on the owner, stating the amount then due on the land for taxes, costs, etc., before asking for a deed, and that he shall be entitled to $3 for service thereof and for making affidavit to such service. *Held*, that the mere service of notice does not entitle the purchaser to the fee of $3; it being essential for him to make proof of such service and furnish the tax collector with such proof.

2. Pol. Code, § 3780, provides that the owner of property sold for taxes may redeem it within a year from the date of purchase, or at any time prior to his receiving notice to redeem, stating the amount due on the land for taxes, costs, etc., as provided by section 3785, which also provides that the time of redemption shall be extended indefinitely until such notice is served. *Held*, that a notice which stated an amount to be due, slightly in excess of what was in fact due, was not a sufficient compliance with the statute to bar the owner's right to redeem.

3. Pol. Code, § 3786, provides that the matters recited in the certificate of sale shall be recited in the tax deed, and that such deed shall be prima facie evidence that the property was assessed and equalized according to law; that the taxes were levied, and not paid; that the property was sold, and not redeemed; that the deed was executed by the proper officer; and that land sold for taxes on personalty belonged to the person liable to pay the tax. Section 3787 provides that such deed, duly acknowledged, is conclusive evidence of the regularity of "all other proceedings," from the assessment, inclusive, up to the execution of the deed. *Held*, that the "other proceedings" referred to are not acts required to be done by the purchaser pursuant to acquiring a tax deed, and that such tax deed is not conclusive evidence that notice to redeem has been served as required by section 3785.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Suit by Ira Hill Reed against I. L. Lyon and others to quiet title to a tract of land claimed by plaintiff by virtue of a tax sale. Judgment for defendants. Plaintiff appeals. Affirmed.

Willis, Cole & Craig, F. J. Solinsky, and *Ira Hill Reed*, for appellant. *Harris & Gregg*, for respondents.

TEMPLE, C. This is plaintiff's appeal from the judgment. Plaintiff sued to quiet his title to a tract of land which he claims under a tax sale. At the trial he offered in evidence (1) the certificate of sale for taxes, duly assigned to him; (2) notice to redeem, preliminary to demand for a deed, pursuant to section 3785 of the Political Code; (3) tax deed to his assignor. To this evidence many objections were interposed, but none are insisted upon here, except that the notice to redeem did not state the amount due, but stated an amount to be due in excess of the true amount. The tax and costs for which the property was sold amounted to $18.66. Adding 50 per cent., authorized by statute, we have $27.99. The statement in the notice was: "The amount due at the date of this notice is twenty-eight and ninety-nine hundredths dollars."

Section 3785 of the Political Code provides that the purchaser shall be entitled to receive the sum of three dollars for the service of said notice and the making of an affidavit of service, "which sum of three dollars shall be paid by the redemptioner at the same time and in the same manner as other costs, percentage, penalties, and fees are paid." Appellant contends that inasmuch as the notice correctly stated the amount for which the property was sold, knowing which, it is easy to find the sum required to redeem, by simply adding 50 per cent., the notice did substantially state the last-mentioned sum, and the defendant could not be misled, and, further, that, as he was entitled to charge $3 additional costs for serving the notice and making proof, the amount stated was less than the amount due; that he had a right to remit part of what was due him, and the defendant cannot complain if he was willing to accept less than the sum actually due. Parties attempting to redeem have often failed to accomplish their object by offering or paying a sum somewhat less than the amount really due. No doubt one reason for requiring the notice was that the redemptioner might know what amount the purchaser claimed to be due. Paying this, I have no doubt a redemption would be effected, even though it should prove less than the amount really due. In this case I fail to see, however, that the amount stated in the notice was less than the amount really due. The notice must state "the amount then due." The $3 was not due when the notice was signed, or even when served; and not until proof of such service was made, and left with the tax collector. Therefore, it was not true that the amount then due was $28.99, or so much as that. But there is another view of that matter which appellant will find it difficult to answer. Sections 3780 and 3785 of the Political Code, in effect, extend the time of redemption for one year, and until the notice prescribed has been given. In the last-mentioned section, it is expressly stated that the time is extended indefinitely unless such notice be given. Since this is purely a matter of statutory control, it is evident that the notice prescribed must be given. No other notice will have that effect. A substantial, rather than a literal, conformity to the statute may possibly be considered sufficient. But beyond this the courts cannot go. The express requirements cannot be avoided on the ground that they serve no useful purpose. The time for redemption has not expired, unless such notice has been given. This requirement differs materially, and in some respects must be construed differently, from provisions chiefly designed to secure efficient and harmonious action on the part of revenue officers, who are to levy taxes, make assessments, and collect revenues for the state. The question then is, has the taxpayer been injured or deprived of some privilege or opportunity to be heard by the irregularity? Here the statutory notice limits the period of redemption, and until the prescribed notice is given the redemptioner is not called upon to redeem, and may insist upon strict construction of the statute. For the court to condone material irregularity here would be to deprive one of his estate, whereas the purchaser still holds his certificate, and may yet take steps to end the period of redemption.

But it is said that the deed, under section 3787 of the Political Code, is made "conclusive of all other proceedings [that is, proceedings not expressly mentioned in section 3786[1]] from the assessment by the assessor, inclusive, up to the execution of the deed," and therefore the question is not open. The deed, it is true, recites the notice, and from that recital the defect appears; but it is claimed that this recital is surplusage. The statute prescribes what shall be stated in the deed; that as to certain matters it shall constitute *prima facie* proof, and (section 3787) that as to all other matters, except actual fraud, it shall be conclusive evidence of the regularity of proceedings "from the assessment, inclusive, up to the execution of the deed." This would present a difficult question, perhaps; but it has recently, since this appeal was taken, been considered and decided by this court in Miller v. Miller, 31 Pac. Rep. 247, where it was held that the other proceedings referred to, as to which the deed is made conclusive, are the acts and proceedings "required to be done and had at the hands of the public officials entrusted with the various steps leading up to the execution of a tax deed, and not, as in this case, to something required to be done by the applicant for the deed." It would follow that the judgment should be affirmed.

We concur: **Haynes, C.**; **Vanclief, C.**

Per Curiam. For the reasons given in the foregoing opinion, the judgment is affirmed.

3 Cal. Unrep. 671

KIRK et al. v. ROBERTS et al. (No. 18,043.)

(Supreme Court of California. Dec. 2, 1892.)

Assignment—Validity—Delivery of Possession—Assumpsit—Pleading—Rights of Assignee in Insolvency.

1. "Book accounts and bills receivable, including all debts of every kind due (the assignor) from any person," are "things in action," and as such expressly exempt under Civil Code, § 3440, from the statutory rule requiring a valid transfer of personal property to be followed by immediate delivery and change of possession.

2. H. having transferred by assignment certain book accounts and bills receivable to plaintiff, in part payment of a debt and as security, retained possession thereof as agent to collect the same, and subsequently defendant was appointed his receiver and assignee in insolvency. *Held*, in an action for moneys collected by defendant on such accounts and notes assigned to plaintiff, where the complaint averred demand on defendant and refusal by him to pay, that it was not necessary to aver or prove nonpayment of plaintiff's claim, such fact being a matter of defense.

3. An assignee in insolvency takes the property of the insolvent subject to all the rights and equities of third persons attached to it in the hands of the insolvent.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; E. A. Bridgford, Judge.

Action by Kirk, Geary & Co. against F. B. Roberts, assignee of Walter R. Hall. Judgment for defendant. Plaintiffs appeal. Reversed.

Johnson, Johnson & Johnson, for appellants. *H. M. Albery*, for respondents.

Belcher, C. It is alleged in the complaint that on the 23d day of April, 1889, one Walter R. Hall was doing business in the town of Colusa, and was indebted to the plaintiffs in a certain large sum of money; that he was the owner of a large amount of book accounts and debts, due him from divers persons, and bills receivable; that on the day named he executed and delivered to the plaintiffs an agreement in writing, a copy of which is set out, that on the 1st day of August, 1889, he filed in the superior court of Colusa county his petition, schedules, and inventory in insolvency, and was thereupon adjudged to be an insolvent debtor; that defendant was appointed receiver, and afterwards assignee, of the estate of the insolvent, and that he duly qualified and entered upon the discharge of his duties as such; that defendant, as such receiver and assignee, took possession of all the property and estate of the insolvent, including the said book accounts, debts, and bills receivable, and thereafter collected of the money due on such accounts, debts, and bills a sum aggregating $2,000; that before the commencement of this action, and while defendant still retained in his possession the money so collected, plaintiffs demanded of him that he pay the same to them, but he wholly failed, refused, and neglected to so pay the same or any part thereof. Wherefore judgment is asked against the defendant for the sum named, with costs. The written agreement set out reads as follows: "Whereas, I am this day indebted to the firm of Kirk, Geary & Co., of Sacramento, Cal., in the sum of five thousand four hundred thirty-nine dollars and fifty-nine cents, ($5,439.59,) $4,024.28 being balance due on merchandise account, and $1,415.31 being amount advanced by them to me for the purpose of paying the claims of Redington & Co. and Chas. A. Bayly against me; and whereas, I am desirous of providing for the payment of said indebtedness: Now, therefore, I do hereby agree that I will pay said firm at least two thousand seven hundred and fifty dollars ($2,750.00) within one year (1 yr.) from the date of this indenture, and to that end will make monthly remittances to said firm of as large an amount as I can; and for the purpose of further providing for the payment of said indebtedness, and in partial satisfaction thereof, (*i. e.*, to the extent of the collections and remittances hereinafter referred to,) I hereby assign and convey unto said firm of Kirk, Geary & Co. all my book accounts and bills receivable, including all debts of every kind due me from any person; and I hereby agree with the said firm to represent it as its agent henceforth in the collection of said bills and book accounts; and I will reduce the same into cash as speedily as possible, and will remit to said firm the proceeds of such collections as soon as I obtain the money thereon. The whole amount of my indebtedness to said firm shall be fully paid within two years from the date of this agreement, and said indebtedness shall bear interest from date, at the rate of eight per cent. per annum, payable quarterly. This indebtedness, however, which is to be secured, further, by a mortgage to be executed by me and W. Y. Gamblin, in favor of said firm, shall be considered due at any and all times during the continuance of this agreement, at the option of said firm, without notice to me. In witness whereof I have hereunto set my hand this twenty-third day of April, in the year one thousand eight hundred and eighty-nine. [Signed] Walter R. Hall. Witness: Albert M. Johnson."

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[1] Section 3786 is as follows: "The matters recited in the certificate of sale must be recited in the deed; and such deed, duly acknowledged or proved, is primary evidence that (1) the property was assessed as required by law; (2) the property was equalized as required by law; (3) the taxes were levied in accordance with law; (4) the taxes were not paid; (5) at a proper time and place the property was sold as prescribed by law, and by the proper officer; (6) the property was not redeemed; (7) the person who executed the deed was the proper officer; (8) where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax."

A general demurrer to the complaint was interposed and overruled, and the defendant then answered. The answer admitted that defendant as receiver and assignee had collected on the bills and accounts, which came into his hands as such, the sum of $635.72, but denied that plaintiffs were the owners of the bills or accounts, or that defendant was indebted to plaintiffs for the money collected thereon or otherwise. At the trial it was admitted that Hall "duly executed the instrument set out in the complaint, and that, at the time of its execution, he owed the plaintiffs the amount mentioned in said instrument, and that thereafter he filed his petition in insolvency, and that defendant was appointed receiver and elected assignee of his estate as averred in said complaint, and that as receiver and assignee he had collected, and as assignee he holds, retains, and claims, the sums stated in the answer of defendant to have been collected of the book accounts, bills receivable, and debts mentioned in said written instrument; and that plaintiffs had demanded payment thereof, and that the defendant had not paid plaintiffs any part of his said collections." It was also admitted that all the book accounts, bills receivable, and debts due, specified in the said written instrument, were scheduled and specified in the insolvency proceedings of Hall, and that they came into the hands of the defendant as the assignee of Hall. Hall was called as a witness, and testified that he executed the paper set out in the complaint, and that he remained in possession of the book accounts and bills receivable until he filed his petition in insolvency, and then turned them over to defendant. The above was, in substance, all the evidence on which the case was tried and submitted. The court found, among other things, that Hall executed and delivered to plaintiffs the written instrument set out in the complaint, but "did not sell, transfer, or convey the said book accounts, debts due him, or bills receivable, or anything referred to in said written instrument, to said plaintiffs; * * * that said written instrument was intended and understood by the parties as a written evidence or memorandum of a then existing indebtedness from said Hall to said plaintiffs, intended as an assignment to secure a then existing indebtedness from said Hall to said plaintiffs; that there was no immediate or any delivery from Hall to plaintiffs of the book accounts or bills receivable, or any thereof, mentioned in said written instrument, nor was there any actual or any change of possession thereof or any portion thereof;" "that at the time said Hall was adjudged an insolvent debtor, as alleged in the complaint, to wit, on the 1st day of August, A. D. 1889, it is not alleged in the complaint, or shown by the evidence, that Hall was indebted to the said plaintiffs in any sum whatever, nor was he indebted to said plaintiffs in any sum of money at the time this action was commenced;" and "that the complaint in this action does not state facts sufficient to constitute a cause of action." Judgment was accordingly entered that the plaintiffs take nothing by their action. The plaintiffs moved for a new trial, and the appeal is from the order denying their motion.

It is evident that the conclusions of the court were based upon the theory that the plaintiffs could not recover for two reasons: (1) Because the transfer from Hall to them was not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred; and (2) because there was no averment in the complaint, or proof on the part of the plaintiffs, that the indebtedness due from Hall to them had not been paid. We do not think this theory sound. The instrument was clearly intended as an assignment of the accounts, bills, and debts mentioned,—whether absolutely or as security is immaterial,—and, as between the parties, it unquestionably operated to transfer them to plaintiffs, and gave the plaintiffs a right to have the moneys when collected applied to the payment of their debt. The "things transferred" were "things in action," commonly called "choses in action," and were expressly excepted from the operation of the rule declared in section 3440 of the Civil Code. An assignee in insolvency has only such powers as are given him by the insolvent act. He may take into his possession all the estate of the debtor, and may sue in his own name and recover all the estate, debts, and things in action belonging or due to the debtor, and may also have and recover from any person receiving a conveyance, gift, transfer, payment, or assignment, made contrary to the provisions of the act, the property so conveyed or transferred. Sections 21, 55. But unless the transfer is made contrary to the provisions of the insolvent act, and is thus tainted with fraud, the assignee takes the property of the insolvent, subject to all such rights and equities of third persons as were attached to it in the hands of the insolvent. This is a well-settled rule under the bankrupt act, and we think it equally applicable to our insolvent act. Ex parte Newhall, 2 Story, 360; Mitchell v. Winslow, Id. 631; Yeatman v. Institution, 95 U. S. 764; Hauselt v. Harrison, 105 U. S. 406. Here there is no pretense that the transfer to the plaintiffs was fraudulent or contrary to any of the provisions of the insolvent act, and hence the fact that there was no immediate delivery nor any actual change of possession of the things transferred did not justify the court in denying to the plaintiffs the relief asked.

The second proposition, that plaintiffs could not recover because they failed to allege or prove that Hall's indebtedness to them had not been paid, was probably based upon the supposed authority of cases holding that a complaint to recover money due on contract is fatally defective unless it avers nonpayment. These cases, however, are not in point here. The complaint did aver demand made upon defendant for the money sought to be recovered, and that he wholly failed and refused to pay the same. We are cited to no case, and we know of none, which holds, in effect, that it was necessary to allege the nonpayment of Hall's indebtedness, and in our opinion such an allegation was not necessary. When one obtains an interest in a chose in action, by indorsement or transfer, the presumption is that that interest was obtained for value, and that it continues in the holder, until the contrary is shown. The point has several times been made that one suing on a promissory note, as maker or indorsee, should allege that he was still the owner and holder of the note, but it has always been held that no such averment was required. Poorman v. Mills, 35 Cal. 118; Hook v. White, 36 Cal. 299. Here, as we have seen, the plaintiffs obtained an interest in the accounts, bills, and debts transferred to them by Hall. The transfer was doubtless made to secure the payment of Hall's indebtedness to them, but, if so, no presumption can be indulged that the indebtedness had been paid, and the interest had therefore reverted to the assignor. If such were the fact, it was a matter of defense, and the burden was upon the defendant to show it. It will be observed that no proof of the payment of Hall's indebtedness was before the court, and therefore the finding that he was not indebted to the plaintiffs in any sum of money at the time this action was commenced was wholly unjustified by the evidence. In our opinion the order appealed from should be reversed, and the cause remanded for a new trial, and we so advise.

We concur: FOOTE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for a new trial.

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96 Cal. 649

MALLOYE v. COUBROUGH. (No. 14,557.)

(Supreme Court of California. Dec. 7, 1892.)

PARTNERSHIP — EXECUTION OF POWER OF ATTORNEY—ACKNOWLEDGMENT—EVIDENCE ALIUNDE—CONSTRUCTION OF POWER.

1. The execution by a partnership of a power of attorney cannot be proven by a notary's acknowledgment alone, since under section 1185 of the Civil Code the notary is not required to know or certify who are included as members in the partnership, but only that the person making the acknowledgment is the one he claims to be, or, in the case of a corporation, that he is the president or secretary of the corporation; and outside evidence is therefore necessary in order to show the existence of the partnership, and that the person mentioned is a member.

2. A power authorizing an attorney, upon nonpayment of a certain judgment, to institute such actions and proceedings as he may deem necessary, prove whatever may be due, give receipts, etc., and for any such purpose to use the names of the principals, and generally to act as fully as they could do, does not authorize an assignment by him of the judgment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by Frank Malloye against Henry

Coubrough. Judgment for plaintiff. Defendant appeals. Reversed.

W. S. Goodfellow, for appellant. *H. G. Platt*, for respondent.

TEMPLE, C. Appeal by defendant from a judgment and from an order refusing a new trial. The action is upon a foreign judgment, which it is averred "Abel Rey & Co., a copartnership doing business in London," before the commencement of this action, assigned to plaintiff. The assignment is denied in the answer. The court found on this issue against the defendant, and it is now contended that the evidence is insufficient to support the finding. It is not alleged who composed the firm of Abel Rey & Co., nor is there any proof upon that subject, except the certificate of the notary in the acknowledgment of a power of attorney under which the alleged assignment was made. Objection was made to the admission of the power of attorney as evidence, on the ground that the proof of its execution by Abel Rey & Co. was insufficient, and that the instrument did not confer the power upon the attorney to make the assignment. A like objection was made to the instrument itself when offered. All the objections were overruled, and exceptions to the rulings noted. These rulings are here assigned as errors, and urged in connection with the same points made under specifications as to the insufficiency of the evidence. Harris, a notary public of London, Eng., certified in the acknowledgment "that the annexed power of attorney was this day signed, sealed, delivered, and acknowledged by the therein-named Abel Rey & Co., by Fernand Rey, (personally known to me,) a member of that firm, as and for the free and voluntary act of himself and his said firm, in my presence and in that of the other subscribing witnesses; further, that the signatures of 'Abel Rey & Co.' and 'Fernand Rey,' subscribed opposite the seal at foot of the said power of attorney, are the own proper handwriting of Fernand Rey," etc. Section 1185 of the Civil Code provides that the officer taking acknowledgment must know or have satisfactory evidence that the person making the acknowledgment is the individual who is described in, and who executed, the instrument, or, if executed by a corporation, that he is the president or secretary of such corporation. In this case the person making the acknowledgment was not Abel Rey & Co., and the statute does not impose upon the notary the duty of knowing who composed that firm, nor does he in fact certify that he knew him to be a member of the firm. He certifies that Fernand Rey was personally known to him, and in his presence executed the instrument, as his voluntary act, and that of his firm. It should have been made to appear that there was such a partnership and who composed the firm, and then when the assignment with the acknowledgment was offered, a *prima facie* case would have been made, from the identity of names, that the person executing it was a member of the firm. The partnership would show his authority to act for the firm. Fernand Rey was not an individual described in the instrument executed as the person executing it, or otherwise. That simply says: "We, Abel Rey & Co."

Nor do I think the power of attorney authorized the assignment. In terms, it authorizes the agent upon nonpayment of the judgment, or any part thereof, "to commence, bring, and prosecute all such actions, suits, and other proceedings in the courts of San Francisco, and elsewhere in America, as he may think fit or be advised, and to institute any proceedings in bankruptcy or insolvency, or for the liquidation of the affairs and estate of the said Henry Coubrough, or such other person or persons as aforesaid, and to prove against his or their estate or estates for all such sum or sums of money as may be due to us, as aforesaid, and, upon judgment or recovery of any such sum or sums from time to time, to give for us and on our behalf full and valid receipts, acquittances, and discharges therefor, and for all and any of the purposes aforesaid to use our names, and generally to act in and about the premises as fully and effectually as we ourselves could do if personally present and acting therein," etc. The power of attorney contains no general clause authorizing the attorney to do anything necessary or convenient in the collection of the judgment, but, on the other hand, as it seems to me, confines the authority to the institution and maintenance of suits, actions, and proceedings to that end. The general language at the conclusion is limited to the premise which defines what may be done. All these could have been done in the name of Abel Rey & Co. Therefore an assignee was not necessary in order to take any of the steps, or to institute and maintain any of the actions, referred to or contemplated as possibly necessary or convenient. In fact, the power expressly authorizes the use of the name of the constituent, and does not contain the alternative or otherwise. Had the letter of attorney authorized the agent to adopt any measure he might deem expedient, or had it been necessary to substitute an assignee for the purpose of maintaining any action or proceeding which might be thought advisable, perhaps the construction contended for should prevail. But under the circumstances I think the language cannot be so extended. I think the judgment and order should be reversed, and a new trial had.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

(96 Cal. 655)

DOUGLASS v. TODD. (No. 14,789.)

(Supreme Court of California. Dec. 8, 1892.)

SETTING ASIDE DEFAULT—MISTAKE—COUNTER AFFIDAVITS.

1. Where defendant, against whom a default has been entered, shows a sufficient defense by affidavit, and gives as a reason for permitting the default that, after summons served, he was advised by an attorney, (nam-

ing him,) whose advice he relied upon, that he had no defense, the default will be set aside; Code Civil Proc. § 473, authorizing the court to relieve a party from a judgment taken "through his mistake," and Civil Code, § 1576, providing that "mistakes may be either of fact or law." Smith v. Tunstead, 56 Cal. 177, distinguished.

2. In a motion to set aside a default, the facts constituting a defense in defendant's affidavit cannot be rebutted by counter affidavits, as the court will not try the merits of the case on affidavits, but will hear counter affidavits as to the excuse for permitting the default.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

Action by L. B. Douglass against W. A. Todd. From an order vacating a judgment entered against defendant by default, plaintiff appeals. Affirmed.

George D. Collins, for appellant. *Cope, Boyd, Fifield & Hoburg*, for respondent.

Haynes, C. Appeal from an order vacating a judgment entered against defendant upon default. The affidavit of defendant stated facts showing a sufficient defense to plaintiff's action,—at least as to the first cause of action. Plaintiff filed a counter affidavit, which, it is contended, rebuts the facts stated in defendant's affidavit. It is well settled that a default will not be set aside unless a sufficient affidavit of merits is filed; but proper practice does not permit the facts stated in defendant's affidavit, which constitute his defense to the action, to be rebutted by counter affidavits. The court will not try the merits of the case upon affidavits, but will hear counter affidavits as to the excuse for permitting the default. Francis v. Cox, 33 Cal. 323; Gracier v. Weir, 45 Cal. 53.

Defendant's affidavit, after fully stating the facts constituting his defense to the action, alleged, as the reason why he permitted a default to be taken against him, that as soon as he was served with the summons he consulted an attorney, whose name he gives, and explained to him the facts stated in his affidavit, and was advised by said attorney that he had no defense, and, believing and relying upon said advice, did not answer the complaint. Appellant does not deny, in his counter affidavit, that respondent received that advice, but denies that he made default for that reason, and alleges that it was because he supposed himself to be "execution proof." It is not probable that, if that was the reason why he permitted a default to be taken, he would have consulted an attorney in regard to a defense to the action; but having done so, and having been advised that he had no defense, it is quite natural that he should assert to plaintiff that he "could hang his judgment on the wall,"—that he couldn't collect it. Appellant contends, however, that the erroneous advice of counsel as to the law of the case upon which the defendant relied, and because of which he suffered the default to be taken, is not a sufficient ground for setting it aside. We are not referred by counsel to any case where this precise question has been decided by this court. Appellant cites cases where it is held that the negligence of the attorney will not avail to set aside a default, and contends that therefore his ignorance will not avail. Ignorance is often the result of negligence, though it cannot always be attributed to that cause. Defendant was not guilty of any negligence. Had he relied upon his own judgment as to the law applicable to the fact of his case, it might have been negligence. But he went to a practicing attorney, and had a right to suppose him to be competent, and was justified in acting upon his advice. Section 473 of the Code of Civil Procedure[1] is broad enough to justify the action of the court below in relieving a party from a mistake of law on the part of his attorney, when by his reliance upon it he is prevented from making any defense. The language of this section does not limit the relief to mistakes of fact.

Section 1576 of the Civil Code is as follows: "Mistake may be either of fact or law." So that it would seem clear that in using the word "mistake" in section 473, Code Civil Proc., without any qualification, it was intended not to restrict the court in granting relief in furtherance of justice to that kind of mistake which involves only facts. That this was the intention of the code commissioners is plain from their note to section 1576 of the Civil Code. They said: "This chapter undoubtedly modifies the rule heretofore existing in this state as to mistake of law. * * * The rule that no relief should ever be granted on the ground of mistake of law seems too harsh, and in some cases might work great hardship. There is, however, no doubt that relief upon this ground must be granted with extreme caution, and only in a limited class of cases." In Whereatt v. Ellis, 70 Wis. 207, 35 N. W. Rep. 314, the syllabus, which correctly states the point decided, is as follows: "Where judgment for a considerable sum has been taken upon a default which was caused by the defendant following in good faith the advice of his attorney, and a meritorious defense is alleged, the court, upon application duly made, should grant a trial or hearing upon the merits, upon such terms or conditions as to do no injustice to the plaintiff; and a refusal to grant such hearing is an abuse of discretion." See, also, Morgan v. Bishop, 61 Wis. 410, 21 N. W. Rep. 263, and Hanson v. Michelson, 19 Wis. 498. In Baxter v. Chute, the supreme court of Minnesota, in an opinion filed June 13, 1892, (52 N. W. Rep. 379,) where a default was suffered because of the ill advice of counsel, reversed the order refusing to set aside the default, and held that "a mistake of law may afford ground for relief as well as a mistake of fact." To the same effect is Brown v. Brown, 37 Minn. 128, 33 N. W. Rep. 546. In both these states the language of the statute as to the ground of relief is the same as ours.

Of course, it does not follow that all mistakes of law are to be relieved against. A sound discretion, controlled by an enlightened judgment, keeping in view public interests and the due and orderly administration of the law, is to be exercised in granting that relief which justice between the parties to the cause seems to require. The view we have taken, and the authorities above cited, are not inconsistent with the cases cited by appellant. Most of those cases were bills in equity to be relieved against judgments based upon circumstances materially different from the case at bar. None of them decide that equity will not relieve in proper cases. Smith v. Tunstead, 56 Cal. 177, is much relied upon by appellant. That was a case of negligence on the part of the attorney. The court said: "In such cases as this," parties are held not entitled to relief on account of the negligence of their attorneys. If in no case parties were relieved from the negligence of their attorneys, there would be much force in appellant's argument that no relief could be had against their mistakes. But relief is granted against the negligence of the attorney, where it is excusable, and therefore appellant's argument fails.

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[1] Code Civil Proc. § 473, provides that the court may relieve a party from a judgment taken against him "through his mistake."

The terms upon which the order appealed from was granted, leaving, as it does, the plaintiff secure in his right to subject certain property of the defendant to the satisfaction of any judgment he may obtain, were proper, and prevent any injustice which might otherwise result to him. The order appealed from should be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed

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(97 Cal. 8)

PACIFIC PAVING CO. v. BOLTON et al.

(No. 14,162.)

(Supreme Court of California. Dec. 10, 1892.)

PUBLIC IMPROVEMENTS—FORECLOSURE OF LIEN.

The act relating to street improvements (section 3) provides that, if no objection to the work is made within a given time, "the city council shall be deemed to have acquired jurisdiction to order any work to be done." Code Civil Proc. § 456, provides that "in pleading a judgment or other determination of a court, officer, or board, * * * such judgment or determination may be stated to have been duly given or made," without stating the facts conferring jurisdiction. *Held*, in an action to foreclose a lien for a street assessment, where the complaint alleged that on a certain date the city council, "deeming it necessary, duly gave and made its determination to order the work done," that there was a sufficient averment of the action of council; the allegation that the order was duly given being equivalent to the statement that everything necessary to be done to give the order validity had been done.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by the Pacific Paving Company against Bolton and others. Judgment for plaintiff. Defendants appeal. Affirmed.

J. M. Wood, for appellants. *Otto Tum Suden*, for respondent.

PATERSON, J. This is an action to foreclose the lien of a street assessment. The only question presented on appeal is as to the sufficiency of the allegations of the complaint. Appellants contend that the complaint is insufficient, because it is not alleged that before ordering the work done the council passed a resolution of intention so to do, or that the superintendent posted or published the notice required by section 3 of the act under which the work was done. The complaint, however, alleges that "on the 24th day of July, 1888, the city council of the city and county of San Francisco, deeming it necessary, duly gave and made its determination to order the work done;" and this, we think, although not clearly expressed, is sufficient. The act provides (section 3) that "at the expiration of ten days after the expiration of the time of the publication, and at the expiration of fifteen days after the posting of any resolution of intention, if no written objection to the work therein described has been delivered, as aforesaid, by the owners of one half or more of the frontage of the property fronting on said work or improvement, the city council shall be deemed to have acquired jurisdiction to order any work to be done." Our Code provides that "in pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction." Code Civil Proc. § 456. The board had no jurisdiction to proceed until the steps required by the statute were taken. When the requirements of the statute were complied with, the board acquired jurisdiction to make the order providing for the work. An allegation that such order was duly given and made is a statement, in legal effect, that everything necessary to be done to give the order validity had been done. Himmelman v. Danos, 35 Cal. 448; City of Los Angeles v. Waldron, 65 Cal. 284, 3 Pac. Rep. 890. There are some minor points made in appellants' opening brief, but we do not think they require special notice. The objection that the record does not show that the executors of Bolton were substituted in his place, has been obviated by the filing in this court of a certified copy of the order of substitution. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(3 Cal. Unrep. 707)

JONES v. IVERSON. (No. 15,077.)

(Supreme Court of California. Dec. 14, 1892.)

APPEAL—RECORD—CERTIFICATE OF UNDERTAKING.

The provision of Code Civil Proc. § 953, that the clerk or attorneys shall certify that an undertaking on appeal in due form has been filed, is not complied with by a general certificate that the record is correct.

Department 1. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

Action by David Jones, administrator, against Niles Iverson. From a judgment entered, plaintiff appealed, and defendant moves to dismiss the appeal. Motion granted.

Bert Schlesinger, for appellant. *J. A. Cooper*, for respondent.

Paterson, J. The respondent has moved, on several grounds, to dismiss the appeal. There is in the record a copy of what purports to be an undertaking filed in the court below, but there is no certificate of the clerk that an undertaking in due form has been properly filed. We have held several times that it is not sufficient to insert in the transcript a copy of an undertaking on appeal with a general certificate that the record is correct, but that it is necessary, in order to satisfy the express requirement of section 953, Code Civil Proc., to produce a certificate of the clerk or attorneys to the effect that an undertaking in due form has been properly filed in the court below. Swasey v. Adair, 83 Cal. 136, 23 Pac. Rep. 284.

The appeal is dismissed.

We concur: Garoutte, J.; Harrison, J.

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97 Cal. 13

CITY OF LOS ANGELES v. DEHAIL et al.

(No. 19,040.)

(Supreme Court of California. Dec. 12, 1892.)

Improvement of Street—Invalid Ordinance.

A city ordinance for the widening and general improvement of a street, which has been adjudged invalid, and conferring no authority on the city to make such improvement, cannot be used as the basis of an action to condemn land sought to be included in such improvements.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by the city of Los Angeles against Alice Dehail and others to condemn certain land of defendants. From a judgment for defendants, plaintiff appeals. Affirmed.

C. McFarland, for appellant. *J. L. Murphy* and *Chapman & Hendrick*, for respondents. *J. H. Magoffey, amicus curiæ.*

Per Curiam. Action to appropriate to the use of the plaintiff as a public street certain lands of the defendants, under proceedings taken by virtue of the act of March 6, 1889, (St. 1889, p. 70.) The complaint sets forth an ordinance for the widening of First street from Los Angeles street to Alameda street, adopted by the plaintiff July 8, 1889, and also the various steps taken by the municipality under that ordinance; and alleges that a portion of the land required for the widening of the street is the property of the defendant Alice Dehail, and that the commissioners appointed under said ordinance have determined that she will be damaged by said improvement in the sum of $3,718.50; that this amount of money has been tendered to her, with a request that she execute a deed for said land to the city, and that she has refused to accept the money or make the deed; and prays judgment for the condemnation of said land upon the payment to the defendants, or into court for their benefit, of the amount of compensation therefor to which they are entitled. A demurrer to this complaint was sustained, and from the judgment rendered thereon in favor of the defendants the plaintiff has appealed.

In Dehail v. Morford, 95 Cal. 457, 30 Pac. Rep. 593, it was held that the ordinance under which these proceedings were taken did not confer upon the city any jurisdiction to make the improvement contemplated thereby, and it is very evident that, if the ordinance was insufficient to give to the city any jurisdiction to make the improvement, the commissioners appointed under that ordinance would have no authority to determine the amount of money which the owners of the land to be taken should accept for its conveyance to the city, and that the owners cannot be compelled to accept that amount, or to make a conveyance of their land. This action cannot be upheld as a proceeding to condemn the land in question under the power of eminent domain, or by virtue of the provisions of section 18 of the act of March 6, 1889. Before such proceedings can be instituted, it is necessary that the municipality shall have passed a valid ordinance for the widening of the street. As the ordinance in question conferred no authority to make the improvement, it cannot be used as the basis of any action for condemnation of the land sought to be included in the improvement.

The judgment is affirmed.

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97 Cal. 47

WATTS v. GALLAGHER et al. (No. 14,662.)

(Supreme Court of California. Dec. 13, 1892.)

Mortgage on Homestead—Foreclosure—Parties—Sale.

1. A sale under an action to foreclose a mortgage on "homestead premises" is void as against the wife of defendant when she is not made a party to such action.

2. In such case the wife is entitled to possession of the "premises" without paying such mortgage indebtedness, or any part thereof.

Department 2. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Watts against Gallagher and others to recover possession of certain land. Judgment for plaintiff. Defendants appeal. Affirmed.

A. M. Rosborough, *Geo. M. Shaw*, and *Jas. C. Martin*, for appellants. *Crittenden Thornton*, *F. H. Merzbach*, and *Rhodes Borden*, for respondent.

De Haven, J. This an action to recover possession of a tract of land, the title to which was on July 29, 1878, vested in one William A. Watts as his separate property. On that day he executed a mortgage thereon to the Hibernia Savings & Loan Society, to secure his promissory note for $1,500. In September, 1879, the said Watts, who was then, and still is, the husband of plaintiff, filed a declaration of homestead upon the premises, and thereafter the Hibernia Savings & Loan Society commenced an action against him to foreclose the mortgage referred to, and upon February 5, 1883, obtained judgment in the action directing a sale of the land in controversy to satisfy the same. The plaintiff here was not made a party to that action. Thereafter the land was sold under that decree to the Hibernia Savings & Loan Society, and, no redemption from such sale having been made, that corporation received a sheriff's deed therefor. The defendant Gallagher purchased the land from the Hibernia Savings & Loan Society, and of course succeeded to whatever title was vested in his grantor by the foreclosure proceedings before mentioned. The plaintiff recovered judgment in the court below, and the defendants appeal.

1. There being a valid homestead on the premises at the date of the commencement of the action to foreclose the mortgage thereon, the plaintiff here was a necessary party to that action; and the judgment therein, in so far as it directed the sale of such homestead premises, was void as against her. Revalk v. Kraemer, 8 Cal. 72; Hefner v. Urton, 71 Cal. 479, 12 Pac. Rep. 486; Building Ass'n v. Chalmers, 75 Cal. 332, 17 Pac. Rep. 229; Morris v. Ward, 5 Kan. 239. The filing of the declaration of homestead gave to the plaintiff an interest in the premises of which she could not be divested by any act of her husband alone, or by any action taken against him alone. As said by this court in Hefner v. Urton, 71 Cal. 479, 12 Pac. Rep. 486: "By the declaration of homestead some portion of his title (just what portion is not necessary now to be determined) passed from him to his wife. He could no longer mortgage or sell unless she joined with him She had the right of residence thereon with him and the family during their joint lives, with some rights in case she should survive him. She had a right of redemption as his successor in interest. Code Civil Proc. § 701, subd. 1. In order to foreclose her interest, and have a complete settlement of the question involved, viz., whether the mortgage was a lien, she was a necessary party. She would have had a right to question the execution or validity of the mortgage; whether it was barred; whether it had been paid."

2. The court below found that the note and mortgage made by plaintiff's husband to the Hibernia Savings & Loan Society had never been paid or satisfied, in whole or in part, other than by the sale under the foreclosure proceedings; and it is claimed by defendants that the plaintiff should not be allowed to recover in this action, except upon the condition that she pay the amount of this note and mortgage. We do not think the fact that plaintiff's husband has not paid the amount due upon this note is any defense to this action. Under that mortgage the grantor of defendant Gallagher was not entitled to the possession of the mortgaged premises until after the expiration of the time for redemption for a sale under a valid foreclosure of the mortgage; and, conceding that Gallagher is entitled to be subrogated to all the rights of his grantor, as holder of the mortgage referred to, he is not at this time entitled to withhold from plaintiff the possession of the land in controversy.

3. The evidence was sufficient to justify the finding of the court to the effect that plaintiff's cause of action is not barred by the provisions of section 318 of the Code of Civil Procedure.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

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97 Cal. 56

HISTORY CO. v. LIGHT, Justice of the Peace.

(No. 18,001.)

(Supreme Court of California. Dec. 15, 1892.)

JUSTICES OF THE PEACE—RULING AS TO JURISDICTION—REVIEW ON CERTIORARI.

A justice of the peace has jurisdiction to entertain a motion to set aside service of a summons, and pass upon the truth of the allegations of the complaint on which jurisdiction of defendant is based, and his decision cannot be reviewed on certiorari.

Department 2. Appeal from superior court, San Joaquin county.

Certiorari on the petition of the History Company to review a decision of Charles Light, a justice of the peace. The writ was dismissed, and petitioner appeals. Affirmed.

J. B. Webster and *L. W. Elliott*, for appellant. *James F. Tevlin* and *R. Percy Wright*, for respondent.

DE HAVEN, J. The petitioner commenced this proceeding in the superior court for the purpose of annulling an order made by a justice of the peace in San Joaquin, setting aside the service of a summons made in a certain action pending in the court of said justice of the peace, wherein the petitioner was plaintiff and one Quackenbush defendant. Upon the return made to the writ of *certiorari*, the superior court dismissed the proceeding, and the petitioner appeals.

The justice of the peace had jurisdiction to entertain the motion of the defendant therein to set aside the service of the summons made upon him in a county other than that in which the action was pending. Section 848 of the Code of Civil Procedure, so far as applicable to this case, is as follows: "Sec. 848. The summons cannot be served out of the county of the justice before whom the action is brought, except * * * when an action is brought against a party who has contracted to perform an obligation at a particular place, and resides in a different county, in which case summons may be served in the county where he resides." It is clear that a defendant has the right to move the court to set aside the service of a summons attempted to be made in violation of the provisions of this section; and the motion is properly made, as it was in this case, upon affidavits showing the grounds of the motion. The fact that the unverified complaint filed in the action alleged that the contract sued upon was to be performed by the defendant therein in the county in which such action was brought did not foreclose all inquiry as to the fact, and deprive the justice of the peace of jurisdicton to pass upon the truth of that allegation upon the motion to set aside the service of the summons. The burden of proving the improper service is, of course, upon the defendant in such a motion, and he should be required to present a clear case. But, the justice having jurisdiction to hear and decide the motion, his decision thereon cannot be reversed or annulled upon *certiorari*, no matter whether such decision was right or wrong upon the evidence before him. Buckley v. Superior Court, (Cal.) 31 Pac. Rep. 8; Sherer v. Superior Court, (Cal.) 31 Pac. Rep. 565, (No. 15,231.) The action of the superior court in dismissing the proceeding was correct, and must be affirmed. Judgment affirmed.

We concur: GAROUTTE, J.; MCFARLAND, J.

97 Cal. 28

BANK OF BRITISH NORTH AMERICA v. ALASKA IMP. CO. (No. 14,198.)

(Supreme Court of California. Dec. 13, 1892.)

Banks and Banking — Statements of Assets and Liabilities —Sufficiency—Publication—Right to Sue.

1. St. 1875–76, p. 729, provides that banking corporations shall publish and record statements each year in January and July; that one of such statements shall show the amount of capital stock actually paid in, and the other shall show the actual condition and value of its assets and liabilities, and where the assets are situated. Plaintiff filed a statement which, omitting the figures, was, under the head of "Liabilities;" "Capital," $———; "Circulation," $———; "Deposits," $———; "Bills payable and other liabilities," $———; "Undivided net profits," $———; "Total," $———; and under the head of "Assets:" "Specie on hand and cash at banker's," $———; "Bills receivable and other securities," $———; "Investments," $———; "Bank premises," $———; "Total," $———,—a sum equaling the liabilities. *Held*, that the statement was not a substantial compliance with the statute.

2. The statute further requires that the statements filed shall be sworn statements, verified, in the case of foreign corporations, by the agent or manager of the business resident in the state. Plaintiff's statement was followed by an affidavit of the managing agent at San Francisco, which stated that the bank has its principal place of business in London; that the accounts of the San Francisco agency are made up twice each year, and forwarded to the London office, where a general statement is prepared and sent to the San Francisco office; that the foregoing is a correct copy of the last statement received. There was nothing in the affidavit to show that the statement was sworn to by any officer or employe of the bank, or that the affiant believed the statement to be true, only that it was a true copy of the last statement received. *Held*, that this was not a sworn statement, within the meaning of the statute.

3. The statute prohibits one violating the same from prosecuting any action in the state until the statute is complied with. *Held*, that such disability is universal, and therefore plaintiff could not maintain an action on the bills in suit on the ground that the transactions out of which the suit grew were personal contracts, made out of the state, and that plaintiff ought not to be deprived of the privilege accorded foreigners of pursuing their remedies against residents of the state on such contracts.

4. The statute requires that the statements be published each year in January and July. It appeared that plaintiff could not get its statement from London before about the middle of February and August, and did not publish them until the following July or January, respectively. *Held* that, thought it would have been a more substantial compliance with the statute to have published the statements as soon as received, yet withholding them until the recurrence of the next July or January would not, of itself, have been considered a fatal defect, since it would have been presumed that the delay was caused by the supposition that the publication could be legally made only in the months named in the statute, and was therefore intended in good faith as a compliance with its requirements.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by the Bank of British North America against the Alaska Improvement Company to recover on certain bills of exchange. From a judgment for plaintiff, and from an order denying its motion for a new trial, defendant appeals. Reversed.

Daniel Titus, for appellant.

Smith & Pomeroy, for respondent, in support of the proposition that plaintiff was entitled to maintain the action because the penalties against suing imposed by the banking act are not applicable to this case, for the reason that the banking business done by plaintiff in purchasing the bills of exchange was done in a foreign country, cited the following New York cases: Garrison v. Howe, 17 N. Y. 466; Bonnell v. Griswold, 80 N. Y. 128; Whitaker v. Masterson, 100 N. Y. 277, 12 N. E. Rep. 604; Whitney Arms Co. v. Barlow, 63 N. Y. 62, and 68 N. Y. 34; and Pier v. Hanmore, 86 N. Y. 95.

Haynes, C. Appeal from the judgment and an order denying defendant's motion for a new trial. The action is upon certain bills of exchange drawn by the defendant upon William T. Coleman & Co., payable to the order of defendant 60 days after date, and by the defendant indorsed and delivered to said William T. Coleman & Co., who, before maturity, sold and delivered the same to plaintiff. These bills were afterwards duly accepted by W. T. Coleman & Co., who failed to pay them at maturity, of all which the defendant was notified. Defendant's answer, in addition to denials not necessary to be noticed, alleged that, after the defendant indorsed said bills of exchange, said William T. Coleman & Co., the drawee, paid the same to defendant, whereby the defendant was released and discharged from liability thereon as drawer and indorser; and, for a further defense, alleged that plaintiff, for more than two years last past, was a banking corporation doing business in the city and county of San Francisco, state of California, and during all that time was, and still is, subject to an act of the legislature of that state, approved April 1, 1876, concerning corporations and persons engaged in the business of banking; that plaintiffs had not complied with certain provisions of that act, (hereinafter mentioned,) and because thereof was prohibited from bringing or maintaining any action in the courts of this state. The court found that all the allegations of the complaint were true, and as to the answer found all the allegations untrue, except that plaintiff had been doing business as a banking corporation for more than two years at the place alleged, and that there were many newspapers of general circulation published in the city of San Francisco.

The act referred to (St. 1875-76, p. 729) requires: (1) That two statements shall be published and recorded each year in January and July. (2) That one of such statements shall state the amount of capital stock actually paid in, and that nothing shall be deemed capital actually paid in except money *bona fide* paid into the treasury of such bank. (3) The other of said statements shall show the actual condition and value of its assets and liabilities, and where the assets are situated. The statements are required to be "sworn statements," verified by certain officers in case of a home corporation, and in case of a foreign corporation "the statements herein provided for shall be verified by the agent or manager of the business resident in this state." These statements are required to be recorded in the office of the county recorder, one in a book entitled "Statements of Banking Capital," and the other in a book entitled "Statements of Banking Assets." The third section of this act is as follows: "Sec. 3. Directors making a false statement shall be jointly and severally liable to any person hereafter dealing with such corporation, to the full extent of such dealing; and no corporation and no person or persons who fail to comply with the provisions, or any of the provisions, of this law, shall maintain or prosecute any action or proceeding in any of the courts of this state until they shall have first duly filed the statements herein provided for, and in all other respects complied with the provisions of this law; nor shall any assignee or assignees of any such corporation or person, whose assignment shall be made subsequent to any such failure to comply with the provisions of this law, maintain any action or proceeding in any court of this state until his or their assignor or assignors shall have first duly complied with the provisions of this law." Appellant contends that the plaintiff has not complied with the requirements of said statute in several particulars: (1) That the statements published and recorded by the plaintiff do not show the amount of the capital actually paid, in money and in good faith, into the bank; (2) that the statements published and recorded by the plaintiff were not "sworn statements;" (3) that, if the statements should be held sufficient as to form and substance, they do not show the condition of the bank in the particulars required for the six months immediately preceding the publication and recording, but of a period ending more than six months prior thereto.

1. The statute contemplates two statements, but we are not prepared to hold that if the one statement contained all the particulars required by the statute it would not be sufficient, inasmuch as the statement was recorded in each of the books, and the information required could be ascertained from either. We think, however, that the statements put in evidence by the plaintiff were not a substantial compliance with the statute. These statements, omitting the figures, were, under the head of "Liabilities:" "Capital," $———; "Circulation," $———; "Deposits," $———; "Bills payable and other liabilities," $———; "Undivided net profits," $———; "Total," $———; and under the head "Assets:" "Specie on hand and cash at banker's," $———; "Bills receivable and other securities," $———; "Investments," $———; "Bank premises," $———; "Total," $———,—a sum equaling the liabilities. The statute requires a statement of the amount of capital actually paid in in money; and thus excludes subscribed capital not paid, and all securities of every description which may be held to represent capital. So in regard to the statement of assets, the statute requires the "value" to be stated, and where the assets are situated. Bills receivable, for example, are never charged up to profit and loss by any banker or business man, until collection is hopeless; but until that time they appear on every trial balance as assets on their face value. However that may be, the legislature required a sworn statement of the capital actually paid in, and the value of the assets, and where the assets were; and we must either hold that "capital," in the statement, means only "capital actually paid in money," and that the words "bills receivable and other securities" of themselves amount to an averment that they are of the actual value there stated, or we must hold the statement materially deficient. We do not say that this defect in the tabulated statement may not be cured by proper averments in an affidavit

attached thereto showing that the "capital" mentioned in the statement has been actually paid in money in good faith into the treasury of the bank, and that the assets there shown are of the value there stated, and are situated at a place or places named. The statute does not prescribe the form of these statements, and it is immaterial in what form the facts required are stated.

2. But these tabulated statements are not only not aided by the affidavit attached thereto, but are not "sworn statements." The affidavit is made by the managing agent at San Francisco, and is as follows: "William Lawson, being duly sworn, says he is the managing agent at San Francisco of the above-named bank, and that said bank has no cashier or secretary at such agency; that said bank is incorporated under the laws of Great Britain, has its principal place of business in the city of London, and carries on its business there and through numerous branches and agencies in Canada, the city of New York, and this city; and, further, that the accounts of the San Francisco agency are made up to the 30th June and 31st December in each year, and forwarded to the London office, where they are consolidated with the other accounts of the bank, and a general statement is prepared showing the entire assets and liabilities, which is sent to this office; that such general statements reach San Francisco about the middle of August and February in each year; that the foregoing is a correct copy of the last statement received. W. LAWSON. Subscribed and sworn to before me this 5th day of July, 1888. [Seal.] JAMES L. KING, Notary Public." It is nowhere intimated in this affidavit that any of the reports or accounts which are combined in the general statement were made under oath by any one, or that the general statement to which he attached his affidavit was the sworn statement of any officer or employe of the bank; nor does he swear that he believes it to be a true or correct statement. He only swears that it is a "a true copy of the last statement received." If the capital of the bank, at the time this statement was made, had been *nil*, and it had not been possessed of a dollar of available assets, and the agent had known it at the time the oath in question was taken, he could not be convicted of perjury. In Whitney Arms Co. v. Barlow, 63 N. Y. at page 66, the court had under consideration a similar statute, requiring the trustees of manufacturing corporations, at stated times, to publish and file a verified report, "which shall state the amount of capital and of the proportion actually paid in, and the amount of its existing debts." It was there said: "The reports should, in all essential particulars, comply with these statutes. The facts need not necessarily be stated with technical or grammatical precision and accuracy, but they must substantially appear, and be verified by the oath of the president and a majority of the trustees, and so distinctly stated that, if untrue, perjury could be assigned, or an action maintained by any one sustaining legal injury from the misstatement." It is true, as said by counsel for respondent, that our statute is in some sense penal, and should receive a liberal interpretation; but the fact that a statute is penal does not authorize the court to refuse to enforce it where the failure to comply with its provisions is, as in this case, palpable and material.

The fact that the San Francisco agent of the plaintiff could not personally know the truth of all the matters required to be embodied in the statements is not sufficient to relieve the plaintiff from such compliance as was within its power; and, if it be said that it is not possible for the plaintiff to comply substantially with the requirements of the statute, that would be conclusive against its right to maintain the action, as it is not in the power of the court to make an exception where none is made in the statute. As to the wisdom of this enactment, either as to its general purpose or the mode of its enforcement, we are not called upon to speak. The power of the legislature to make the enactment is not questioned, and our whole duty is to determine whether or not the law has been complied with, and, if it has not, to further determine the effect of such noncompliance upon the right of the plaintiff to maintain this action. In Bank v. Cahn, 79 Cal. 463, 21 Pac. Rep. 863, this court held that a failure on the part of the plaintiff to comply with the provisions of the act in question was a sufficient defense to the action. Counsel for respondent contends, however, that in the case above cited it was held that the publication and recording of these documents is mainly for the benefit of those locally interested, by giving information to them through local publication and recording, and that therefore the statute was not intended to have an extraterritorial effect; that in this case the bills of exchange sued upon were purchased by plaintiff at its agency at Vancouver in British Columbia; and that the "banking business," so far as these bills were concerned, was done in a foreign country. The record shows that these bills were purchased at plaintiff's Vancouver agency, and paid for by drafts drawn by that agency upon the San Francisco agency; that the bills were forwarded to the latter agency, and by it presented for acceptance, and after acceptance retained for collection. Upon this state of facts, respondent contends that it should not be deprived of the right "accorded to all foreigners, of pursuing their remedies against residents of this state upon personal contracts made out of the state." But the personal contract in this case sought to be enforced was a California contract, made here, and to be performed here. The Alaska Improvement Company, the defendant in the action, did not sell these bills to the plaintiff at Vancouver or elsewhere. Its only liability was that of a drawer and indorser, and not upon a supposed guaranty or other obligation, created by a sale of the paper in a foreign jurisdiction; nor can we see why the payment of the draft drawn by the Vancouver agency upon the San Francisco agency in payment for the bills of exchange, the presentation of them for acceptance, the demand of payment at maturity, and the protesting them for nonpayment, is not doing a banking business in the state of California. If John Smith, a resident of Vancouver, had there purchased them, and sent them to plaintiff's agency at San Francisco for the purposes above mentioned, would any one doubt that the same acts as those performed by the plaintiff in the case at bar were within the legitimate functions of a bank, were, indeed, the exercise of one of the most common and convenient functions of a bank, and which is everywhere regarded as "banking business?" In Bank v. Barling, 44 Fed. Rep. 641, an action against a stockholder of the Alaska Improvement Company upon his personal liability as a stockholder for these same bills of exchange, (cited by respondent's counsel,) the court held that the right of the plaintiff to maintain an action in the federal courts was not affected by the state statute under consideration here. Having so decided, the court also expressed the opinion in that case, in the circuit court, and also in the same case in the circuit court of appeals, (50 Fed. Rep. 260, 1 C. C. A. 510,) that, as the purchase of the bills of exchange occurred beyond the limits and jurisdiction of the state of California, the case was not within the statute; but this was clearly *obiter dicta*, and not authority upon the point here. But the whole question as to where the "banking business" was done, or the purchase was made, if material in any sense, is not conclusive. It is conceded that the plaintiff is, and during all the time covered by this transaction has been, doing a banking business in this state. The requirements of the statute are imperative. The penalty for a failure to comply with the statute is not that it shall not maintain or prosecute any action or proceeding upon or concerning a banking transaction done or performed by it within this state, but it is that "no corporation and no person or persons who fail to comply with the provisions, or any of the provisions, of this law, shall maintain or prosecute any action or proceeding in any of the courts of this state until," etc. The disability imposed by the statute as a consequence of the noncompliance is universal. There are no exceptions expressed in the statute, and none are implied. As to remedies, the *lex fori* governs, not the *lex loci contractus*. The penalty imposed by the statute for its violation affects the person or corporation by creating a personal disability, but in no wise affects the legality of business transacted. The view we have taken does not, as we think, conflict with the New York cases cited by the respondent, but, on the contrary, is clearly supported by them. Those cases proceed upon the theory that the duty of the corporation to make these reports is one which it owes to the public generally, for the protection of all persons who may have occasion to deal with it; that the duty is a corporate one; that the state confers upon the corporation valuable privileges, and, to carry out its policy, exacts the performance of specified duties which they must perform as the condition upon which they are entitled to enjoy these privileges. It does not affect the analogy between those cases and the case at bar that the penalty for a failure to comply with the statutory requirements was in some cases a pecuniary liability of the members of the corporation, and in others a forfeiture of the corporate franchise. The duty was the same, imposed for the same reason; the only difference being in the mode of securing its performance.

3. The statute doubtless intended that these statements should show the condition of the bank as of a time immediately or shortly preceding the publication of the statement, as otherwise there could be no object in requiring semiannual statements. We are not prepared to hold, however, that, where an exact compliance with the requirements of the statute as to the time of publication is impossible, a publication and recording, as soon thereafter as the same could reasonably be done, would not be a substantial compliance, and relieve the corporation from the penalty imposed by the statute. The legislature, in fixing the time for the publication of these statements, no doubt took into consideration the fact that banks usually prepare semiannual statements at the close of the months of June and December, and in naming January and July as the time of publication supposed that ample time was given for that purpose; and, as recent information as to the condition of banks and bankers is of more importance to the public than that the publication should be made in a particular month, that a publication in February and August would be a more substantial compliance with the statute than withholding the publication and recording until the recurrence of the next July or January. If this delay in the publication had been the only defect, we should have been inclined to hold that the delay was caused by the supposition that the publication could be legally made only in the months named in the statute, and was therefore intended in good faith as a compliance with its requirements. The conclusions at which we have arrived upon questions above considered render it unnecessary to consider other questions presented by appellant. We advise that the judgment and order appealed from be reversed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

(97 Cal. xvii)

BANK OF BRITISH NORTH AMERICA v. ALASKA IMP. CO. (No. 14,199.)

(Supreme Court of California. Dec. 13, 1892.)

Department 2. Appeal from superior court, city and county of San Francisco; J. P Hoge, Judge.

(Not to be published in California Reports.)

Action by the Bank of British North America against the Alaska Improvement Company to recover on certain bills of exchange. From a judgment for plaintiff, and from an order denying its motion for a new trial, defendant appeals. Reversed.

Daniel Titus, for appellant. *Smith & Pomeroy*, for respondent.

PER CURIAM. Appeal from the judgment, and from an order denying a new trial. This action is upon another bill of exchange drawn and indorsed by the defendant at the same time with those involved in case No. 14,198, between the same parties, and presents the same questions, and was submitted upon the same briefs. 31 Pac. Rep. 726. For the reasons given in the opinion in that case, No. 14,198, (this day filed,) it is ordered that the judgment and order appealed from be reversed.

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97 Cal. 40

FREEL *v.* MARKET ST. CABLE RY. CO.

(No. 14,892.)

(Supreme Court of California. Dec. 13, 1892.)

IMPEACHMENT OF WITNESS—PRIVILEGED COMMUNICATIONS.

1. In an action against a street railway for personal injuries, an employe of defendant, a witness for plaintiff, testified on cross-examination that he had obtained written statements from other employes as to the manner in which the injuries occurred, but that he did not know where these statements were. The witness identified a bundle of papers in the hands of defendant's counsel as the reports referred to, which plaintiff's counsel was permitted to examine. Subsequently another employe, who admitted that he made a written report to defendant in relation to this accident, was called by defendant, and testified to a material circumstance at variance with and contradictory to his report. *Held*, that plaintiff's counsel was entitled on demand to receive this report, which was lying on the table of defendant's counsel, and to introduce it in evidence for the purpose of impeaching such witness.

2. Where a physician, who was called as a witness by defendant, had obtained his knowledge of the case by prescribing for plaintiff, he was incompetent to testify, under Code Civil Proc. § 1881, which provides that a physician cannot, without the consent of his patient, testify as to any information acquired in attending the patient, which was necessary to enable him to prescribe for her.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Mary Freel against the Market Street Cable Railway Company for damages. Judgment for plaintiff. Defendant appeals. Affirmed.

W. H. L. Barnes and *Frank Shay*, for appellant. *Sullivan & Sullivan*, for respondent.

FOOTE, C. This was an action for damages for injuries done the plaintiff while endeavoring to get upon the car of the defendant. Judgment was given in favor of plaintiff, from which, and an order refusing a new trial, this appeal is taken.

The only grounds urged for a reversal of the judgment and order are: "(1) That the court erred in compelling defendant's counsel to give to plaintiff's counsel certain written statements of employes of defendant in relation to the facts surrounding the occurrence which caused the plaintiff's injury, which statements were in the possession of the defendant's counsel, and which plaintiff's counsel desired to use as a foundation to impeach the testimony of Thomas Hurley, a witness for defendant. (2) That the court erred in refusing to allow Dr. Hutchins, a physician who had prescribed for plaintiff, to give evidence of information acquired by him of her physical condition, which was necessary for him to know in prescribing for her." The rulings of the court upon these matters were fully discussed on the motion for a new trial, and the learned judge of that tribunal gave reasons for his rulings in the premises, which read thus:

"This is an action to recover damages for personal injuries sustained by the plaintiff. The cause was tried, and the plaintiff recovered a verdict for $4,500, and the defendant now moves for a new trial. But two points are discussed in the defendant's brief in support of the motion: *First*, it is claimed that the court erred in requiring defendant's counsel to exhibit certain papers to the plaintiff; and, *secondly*, that the court should have admitted the testimony of Dr. Hutchins.

"1. As to the first point, it appears that during the cross-examination of James C. Gould, an employe of the defendant, and called as a witness for the plaintiff, he stated that he had obtained statements of the manner in which the plaintiff's injuries had occurred from the defendant's conductor and gripman; that he did not know where these statements were, but 'they may be upon the table, in front of defendant's counsel.' Thereupon plaintiff's counsel took from the table in front of defendant's counsel, and from among the papers of the latter, which he was using in the case, a number of papers fastened into one package or bundle, 'and held them up before the witness.' The witness then identified these papers as the reports made to defendant by these employes. The plaintiff's counsel then asked permission of defendant's counsel to take the papers, and the latter thereupon stated that he could examine them during the recess. Subsequently, when one of the defendant's employes (Thomas Hurley) was upon the stand and testifying on behalf of the defendant, he was asked if the plaintiff did not take hold of the hand rail of the car, just as the gripman was applying the grip,—a material circumstance. To this the witness answered, 'No.' He was then asked if he ever so stated, and he said he never did. Thereupon plaintiff's counsel requested of defendant's counsel the papers previously referred to, which he had allowed him to examine, stating that he desired to show by these papers that the witness upon the stand had formerly made a statement at variance with his present testimony in the last-mentioned particular, and that the papers to establish this fact were in the possession of the defendant's counsel. The latter denied the right of counsel to demand his private papers for cross-examination. The plaintiff's counsel then reiterated the demand, and offered to show by means of a paper then in the possession of the defendant's counsel—the paper which he had been allowed to examine—that the witness had made a statement at variance with the statement then made upon the stand, and that he desired to offer it for the purpose of impeaching the testimony thus given by him. Thereupon the witness was further questioned, and admitted that he did make a statement in writing to the company defendant in relation to this accident, and that this statement was sent to the office of the company; that the statement contained an account of how the accident happened, as the witness remembered it. Thereupon the court held that the plaintiff's counsel was entitled to the paper, whereupon Mr. Barnes handed the paper to Mr. Sullivan, plaintiff's counsel, and excepted to the ruling of the court. The witness was then confronted with the paper, and it did appear therefrom that he made therein a statement inconsistent with and contradictory to the testimony previously referred to and given by him upon this trial. Counsel, in support of the alleged error of the court in making this order, cites the case Stokoe v. Railway Co., (Minn.) 42 N. W. Rep. 482. There a release had been executed by the plaintiff to the defendant of the cause of action sued upon. The plaintiff requested defendant's counsel to produce the release. The defendant's counsel failed to do so, and the court held that the plaintiff was not entitled to the paper sought, but could offer parol evidence of the contents thereof. A similar doctrine was announced in Tannahill v. Coveney, 1 Hill, 33; Rhoades v. Selin, 4 Wash. C. C. 715. That decision is manifestly inapplicable to the case at bar. There a paper had been executed by the plaintiff himself, and delivered to the defendant, with the contents of which the plaintiff was presumed to be fully acquainted. Here, however, was a statement or account of plaintiff's injury prepared by Mr. Gould, an employe of the defendant, and signed by Mr. Hurley, another employe, and delivered into the custody of the defendant. This statement was in the possession of defendant's counsel upon the trial, and, indeed, was lying upon the desk before him when the demand in question was made. The plaintiff could not, in the nature of things, know the contents of this paper. It is not claimed that she had ever seen it, nor had it ever been in her possession. It was produced for the first time by defendant's counsel. To sanction the rule claimed by the defendant in this case would enable a litigant to suppress adverse evidence of the most important character. Here the plaintiff had a right to show, by way of the impeachment of the defendant's witness, that he had on another occasion made a statement inconsistent with his present testimony. The law provides that, where such statement is in writing, it must be shown to the witness, and an opportunity afforded to the latter to explain it. Upon defendant's theory, if he were permitted to retain this paper in his possession, so that the plaintiff's counsel could not, on cross-examination, show it to the witness for the purpose of impeaching him, it would be impossible, under similar circumstances, to impeach any witness. While a notice to produce a paper in certain cases is proper, yet in this instance the objection was not placed upon that ground. There was no necessity of a formal notice, inasmuch as the paper at the time the demand was made was lying in front of the counsel in the court room and upon the table. I am of opinion that no error was committed in this particular.

"2. As to the second point, the exclusion of the testimony of Dr. Hutchins, subdivision 4, § 1881, of the Code of Civil Procedure, provides that a physician cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. The plaintiff's mother testified on her behalf that after her daughter's injuries she called at the office of the railroad company, and requested them to furnish her daughter a doctor. She states that she met Dr. Hutchins in the office. The latter does not remember whether he met plaintiff's mother there or not. It appears, however, that he did call upon the plaintiff, and examined her. When interrogated as to what was said by him to her when he entered her sick room, he stated that he informed her that he had been sent there by the company. After he had made such examination as he thought proper, he returned a second time. When questioned whether he returned on the second occasion of his own motion or at the request of the plaintiff, he was uncertain. The plaintiff's testimony shows that Dr. Hutchins called upon her on several occasions, and prescribed for her. The doctor, when questioned upon this subject, failed to remember whether he did or did not prescribe for her. He was then asked by plaintiff's counsel this question: 'It was during this time that you were making these visits and prescribing for her that you obtained any knowledge that you have of her case?' And his answer was: 'Yes, sir; that is all, except conversations with Dr. McLean.' Upon this testimony the court held that he should not be permitted to testify. This ruling is attacked upon the authority of the case of State v. Depoister, (Nev.) 25 Pac. Rep. 1000. That was a criminal action,—an indictment for the rape of a child seven years old. The prosecution was conducted at the instance of the parents of the child, and in the course of the trial the people called as a witness a doctor called in by the parents to attend the child; and in response to questions propounded by the prosecution the doctor was permitted to testify as to information acquired by him in his professional capacity upon these visits. The facts there presented are entirely different from those disclosed in this case. The rule which excludes a physician from revealing the secrets of the sick chamber may not, in the nature of things, apply to criminal prosecutions. The interests of justice oftentimes in such cases unseal the doctor's lips. As was well said by the New York court of appeals, (Pierson v. People, 79 N. Y. 432,) the purpose of the law in excluding the testimony of the doctor in such cases never designed to shut out evidence necessary for the proof of guilt or the punishment of crime. It was never intended 'to protect the murderer rather than to shield the memory of the victim.' In civil cases, however, the rule is different. It will be observed that the rule of exclusion, by the precise terms of the statute, is confined to civil actions. The language of the statute (section 1881) is: 'A physician cannot be examined in a civil action as to any information acquired,' etc. And it will be observed that, while in the Penal Code the provisions of section 1881 in relation to parties prohibited from testifying is adopted as to a husband and wife, it is not in terms adopted as to any other of the professions or classes in section 1881 enumerated. In this case it appears that the plaintiff requested the defendant to furnish a doctor; that, in response to such request, Dr. Hutchins called upon her four or five times, and counseled with her as to her treatment, and prescribed for her. Under these circumstances, it seems to me he occupies a different position than if he had gone there originally upon the suggestion of the defendant, and stated to the patient that he came there solely and entirely at the request of the defendant, to ascertain the nature and character of her physical injuries, for the purpose of reporting them to the defendant. If he had confined his conduct to such examination and such report, he should have been permitted to testify. But in this case it appears from his own testimony that the information acquired by him was obtained while visiting and prescribing for her, and I therefore think that the proposed evidence was properly excluded. Motion for a new trial denied."

We are of opinion that the trial court was right in its views of the matters in dispute, and therefore advise that the judgment and order be affirmed.

Haynes, C. I concur.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 19)

BOSKOWITZ v. NICKEL. (No. 14,750.)

(Supreme Court of California. Dec. 13, 1892.)

PARTNERSHIP—SETTLEMENT—AGREEMENT OF LIQUIDATION.

1. Where property is purchased out of the funds of an individual partner, but the other partner receives his share of the benefit, and it is considered by both a partnership transaction, the former is, notwithstanding an agreement of liquidation, wherein the entries in the books as they stood at the time were to be treated as correct, entitled to credit.

2. Where a partnership incurs an indebtedness with the express consent of a certain partner, and subsequent to an agreement of liquidation, wherein each partner was to satisfy one half the interest charged upon all indebtedness thereafter to be incurred, the interest on such indebtedness is a proper charge against the partner.

Department 1. Appeal from superior court, city and county of San Francisco; T. N. Rearden, Judge.

Action by Charles J. Boskowitz against J. Leroy Nickel for the settlement of partnership accounts. Judgment from which defendant appeals. Modified and affirmed.

Olney, Chickering & Thomas, for appellant. *Edmund Tauszky*, for respondent.

Garoutte, J. This is an appeal from a judgment settling the partnership accounts existing between these parties to the action, and it is insisted that the conclusions of law as to certain items of the account charged to appellant are not supported by the findings of fact. Difficulties having arisen between these parties as to the conduct of the business, and the firm having but one creditor, it was concluded to close out the business, and an agreement of liquidation was entered into with that object in view. This agreement contained the following provisions: "(4) The entries in the books, as they stand at the present time, shall be treated as correct, and as having been made after full discussion of all matters involved. (5) Interest on all overdue accounts becoming due to said Live Oak Distillery Company after this date shall be borne and paid equally between the parties hereto." The court held that an item of the account consisting of $666.31 should not be credited to appellant. This item was the value of one half of certain whisky, which formed a portion of the purchase price of a tract of land. The court found that this whisky was paid for from the personal funds of the appellant, and that the whole transaction was considered by both parties as a partnership matter, and they asked that it be settled as such. It is insisted by respondent that the fourth provision of the agreement of liquidation, wherein it is provided that the books, as they stand at the present time, shall be treated as correct, bars any credit to appellant as to this item. Such position is not tenable, and we hold to the contrary. Respondent recognized the transaction as a partnership matter, took title to one half the realty in his own name, had the full benefit of appellant's money, and should be charged with his share of the cost of the investment. There is nothing in the provisions of the contract quoted to prevent such an adjustment; neither are the books of the firm here referred to impeached by such a course.

The item of interest upon the amount due the partnership creditor was also a proper charge against respondent. The last indebtedness of the partnership to the creditor was created with the express consent of the respondent, and created subsequent to his agreement of 1888, which expressly provided that each party should satisfy one half of the interest charged upon all indebtedness due subsequent to the date of the agreement. Respondent's share of the office expenses is also a proper charge to be placed in the account. We find nothing in the agreement of May, 1888, to prevent the allowance of these items.

The findings in this case are an object of curiosity. They consist of a detailed statement of the evidence and the respective claims of the parties to the action, together with the views of the court upon matters of law. The practice is not one to be commended, and, if it is desirable in any case to place the evidence before this court, a motion for a new trial should be made. Let the cause be remanded, with directions to the trial court to modify the judgment by deducting therefrom the sum of $802.62 from the date of the entry thereof, and in all other respects let the judgment be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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97 Cal. 70

WOOLLEY v. WICKERD. (No. 19,126.)

(Supreme Court of California. Dec. 20, 1892.)

VENDOR'S LIEN—ASSIGNMENT OF CLAIM—EXTINGUISHMENT.

Civil Code, §§ 1721, 1722, declare a sale to be a contract by which, for a pecuniary consideration called a "price," one transfers to another an interest in property, and that the subject of sale must be property the title to which can be immediately transferred from vendor to vendee. *Held*, that an assignment to one's attorneys of a judgment thereafter to be recovered, in a certain action brought to enforce a vendor's lien, is not such a sale or assignment of the amount claimed as to extinguish the lien.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Action by E. B. Woolley against Isaiah Wickerd. Judgment for plaintiff. Defendant appeals. Affirmed.

R. H. Horton, for appellant. *Alfred Cooper*, *Frank H. Suffel*, and *J. W. Swanwick*, for respondent.

BELCHER, C. The plaintiff brought this action to recover the sum of $400, balance of purchase money due for certain real property sold by him to the defendant, and to foreclose a vendor's lien on the property therefor. The court below gave judgment for the plaintiff, according to the prayer of his complaint, and the defendant appeals from the judgment and an order denying his motion for a new trial. Only two points are made by appellant. They are that the judgment should be reversed upon the grounds: (1) That the plaintiff by his delay lost his rights; and (2) that there was no vendor's lien which could be enforced in the action.

As to the first point, the court found, in effect, that the delay complained of was by agreement with and consent of the defendant, and therefore that any objection on account of the delay was waived. It would subserve no useful purpose to state the evidence bearing upon this question. In our opinion, it was fully sufficient to justify the finding, and hence this point cannot be sustained.

The second point is based upon the theory that the plaintiff sold and assigned his claim for the $400, unpaid purchase money, before the judgment was rendered, and that the lien was not assignable, and therefore ceased to exist when the sale was made, and could not thereafter be enforced in the name of the assignor or assignee. It is true that when the owner of real property parts with his title to it, and the purchase money is not paid, and no security is taken, the law implies a lien in his favor to secure its payment. Th lien does not arise from any agreement o the parties, but is the creature of equity and is established solely for the securit of the vendor. It is a privilege purely personal, and cannot exist in favor of an one but the vendor. It is not assignabl even by express contract, and the assignee of the right to recover the mone for which the land was sold cannot enforce the lien. Baum v. Grigsby, 21 Cal. 173 Avery v. Clark, 87 Cal. 619, 25 Pac. Rep 919; Gessner v. Palmateer, 89 Cal. 89, 2 Pac. Rep. 608, and 26 Pac. Rep. 789. Th above are well-settled rules of law, an the question is, do they apply to thi case? The only proof that the plaintif had assigned his claim for the $400 wa that, after the action was commenced, h assigned to his attorneys all his right, title, and interest in any judgment that he might recover in the action. The Civil Code has the following provisions: "Sec. 1721. Sale is a contract by which, for a pecuniary consideration called a 'price,' one transfers to another an interest in property. Sec. 1722. The subject of sale must be property the title to which can be immediately transferred from the selle to the buyer." When the alleged assignment was made, there was no judgment the title to which could be immediately transferred. The assignment, therefore, did not transfer the cause of action, and could, at most, operate only as an agreement to assign or transfer the judgment when recovered. This does not, in our opinion, bring the case within the rules of law above declared.

There is nothing in the other objections that the plaintiff had received the entire purchase price of his land, and that there was no lien because the parties had entered into a collateral agreement about another contract. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

3 Cal. Unrep. 728.

RICHARDSON et al. v. DUNNE et al.

(No. 14,587.)

(Supreme Court of California. Jan. 7, 1893.)

APPEAL—MATTERS NOT APPARENT ON RECORD.

A finding by the trial court that plaintiffs' causes of action are barred by limitation is conclusive on appeal, where no exceptions were taken to such finding, and where the appeal was not taken within 60 days after judgment rendered.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

Action by Elizabeth C. Richardson and others against Kate Dunne and Alice Dunne to quiet title to land. Judgment for defendants. Plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. *W. S. Goodfellow*, for respondents.

VANCLIEF, C. Action to quiet title to land. On the first trial there was a judgment for plaintiffs, from which, and an order denying their motion for a new trial, the defendants appealed, and the judgment and order were reversed, and a new trial ordered. 82 Cal. 174, 23 Pac. Rep. 9. On the new trial, judgment passed for defendants, from which plaintiffs bring this appeal on the judgment roll, containing a bill of exceptions as to questions of law, but raising no questions of fact.

All the questions of law presented by the record on this appeal were decided on the former appeal; and the judgment on the new trial, from which this appeal is taken, appears to be, and is admitted by appellants' counsel to be, in strict accordance with the law of the case, as expressed on the former appeal. In his opening brief counsel for appellants says: "As the former decision of this court is the law of the case, right or wrong, so far as this court is concerned, we do not deem it proper to more than state our points and objections here, which we still believe well taken, but we realize that we must now take our chances in another forum to realize our expectations." In his closing brief, counsel makes a point on the finding by the court on the new trial that plaintiffs' causes of action were barred by sections 1573 and 1574 of the Code of Civil Procedure "as the same existed prior to the amendment thereof in the year 1880." Nothing as to this was decided on the former appeal; but the conclusion that the causes of action were barred does not appear to be an erroneous conclusion from other facts found, or in any way disclosed by the record; and since there is no exception to the findings, and as the appeal was not taken within 60 days after the rendition of the judgment, the findings must be regarded as conclusive as to the facts. Besides, the judgment is well supported by other findings, regardless of the finding that the causes of action were barred. I think the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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3 Cal. Unrep. 665

ASBILL v. STANDLEY, Sheriff.

(No. 14,250.)

(Supreme Court of California. Dec. 1, 1892.)

SALE—DELIVERY—CHANGE OF POSSESSION—EVIDENCE OF GOOD FAITH—VERDICT—SUFFICIENCY.

1. In an action to recover certain mares and colts seized on an execution against plaintiff's husband, plaintiff testified that her husband sold her 16 mares in satisfaction of a debt. The mares were pastured on the husband's land prior to the sale, and were branded with his brand, but at the time of the sale they were brought to the corral, vented with the husband's brand, and then branded with plaintiff's brand. A bill of sale was also given, and they were then turned back on the range where they had been before, and cared for, at seasons requiring care, by men hired and paid by plaintiff. *Held*, that there was sufficient delivery and change of possession of the property.

2. Evidence as to whether plaintiff in 1889 gave in to the assessor the ranch as her property could not affect the validity of her purchase of the mares in question in the preceding July, and did not tend to show fraud in the transaction, and was therefore properly excluded.

3. A verdict will not be set aside on the ground that it is so uncertain that the judgment thereon cannot be executed, when such objection is presented on the judgment roll alone, and there is no bill of exceptions presenting the facts sustaining the contention of the uncertainty of the verdict, and when the answer of defendant sheriff also shows a familiarity with the property referred to in the verdict.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

(Not to be published in California Reports.)

Action in replevin by Mary Asbill against J. H. Standley, sheriff, for the recovery of certain mares. From a judgment in favor of plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

J. A. Cooper, for appellant. *J. L. Carothers*, for respondent.

HAYNES, C. Appeal by defendant from a judgment rendered against him, and from an order denying a new trial. The plaintiffs brought replevin against the defendant for the recovery of certain mares and colts seized by the defendant as sheriff on an attachment issued against the property of the plaintiff's husband. The cause was tried before a jury, and the plaintiff had a verdict and judgment for return of part of the property, or for $1,600, the value thereof, if a delivery thereof could not be had.

We have looked carefully into the questions presented by the record upon the motion for a new trial, and find no error of which the appellant can complain. The instructions to the jury were full and clear, especially those given at the request of the defendant, and, as they do not involve any new principle of law, a discussion of them would serve no useful purpose.

The principal question in the case is the oft-recurring one as to what constitutes "an immediate delivery, and an actual and continued change of possession," and upon this question appellant contends that the evidence does not justify the verdict. The plaintiff gave evidence tending to prove that her husband was indebted to her, and sold her 16 mares in satisfaction of the debt. These mares were pastured on land of the husband prior to the sale, and were branded with his brand. That at the time of the sale they were brought to the corral, and vented with the husband's brand, and then branded with plaintiff's brand. A bill of sale of the mares was also given. They were then turned back on the range where they had been before, and cared for, at seasons requiring care, by men hired and paid by plaintiff. One of the means provided by statute for designating the ownership of stock, whether horses, cattle, sheep, or hogs, is by marks and brands; a mode indeed well calculated to indicate ownership, and which was in common use before the statute was enacted. If the husband's brand had been permitted to remain upon the mares without venting, it, under the circumstances shown, would have been taken as conclusive of his ownership, as in the case of Dean v. Walkenhorst, 64 Cal. 79, 28 Pac. Rep. 60, cited by appellant. The plaintiff's brand was different from that of her husband, easily distinguishable from it, and was not only notice of ownership, but almost the only indication of ownership possible in the case of "stock" animals which are not housed or commonly used. In McKee v. Garcelon, 60 Me. 165, also cited by appellant, the facts were materially different. There the cattle were sold by the husband to the wife. A bill of sale was given, and the cattle remained upon the husband's farm, where both resided, as before, where all the cattle were kept and used. No other act of delivery was made, so far as the report discloses, and we may therefore conclude they were not branded. Here there was not only a bill of sale, but the husband's vent brand was put on, as the statute requires, where branded animals are sold, and the purchaser's brand was also put on. It was properly said in the case last cited that "it is clear that there is the same necessity of a delivery where the parties to the sale are husband and wife that there is in other cases. For this purpose the wife sustains the same relation to the husband as any other person." In the case at bar there can be no question that there was a delivery of the property to the wife. It may have been fraudulent and without consideration, but those questions were submitted to the jury with proper instructions, and from the evidence they found that there was a consideration for the sale, and that it was not fraudulent. The sole question remaining, then, is as to the actual and continued change of possession; and the only ground upon which it could reasonably be claimed that there was not is that they were kept after the sale in the same place they were before. This court has repeatedly held that that is not conclusive. It is a circumstance which the jury may look to in determining that question, but it must be viewed in the light of other facts attending the transaction. Possession, after the transfer, by either party, is only evidence tending to show ownership, or a change of ownership. A change from the place where the property was kept before the sale may not be as conclusive evidence of a change of ownership as other visible indications upon the property itself, without a change of place; nor can the place where this property was kept by the plaintiff, after the transfer, be said to rebut or weaken the evidence shown by the change of brands, even if it was a place where she would naturally have kept similar property purchased from another. This property carried with it, wherever it might be, "the usual marks and indications of ownership," and were "such as to give evidence to the world of the claims of the new owner."

The evidence upon all points necessary to sustain the verdict was sufficient. The objections to questions put to the plaintiff upon cross-examination were properly sustained. Whether the plaintiff did or did not give in to the assessor in 1889 the ranch as her property could not in any manner affect the validity of her purchase of the mares in question the preceding July, and did not tend to show fraud in that transaction. The latter part of the question assumed what was not shown by the evidence, that she had made an affidavit as to her ownership of the ranch, and for that reason, as well as because it did not relate to nor affect the transaction involved in the litigation, was irrelevant. Nor can we perceive the materiality of the question as to how many sheep and cattle her husband had at the time of her marriage to him in the year 1887.

The only question arising upon the judgment roll is as to the sufficiency of the description of the property to which the jury found the plaintiff entitled. The verdict is as follows: "We, the jury, find a verdict for the plaintiff, Mrs. Mary Asbill, for the 16 mares bought of F. M. Asbill on the 23d day of June, 1888, with suckling colts, which we value at $675; also 12 two year old mules, valued at $560; also 4 two year old horse colts, valued at $140; also 4 one year old mule colts, valued at $160; also 3 one year old horse colts, valued at $65, the latter being the increase of aforesaid 16 mares,—being a sum total of $1,600 for value of said animals as a whole." We cannot say that the verdict is so uncertain that the judgment thereon cannot be executed. For aught that appears, the mares that were bought from F. M. Asbill, with their increase, are distinguishable from the other property sued for, and can be delivered by the defendant. All intendments are in support of the judgment, and, as this objection is presented upon the judgment roll alone, it was incumbent upon the appellant to present by bill of exceptions such facts as would sustain his contention that the verdict is so uncertain that the judgment thereon cannot be executed. We cannot say from its language that such uncertainty exists.

The answer of the defendant affirmatively alleged that "plaintiff claims title to the property described in the complaint, either directly or indirectly, from the said F. M. Asbill, her husband, to herself;" and also alleged "that on or about June 23, 1888, * * * all these things being well known to the plaintiff and to the said John B. Asbill, the said F. M Asbill transferred by bill of sale, without consideration, 16 head of horses, being part of the property described in the complaint, to the plaintiff herein, and at the same time transferred by bill of sale, without consideration, the remainder of said property described in the complaint to his son, John B. Asbill." The answer further alleged that the remainder of the property was transferred to the plaintiff by John B. Asbill, November 1, 1888. The appellant took all the property under an attachment, and justifies under his writ. His answer shows a familiarity with the property, which precludes the idea that he is unable, for want of a sufficient description of the property in the verdict and judgment, to comply therewith; and, unless we can see how the defendant may be prejudiced by the defective description, we are not permitted to reverse the judgment. Code Civil Proc. § 475. The discrepancy between the number of mares sued for and the number awarded plaintiff by the verdict was corrected in the court below, and no question is now made thereon. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(96 Cal. 617)

KREISS v. HOTALING. (No. 13,320.)

(Supreme Court of California. Dec. 2, 1892.)

ARBITRATION — COMMON-LAW AWARD — ENFORCEMENT—STAY OF, AFTER VOID JUDGMENT.

1. Plaintiff and defendant agreed upon an arbitration stipulating that two arbitrators, without being sworn, might make an award, without set times or an appointed place for their proceedings; that they might obtain such information as they deemed best, anything in the Code of Civil Procedure to the contrary notwithstanding; that, if they failed to agree, they should choose a third, and the decision of a majority should be final; that the submission should be filed with the clerk, and entered as an order of the superior court; that after entry neither party should ask for any reduction, exception, new trial, or appeal therefrom, but it should have all the force of a final judgment of the court of last resort. *Held* that, since the parties intentionally ignored the material provisions of the statute on arbitrations, the submission, as a statutory submission, was void, and the award cannot be enforced as a judgment, though it is good as a common-law award, and the basis of an action.

2. The judgment being absolutely void, the court has no power to set it aside; but it may, to prevent annoyance which might be occasioned by the attempted execution of a void judgment, either stay or arrest the process.

In bank. Appeal from superior court, city and county of San Francisco.

An agreement for a submission to an arbitration was entered into between L. Kreiss and A. P. Hotaling. An award was made in favor of Hotaling, which Kreiss moved to set aside. The motion was dismissed, and an order entered perpetually staying any proceedings under the judgment entered on the award. Hotaling appeals. For former report, see 28 Pac. Rep. 806. Affirmed.

A. N. Drown, for appellant. *Henry E. Highton*, for respondent.

PATERSON, J. A dispute having arisen between respondent and appellant as to the balance, if any, due from the latter to the former for certain work done by him in decorating appellant's dwelling house, a contract was entered into, by the terms of which they agreed to submit the matter in controversy to two arbitrators, who were authorized to choose an umpire in the event of their inability to agree. It was stipulated that the submission to arbitration should be filed with the clerk, and entered as an order of the superior court. The arbitrators were unable to agree upon an award, and Augustus Laver was chosen by them to act "as an umpire or third arbitrator." An award was filed April 21, 1888, in which the arbitrators found that appellant had overpaid respondent, and that he was entitled to have and recover from respondent the sum of $3,000. The award was entered in the judgment book by the clerk, who thereupon made up what he certifies to be the judgment roll, consisting of the agreement, stipulations extending the time in which the arbitrators should make the award, a notice and affidavit of Kreiss setting forth his objections to the entering of any award, and the award of the arbitrators. Respondent moved for an order setting aside the award, and granting a rehearing before the arbitrators. Thereupon the court made the following order, from which the appellant has appealed: "In this cause the motion of L. Kreiss, one of the parties above named, made June 11, A. D. 1888, for the purpose of vacating and setting aside the award in this proceeding, coming on regularly this day for hearing, the said L. Kreiss being represented by Henry E. Highton, Esq., his attorney, and A. P. Hotaling, the remaining party to said alleged arbitration, being represented by A. N. Drown, Esq., his attorney, it appearing to the court that the submission to arbitration filed herein on April 17, A. D. 1888, is not a statutory submission, under title 10, §§ 1281 to 1290 inclusive, of the Code of Civil Procedure of this state, it is hereby ordered that upon this ground, and for this cause, and for want of jurisdiction thereof, the said motion is now dismissed; and it is further ordered that the judgment entered in form in the said proceeding by the clerk of this court be, and all proceedings thereunder be, and the same hereby are, perpetually stayed. Affidavits of A. P. Hotaling, M. E. Knoph, Augustus Laver, and R. Blum read and filed in opposition to said motion."

It clearly appears from the provisions of this order that the court denied the motion of respondent to set aside the award, and, in lieu of the relief asked for, made an order staying all proceedings on the judgment entered by the clerk. Inasmuch as no motion was made to perpetually stay all proceedings under the judgment entered by the clerk, the matter must be treated as if such order had been made by the court of its own motion, and its action can be justified only upon the ground that the judgment entered by the clerk was absolutely void,—a mere nullity. In determining the question whether the judgment entered by the clerk was void, or merely irregular, it is necessary to consider the provisions of the Code relating to arbitration and award. If the agreement of submission under which the award was made was valid as a statutory submission, the court had no right to stay proceedings on the judgment, however erroneous the action of the arbitrators may have been. Relief from such irregularities can be had only in the manner and upon the grounds specified in sections 1287, 1288, Code Civil Proc. If the award, though not good under the statute, is valid as a common-law award, the court properly denied the motion to set it aside, because the effect of such an order as the motion called for would have been to declare it invalid for any purpose. Fink v. Fink, 8 Clarke, (Iowa,) 316. It has been held in many cases that statutory proceedings in cases of arbitration, being in derogation of the common law, must be strictly construed. Monosiet v. Post, 4 Mass. 532; Mining Co. v. Pratt, 101 Mass. 359; Barney v. Flower, 27 Minn. 403, 7 N. W. Rep. 823; Hamilton v. Hamilton, 27 Ill. 160; Burnett v. Gould, 27 Hun, 366. But, as in this state the rule of the common law, that statutes in derogation thereof are to be strictly construed, has been abrogated by the Code, it is sufficient if there is substantial compliance with the requirements of the statute.

In the agreement of submission, M. E. Knoph and Robert Blum were named as sole arbitrators, with power to determine which party was indebted to the other, and in what amount. It was stipulated that all of the requirements of section 1285 of the Code of Civil Procedure might be dispensed with, and that the arbitrators, without being sworn, might proceed to make an award, "without set times or an appointed place for their proceedings," and that they might obtain such information touching the subject-matter of the arbitration as they desired, and in such manner as they deemed best, "anything in the said Code of Civil Procedure to the contrary notwithstanding." It was further agreed that, in the event of the arbitrators named failing to agree, they should choose a third arbitrator or umpire, and the decision of the majority of the three should be final and binding. The agreement also provided that the submission should be filed with the clerk, and entered as an order of the superior court, and that, after a decision was entered upon the judgment book, neither of the parties thereto would ask for "any reduction, exception, new trial, or appeal therefrom, or from any part thereof," but that said decision should "have all the force and effect of a final judgment of the court of last resort, from which there shall be no appeal whatever; it being the object and intent of this agreement of submission to avoid the expenses and delay of a litigation in court." The agreement concluded with a stipulation that the submission should not be revoked by either party, but that the same should be final and irrevocable. Thus it is made clearly to appear that the parties intended to ignore nearly all of the material provisions of the statute relating to arbitrations. They expressly repudiated any intention of following its requirements, or of availing themselves of the machinery of the court to assist the arbitrators, or correct any errors of the latter. The submission, therefore, as a statutory submission to arbitration, is void; and the award cannot be enforced as a judgment, although it is good as a common-law award, and the basis of an action. The distinction between the case at bar and Williams v. Walton, 9 Cal. 146, on the question of the validity of the award as a common-law award, is clear. Morse Arb. pp. 44, 575; Fink v. Fink, 8 Clarke, (Iowa,) 313; Gibson v Burrows, 41 Mich. 713, 3 N. W. Rep. 200; Willingham v. Harrell, 36 Ala. 586; Coats v. Kiger, 14 Ind. 180; Strum v. Cunningham, 3 Ohio, 286; Myers v. Easterwood, 60 Tex. 107; Tynan v. Tate, 3 Neb. 388; Steel v. Steel, 1 Nev. 31; Fairchild v. Daten, 42 Cal. 129. In Halloran v. Bray, 29 Ga. 423, the court held that an umpire selected by two arbitrators chosen by the parties to the submission was not authorized to act, and there was no power in the court to make the award a judgment of the court. In Holdridge v. Stowell, 39 Minn. 360, 40 N. W. Rep. 259, the parties entered into an agreement, as in this case, to submit a certain matter in difference between them to the arbitrament of two persons named, and such other person as might be chosen by those two. The statute, it appears, did not authorize the two arbitrators named to choose a third. The award was set aside on the ground that it was invalid because the arbitrators were not chosen by the parties to the proceedings, and on appeal the judgment was affirmed. The court said: "It is conceded that the agreement was not good as a statutory arbitration, for the reason that the arbitrators are not all named in it." The judgment entered by the clerk being absolutely void because not supported by a valid statutory agreement of submission, we entertain no power of the court to set it aside, with or without a motion therefor. "If a judgment is absolutely void, and a mere nullity, of course it is no protection or justification to any person, and it is immaterial whether it be set aside or not." Black, Judgm. § 355. "A void judgment is, in legal effect, no judgment. By it no rights were divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers." 1 Freem. Judgm. § 117. "Each court has such general control of its process as enables it to act for the prevention of all abuse thereof. Hence it may, to prevent the annoyance which might be occasioned by the attempted execution of a void judgment, either stay or arrest the process." Freem. Ex'ns, § 32. In People v. Greene, 74 Cal. 405, 16 Pac. Rep. 197, Chief Justice SEARLS, speaking for the court, said: "A judgment which is void upon its face, and which requires only the inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists." People v. Harrison, 84 Cal. 607, 24 Pac. Rep. 311, cited by the appellant, is not in point. The judgment there considered was not void on its face. The order is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; GAROUTTE, J.; DE HAVEN, J.

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97 Cal. 58

WASHBURN v. KAHLER. (No. 14,446.)

(Supreme Court of California. Dec. 16, 1892.)

MECHANICS' LIENS — ESTOPPEL — COMPLETION OF BUILDING—PROOF OF TIME.

1. A material man is not estopped from seeking to foreclose his liens for materials furnished by him to the contractor by reason of his giving a false receipt for the amount due him, to enable the contractor to obtain a payment from the owner, where the owner has paid out no money, and suffered no loss on account of such receipt.

2. A certificate dated January 23, 1889, was issued for the final payment on a building, in compliance with the building contract, which

provided for a final payment to the contractor when all the work was complete, and accepted by the architect, provided that, before such payment should be made, the contractor should produce receipted bills for all material furnished by him, (the contractor.) *Held*, that a finding, based on the evidence of the certificate, that the building was completed on January 23d is erroneous, in that the issuance of such certificate was dependent both on the completion of the building and on the condition that receipts and bills for materials furnished should be presented to the architect, and because such receipts might have been presented to the architect long after the building was completed.

Department 1. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by Albert Washburn against Elizabeth Kahler to foreclose a mechanic's lien. Judgment for plaintiff. Defendant appeals. Reversed.

William H. Jordan, for appellant. *E. H. Wakeman*, for respondent.

Garoutte, J. This is an action for the foreclosure of a mechanic's lien for materials furnished in the alteration of a building. It is insisted that the court committed error in not finding upon the matters set out in the answer in the nature of an estoppel. It appears that the payments were to be made to the contractor by the owner upon the certificate of the architect, and that the contractor obtained his last certificate from the architect, certifying that the final payment provided for under the terms of the contract was then due by presenting the receipted bills of plaintiff for the materials, upon which the present lien is based. Plaintiff furnished these receipted bills to the contractor, (although in fact the money had not been paid,) for the purpose of assisting him in securing his certificate from the architect. The answer for an estoppel alleges that defendant relied upon the truthfulness of the recitals contained in said receipted bills, and so relying paid to said Wells, the contractor, "a large part, if not all, of the money due to him" under said contract. Inasmuch as a large part of the contract price was due and payable under other certificates of the architect, the issuance of which in no manner depended upon or was effected by these falsely-receipted bills, the allegations of estoppel would hardly seem of sufficient importance to demand findings of fact. But, aside from such consideration, the court found that defendant paid no money upon this certificate of the architect, and such finding is fatal to the estoppel, conceding it to be well pleaded, for appellant suffered no damage by reason of respondent's conduct in this regard. We are unable to perceive any substantial variance between the pleading, the liens, and the proof.

Appellant contends that the liens were filed too late for the purpose of establishing the date of completion. Respondent offered in evidence the following certificate of the architect: "San Francisco, Jan. 23, 1889. Mr. H. Kahler—Dear Sir: Your building, No 11 Guerrero street, is now finished as per contract, dated Sept. 6th, 1888, by Ivory Wells, contractor, who is now entitled to the last and final payment, viz., $325. You will therefore please pay same to him, and this shall be your receipt therefor: provided, however, that all bills and receipts are satisfactory to you. [Signed] R. H. Daley." This certificate was issued in compliance with a provision of the contract that provided for a payment to the contractor, to wit, "when all the work is complete and accepted by the architect, $325: 'provided that at the making of any payment the said contractor shall produce receipted bills for all materials and labor furnished by him [the said contractor] to the architect before any certificate is given for the said payment.'" It is thus apparent that the date of the certificate of the architect is no evidence of the time of the completion of the building. Such was neither its object nor purpose. The certificate was provided for in the contract for the purpose of indicating when the final installment was payable to the contractor. The time for the payment of this installment was dependent upon the issuance of the certificate, and the issuance of the certificate was dependent, not alone upon the completion of the building, but also upon the condition precedent that receipted bills should be presented to the architect. The receipted bills may have been presented upon the day of completion, but their presentation may have followed weeks subsequent to that event, and from the face of the certificate it is impossible to determine the date of completion. The contractor, who was offered as a witness for the respondent, testified upon cross-examination that the building was completed January 13th. This evidence, taken in connection with the architect's certificate, comprises all that was presented upon this matter, and upon such a state of facts the finding that the building was completed upon the 23d day of January must be set aside, as without support in the evidence. It follows that the judgment and order should be reversed, and the cause remanded for a new trial. It is so ordered.

We concur: Harrison, J.; Paterson, J.

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97 Cal. 72

BREEZE et al. v. BROOKS et al. (No. 14,650.)

(Supreme Court of California. Dec. 24, 1892.)

JUDGMENT LIEN—LAND OF THIRD PARTY IN DEBTOR'S NAME.

In an action to subject certain lands owned by defendant's brother to the payment of an account due plaintiffs from defendant, it appeared that the lands were in defendant's name, and in his possession, and that plaintiffs relied on defendant's statement that he was the owner of the land, in giving him credit, but there was no finding that defendant's brother had any knowledge that defendant was obtaining credit with plaintiffs on the faith of his apparent ownership of the land. *Held*, that a judgment refusing to subject the land to the payment of plaintiffs' claim was justified.

Department 1. Appeal from superior court, San Mateo county; F. E. Spencer, Judge.

Action by Charles K. Breeze and others

against John Brooks and others to subject certain lands of Patrick Brooks to the payment of a debt due plaintiffs from defendant John Brooks, his brother. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

For former reports, see 11 Pac. Rep. 885, and 9 Pac. Rep. 670.

Geo. W. Fox and *Geo. C. Ross*, (*S. F. Lieb*, of counsel,) for appellants. *E. B. Mastick* and *W. C. Belcher*, for respondents.

HARRISON, J. The plaintiffs brought this action to subject certain lands of Patrick Brooks, which he had allowed to stand of record in the name of his brother John, to their claim as creditors of John, upon the ground that the subsequent transfer from Patrick to John was fraudulent, and with intent to defraud them as creditors. Judgment was rendered in favor of the defendants, and the plaintiffs have appealed upon the judgment roll alone, claiming that, upon the findings of fact, judgment should have been given in their favor. Upon a former appeal herein, (71 Cal. 169, 9 Pac. Rep. 670, and 11 Pac. Rep. 885,) the judgment in favor of the plaintiffs was reversed upon the ground that the findings did not sustain it, and the action was remanded for a new trial. Unless, therefore, the facts now presented are materially different from those presented upon the former appeal, the judgment of the court below must be affirmed.

The findings of fact which were before the court on the former appeal are substantially set forth in the report of the case, and were again made by the court upon the subsequent trial, and in the same language as before. In addition thereto the court has now found that, during the time that the legal title to the land stood in John, he was generally reputed and believed in his neighborhood, and among his neighbors, and by the community generally, to be the legal and equitable owner of the land; that the deed to him was delivered to him in person by the grantors, and was taken by him to the recorder's office for record, and was recorded at his request; that, during the time that it stood of record in his name, it was assessed to him and in his name, and that he had paid certain taxes thereon; that in the year 1869 he commenced an action against the Spring Valley Waterworks for damages, which, after having been partly tried, was compromised between the parties without going to judgment, under which the defendant paid him certain moneys; that at the trial thereof Patrick testified as a witness in his favor, and it was stipulated by counsel for the respective parties in open court, and in the presence of Patrick, that John was the owner in fee of the land. The court also finds certain details of the transactions between John and the plaintiffs, by which he incurred the indebtedness for which he gave them the promissory note on which they recovered the judgment they are now seeking to enforce, and that during all this time the only information which Patrick had that John was obtaining credit from the plaintiffs, or dealing with them, was that he was informed of an error which the plaintiffs made in September, 1872, by charging two items, amounting to about $20, to John, instead of to himself, and of the subsequent correction of the error by transferring the items to his own account.

A comparison of the facts found at the last trial with those before the court on the former appeal shows that they do not take the case out of the principles then laid down, or call for the application of any different principles. It was then held necessary that the plaintiffs, in order to entitle them to a recovery, should show that Patrick was in some way privy to John's obtaining credit from them, or that in giving such credit they relied upon some affirmative statement or act of Patrick, other than his permitting the title to stand of record in John's name; and that the mere fact that Patrick allowed the title to the land to stand of record in the name of John was unavailing to the plaintiffs, unless they could establish, to the satisfaction of the court, that they relied thereon as an inducement to give credit to John. The court says in its opinion: "The findings negative the idea that the plaintiffs, in giving credit to John, relied on any statement of Patrick that John owned the land; nor is it intimated that they examined the records of deeds, or that of the partition suit, to find out what they disclosed in reference to John's title, or relied on them in any way to induce the credit which they extended to John. They seem to have relied on the facts that John lived on the land, claimed it in his conversations with them as his, and that he was insolvent, and Patrick knew it; and that is all which it is there claimed even tends to show Patrick as having been privy in any way to John's obtaining credit from the plaintiffs. * * * So far as the findings disclose, Patrick did no act to induce creditors of John to believe the land was John's, save that he allowed the title, upon the record, to stand in John's name, which record these creditors never examined. It does not appear that Patrick had any knowledge that John was getting credit from any one upon the faith of his apparent ownership of the land. There was, therefore, on the part of the former, no such carelessness or negligence as amounted to even the smallest degree of turpitude; and in such a case we understand the authorities all to agree that one cannot be estopped to set up that which, but for such act, would be a good legal title to land." Instead of there being affirmative findings in their favor, as in the opinion upon the former appeal was held to be essential to a recovery by them, the findings now presented fail to show that the plaintiffs had any knowledge of the relation held by John to the land, or of his acts in reference thereto. It is not found that they knew that he was generally reputed or believed to be the owner, or had any information of the litigation between him and the Spring Valley Waterworks, or of what was done by him or by Patrick during that litigation; and it cannot, therefore, be said that it appeared to the trial court that they in any way relied thereon in giving credit to John. On the contrary, the court finds that the plaintiffs believed the statements of John, that he was the owner of the land, and knew that he was in exclusive possession of the property, "and relied on said statements and were wholly ignorant of the fact that he (John) was not the equitable owner thereof, or that said Patrick had or claimed to have any interest therein, and solely by reason of said statements, apparent ownership, and belief, gave said John said credit, and would not have given him credit except for said statement, belief, and apparent ownership." Neither do the facts found by the court show that Patrick had any knowledge that John was obtaining credit with the plaintiffs upon the faith of his apparent ownership of the land. The court does not find that he had any such knowledge, and its finding that he knew of the charge to him of certain items which should have been charged to himself, and the subsequent correction of the mistake, cannot be construed as equivalent to a knowledge that they were charged to John upon any faith in his ownership of the land. We are not at liberty to assume, as is urged on behalf of appellants, that because of the relation between Patrick and John, and of the knowledge which Patrick had of John's relation to the land, and his knowledge that he was dealing with the plaintiffs, he must have known that they gave him this credit upon their faith in his apparent ownership of the land. The findings of the trial court are to receive such a construction as will uphold, rather than defeat, its judgment thereon; and whenever, from the facts found by it, other facts may be inferred, which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering such judgment. The trial court, in this case, had before it the opinion of this court on the former appeal, and must be deemed to have made its findings of fact from the evidence before it, in the light of what was then held to be essential to a recovery by the plaintiffs. Its failure to find from the evidence the facts then declared essential to a recovery, as well as its own construction of the findings, which it has made by rendering a judgment thereon in favor of the defendants, must be regarded as its own conclusion that the evidence was insufficient to justify such findings as, under the former opinion of this court, would authorize a decision in favor of the plaintiffs. The judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(97 Cal. 78)

SALINAS CITY BANK v. DE WITT et al.

(No. 14,314.)

(Supreme Court of California. Dec. 24, 1892.)

PARTNERSHIP—EVIDENCE.

Declarations by a person that he and W. are partners are not admissible against W. to establish the facts of partnership, if made in his absence.

Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Action by the Salinas City Bank against George W. De Witt and William De Witt. Judgment for plaintiff. William De Witt appeals. Reversed.

S. F. Geil and *H. V. Morehouse*, for appellant. *N. A. Dorn* and *Parker & Nougues*, for respondent.

HARRISON, J. The plaintiff seeks to establish a joint liability against the defendants for the amount of an overdraft at its bank. The making of the overdraft was by the defendant George De Witt, and the plaintiff seeks to hold the defendant William De Witt liable therefor by showing that a partnership relation existed between the two. The complaint, which is unverified, alleges "that the defendants are indebted to the plaintiff on account of moneys had and received by them from the plaintiff at their special instance and request, in the sum of $865;" and "that the amount of the said indebtedness is the balance of an account had by the defendants with the plaintiff wherein the defendants deposited money with the plaintiff and drew money from the plaintiff, and the said sum is the balance of the said account, consisting of what is called an 'overdraft,' and interest thereon." To this complaint the defendant William De Witt made a general and specific denial. The case was tried by the court; judgment was rendered against him, from which, and also from an order denying his motion for a new trial, he has appealed.

It was essential for the plaintiff, in order to fix the liability of William for the acts of George, to show that a relation of partnership existed between them, or that by virtue of some express or implied authority George was the agent of William in making the overdraft; and in order to establish this relation several witnesses were permitted to testify on behalf of the plaintiff to certain declarations made by George, in the absence of William, that William and he were partners. The appellant duly objected to this testimony, but his objections were overruled, and these rulings of the court are now assigned as error. The admissibility of such evidence was before this court in an action against the same defendants, (Vanderhurst v. De Witt, 95 Cal. 57, 30 Pac. Rep. 94,) and it was there held to be a settled rule of law that such evidence is incompetent to establish the fact of partnership; and upon the authority of that case the judgment and order denying a new trial herein must be reversed.

The respondent appears to concede that the admission of this testimony was error, but urges that it was an immaterial error, for the reason that there was other evidence before the court sufficient to sustain its finding upon this issue. We cannot, however, accede to this proposition. The fact that appellant held such relation was controverted both by the pleadings and at the trial, and the evidence offered in support thereof, aside from the acts and declarations of George, was chiefly circumstantial, or of matters from which such relation might be inferred. The appellant himself testified: "I know George De Witt. The only relation I ever had with him was I let him have my threshing machine, machinery, horses, plows, wagons, harness, etc., and he was to carry on the threshing and farming business, and pay all expenses, and pay me for the use of my property one half the net proceeds." If this was true, then, as was held in Vanderhurst's Case, the relation of partnership did not exist between them. In any view of the case, there was a very sharp conflict of testimony upon the issue, and "in such a case all the evidence upon that point becomes material, and the introduction of any incompetent testimony is presumed to cause an injury to the opposite party, and we cannot determine the weight which the court below gave to this testimony in reaching its conclusion upon this controverted point." Smith v. Westerfield, 88 Cal. 383, 26 Pac. Rep. 206. The fact that the court received the testimony after proper objection had been made to its introduction raises the presumption that it believed it entitled to consideration, and we must assume that it did give it some weight in determining the issue. As was said in Smith v. Westerfield, supra: "If the respondent believed that this testimony of the witness was unnecessary for the purpose of establishing its case, it should have declined to introduce it after the objection had been made thereto. It cannot now, after insisting upon a ruling in its favor, and introducing the testimony, say that the error was harmless." The judgment and order denying a new trial are reversed.

We concur: PATERSON, J.; GAROUTTE, J.

(3 Cal. Unrep. 710)

HAYNES v. BACKMAN et al. (No. 19,000.)

(Supreme Court of California. Dec. 27, 1892.)

FORECLOSURE—SETTING ASIDE OF SALE—DISCRETION.

In a proceeding to set aside a foreclosure sale on a showing promptly made, it appeared that the property had brought a very inadequate price; that the deputy having the matter in charge had been asked to bid for the mortgagee in the latter's absence, but had neglected to do so; that the mortgagee's intention to bid was known to the purchaser; and that the mortgagee could not collect any of the deficiency from the mortgagor. *Held*, that the court might properly set aside the sale.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Proceeding by Mary E. Haynes against Peter Backman and others and the Los Angeles Terminal Land Company to set aside a sale of property made under a mortgage foreclosure. Order setting aside the sale. The defendant land company appeals. Affirmed.

Burnett & Gibbon, for appellant. *Geo. I. Cochran*, *Henry Bleecker*, and *John T. Jones*, for respondent.

TEMPLE, C. This is an appeal by a purchaser at a sale of property under foreclosure of a mortgage from an order setting aside the sale. From the affidavits used on the motion, the court below may have believed the following to be the facts in reference to the sale: The amount found due on the mortgage, including costs, was about $1,600; that the land was worth that sum; that plaintiff had instructed her attorneys to attend the sale, and in case no one bid more, or an equal sum, to bid for her the amount of the judgment and costs; that one of her attorneys, Cochran, was intending to carry out this instruction, and informed the deputy sheriff who had the matter in charge of that fact, and instructed the deputy, in view of the fact that the sale was fixed for Monday, which was law day, when he might be busy in court, that in case he was not present to bid for his client the amount due on the judgment; that the purchaser, or its agent, was well aware of plaintiff's intention to bid the full amount of the judgment; that the defendant, who joins in the motion, inquired of plaintiff's attorney as to his intention with reference to the sale, and on being informed that he would bid the amount of the judgment, and that there would be no judgment for deficiency, relying upon the promise, made no effort to have the property bring a larger sum, being satisfied if the property should pay the debt; that the sale was advertised for October 19, 1891, at 12 M.; that on that morning Cochran was actually engaged in the argument of a demurrer, and was delayed by this business a few moments after 12 o'clock, but still hurried to the place of sale, expecting to be in time; but, although he arrived within 20 minutes after 12, the property had been struck off to appellant for $500, and the amount paid to the sheriff. On the same day, an order to show cause on the next day why the sale should not be set aside was obtained, and served on the purchaser. On the hearing, which by consent was adjourned for five days, the order appealed from was made. It also appeared that plaintiff would be unable to collect any deficiency from the defendant. Some of these facts were controverted, but it devolves upon the appellant to show error. Unless, therefore, we can plainly see that the conclusion reached by the court, from the affidavits, was erroneous, we cannot interfere with its discretion. It is true it has been held that mere inadequacy of price will not justify a court in setting aside a sale where all the proceedings are regular and free from fraud or mistake. Still, in numerous cases upon this subject, that fact figures as an important factor. Here the attorney had left with the deputy sheriff his bid. Such course is not unusual, and, if the deputy was unwilling to accept the bid in that form, he ought to have informed the attorney of such fact, in which case, very likely, knowing that he might be detained, he would have had some person present to bid for him. Setting aside the sale so promptly will harm no one except a purchaser who insists upon an unfair advantage obtained by this excusable neglect on the part of plaintiff's attorney, while the client will be irreparably injured if the sale is allowed to stand. Greater delinquency has been found excusable by this court in many cases. Buell v. Emerich, 85 Cal. 116, 24 Pac. Rep. 644; Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. Rep. 332. As said in Buell v. Emerich, supra, very great discretion is conceded to the trial court in regard to these matters, in the interests of justice. We cannot say that such discretion has been abused in this case. We therefore advise that the order appealed from be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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3 Cal. Unrep. 712

HAYNES v. BACKMAN et al. (No. 19,001.)

(Supreme Court of California. Dec. 27, 1892.)

APPEAL—RECORD—JUDGMENT AGAINST PERSONS NOT PARTIES.

1. Questions which can be determined only from the evidence are not reviewable on an appeal taken upon the judgment roll alone.

2. The fact that a certain corporation is named as defendant in a complaint, while judgment is rendered against another not named, does not render the judgment irregular, where the latter appeared and filed an answer which, if true, showed the identity of the two.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Proceeding by Mary E. Haynes against Peter Backman and others and the Los Angeles Terminal Railway Company. Judgment for plaintiff. The defendant railway company appeals. Affirmed.

Burnett & Gibbon, for appellant. *Geo. J. Cochran*, *Henry Bleecker*, and *John T. Jones*, for respondent.

TEMPLE, C. This appeal is from the judgment, without a bill of exceptions. Two points are made:

1. The appellant purchased from the mortgagor, subsequent to the mortgage, a strip of land, part of the mortgaged premises, for a right of way. In its answer, appellant asked to have the land divided and sold in parcels, the division to be as divided by the railroad, and that the strip occupied by the appellant should be sold only in case sufficient money could not be realized for the residue to pay the mortgage. This was not done. There being no bill of exceptions, and no findings, we do not know that the appellant acquired title to the strip of land by conveyance from the mortgagor after the mortgage was given, or that a sale in separate parcels can be had to advantage, or without danger of depreciating the price which might be realized to the extent of preventing plaintiff from realizing the amount of her mortgage. These were questions to be determined from the evidence, and on the appeal upon the judgment roll alone we cannot review the action of the court.

2. The appellant was not named in the complaint as a defendant, but the Los Angeles, Pasadena & Glendale Railway Company was. The judgment is not against the last-named company, but is against appellant. The complaint was not amended so as to include the appellant. It is contended that the judgment is irregular, under the rule laid down in McKinlay v. Tuttle, 42 Cal. 570, and Campbell v. Adams, 50 Cal. 203. Though not named as a party, appellant appeared and filed an answer, in which it is stated: "Comes the Los Angeles Terminal Railway Company, a corporation duly organized under the laws of this state, and leave of court having first been obtained to appear and defend said action," etc. The answer then proceeds to aver a sale and conveyance of a portion of the mortgaged premises by the mortgagor, after the execution of the mortgage, to the other corporation named in the answer; that subsequent to that conveyance the Los Angeles Terminal Railway Company had consolidated with the other named corporation, under the name of the "Los Angeles Terminal Railway Company." The judgment recites that appellant "has been duly made a party defendant to this action by order of the court." Evidently this means that appellant was made a party as successor in interest to the other named defendant. As a matter of fact, the answer, if true, shows the identity of appellant with the corporation defendant named. There is no injurious error in this.

The judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

CAMPBELL et al. v. QUACKENBUSH. (No. 13,622.)

(Supreme Court of California. Dec. 2, 1892.)

In bank. Appeal from superior court, city and county of San Francisco.

Action by Henry C. Campbell and others against Thomas M. Quackenbush. Judgment for plaintiffs. Defendant appeals. Affirmed.

R. Percy Wright, for appellant. *Pringle, Hayne & Boyd* and *A. A. Sanderson*, for respondents.

PER CURIAM. This case presents substantially the same question decided in San Gabriel Valley Land, etc., Co. v. Witmer Bros. Co., 31 Pac. Rep. 588, (No. 14,324,) the opinion in which has this day been filed, and upon the authority of that case the judgment herein must be affirmed.

I dissent: HARRISON, J.

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96 Cal. 505

CURRIER v. NELSON et al. (No. 14,138.)

(Supreme Court of California. Dec. 29, 1892.)

Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

On motion to modify the judgment rendered on appeal. Motion refused. For opinion on appeal, see 31 Pac. Rep. 531.

Theodore H. Hittell, for appellant. *Thos. F. Barry*, for respondents.

DE HAVEN, J. The motion of appellant to modify the judgment rendered in this case on

November 29, 1892, by directing the court below to enter judgment for the plaintiff on the findings, is denied. We did not in the opinion filed on that date intend to be understood as saying that upon proof of the single fact that the parties to the deed of September 17, 1879, adopted the description which it contains by mistake, the defendant would be entitled to a judgment in the action, nor do we think the language used by us can be so construed. The question as to what facts should be alleged in order to constitute an equitable defense to the action growing out of such mistake, if made, was not before us, and it was not our purpose to give a complete outline of all that such a pleading should contain. The sufficiency of such an answer must be determined by the court when it is filed.

We concur: BEATTY, C. J.; McFARLAND, J.

97 Cal. 161

HOLMES v. SOUTH PAC. COAST RY. CO.

(No. 14,880.)

(Supreme Court of California. Jan. 12, 1893.)

Railroad Companies — Injury to Person on Track—Evidence—Contributory Negligence.

1. Plaintiff's intestate, while waiting for defendant's train, was walking up and down between the sidewalk and the track. His back was towards the train as it approached, and when the whistle sounded eight feet away from him he stepped on the track, and was struck by the engine. The bell was rung as the train approached, but no whistle sounded except as above stated. Deceased had good sight and hearing. It was daylight, and he could have seen the train in ample time to escape injury, if he had looked in the right direction. *Held*, that plaintiff was guilty of such negligence as to prevent recovery.

2. The engineer was not negligent in not earlier blowing the whistle, as he might reasonably believe that deceased knew of the train's approach, and would move away from the track in time to escape injury.

3. The rule that the negligence of the plaintiff will not prevent his recovery if, notwithstanding such negligence, the injury could have been avoided by the exercise of ordinary care on the part of the defendant at the time, does not apply where both persons are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them.

4. Where defendant company had for two years before the accident run its train on the left-hand track, it was not error to refuse to allow plaintiff to show that, except in the case of this road, it was the "universal" custom in operating double-track roads to run trains on the right-hand track.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by one Holmes, administratrix, against the South Pacific Coast Railway Company. From a judgment of nonsuit, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

George Lezinsky, for appellant. *Frank Shay*, for respondent.

De Haven, J. The plaintiff appeals from a judgment of nonsuit and an order denying her motion for a new trial. The action is to recover damages against the defendant for its alleged negligence in causing the death of George A. Holmes, Jr., of whose estate the plaintiff is administratrix.

The evidence given upon the trial shows that defendant was on May 19, 1889, operating a double-track railroad on Encinal avenue, in the town of Alameda, and on that day the decedent was killed by one of its moving trains at Webster station, on that avenue or street. The station consisted of a house or shed built upon the sidewalk, and the space between the sidewalk and defendant's track was three feet in width, and the sidewalk was only two or three inches higher than the roadway between it and the railroad track. The deceased, at the time of the accident, was waiting for one of defendant's trains, intending to take passage thereon for San Francisco, and he was the holder of a ticket which entitled him to do so. While thus waiting for the train, which was soon expected, he walked up and down near the station, on the roadway between the sidewalk and the railroad track, and in going one way was facing in the direction from which the expected train was to come. He had been thus walking for from five to eight minutes before the accident, and had just turned his back upon the approaching train when it came in sight of others at the station; but he continued to walk along between the sidewalk and the track, and did not look around, or seem to be aware of the train which was coming behind him. The bell upon the engine was kept ringing all the time as the train approached, but no alarm whistle was sounded until the engine was within six or eight feet of the decedent. When the alarm whistle was sounded, deceased stepped partly upon the track, and was struck by the engine. It does not appear very clearly just when the deceased was first seen by those in charge of the train, but he might have been seen by them, if they had looked towards him as soon as the train came in sight of the station, a distance of 400 or 500 feet. The fireman was the only one on the train who saw him, and he testified that he did not give the danger signal to the engineer until just before the deceased was struck. When the engineer received this signal he blew the whistle, reversed the engine, and did all that was possible to stop the train. It also appears from the evidence that deceased had good sight and hearing. The accident occurred in the daytime, and the train could have been seen by deceased in ample time for him to have escaped injury, if he had looked in the direction from which it came, after it was in sight of the station.

Upon these facts it is clear to us that the judgment must be sustained, as the deceased, in walking where he did, in dangerous proximity to the track of defendant, without looking or listening for the approach of the train for which he was waiting, and finally stepping partly upon the track in front of the moving engine, was guilty of such contributory negligence as defeats plaintiff's right to recover in the action. Indeed, it would be difficult to imagine a clearer case of contributory negligence upon the part of a person injured than is presented by the evidence in this case. A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to be struck by a passing train, without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person, so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such situation, is negligence *per se*. The following are a few of many cases which might be cited to sustain this proposition: Harlan v. Railway Co., 64 Mo. 480, on rehearing, 65 Mo. 22; Railroad Co. v. Depew, 40 Ohio, St. 121; Kelley v. Railroad Co., 75 Mo. 138; Glascock v. Railroad Co., 73 Cal. 137, 14 Pac. Rep. 518.

It is argued, however, by plaintiff that the engineer or defendant was guilty of negligence in not blowing the alarm whistle sooner, and thus giving more timely warning to deceased of his peril, and that defendant is for this reason liable, notwithstanding the negligence of deceased in placing himself in the dangerous position in which he was walking. If it be assumed that the deceased was actually seen by those in charge of the train before the whistle sounded, still we do not think, under the facts here appearing, that the engineer was guilty of any negligence in not sounding the alarm whistle before he did. In addition to the noise which was made by the moving train, the usual signal of its approach was given by ringing the bell, and, as the deceased was a man of mature years, and nothing to indicate that he was not able to take care of himself,—as he was, in fact,—the engineer might reasonably believe that he knew of its approach, and would, in obedience to the ordinary instinct for self-preservation, move away from the track before being overtaken by the engine. Railroad Co. v. Miller, 25 Mich. 279. But if it should be conceded that it was a question for the jury to determine whether the engineer, in view of all the facts shown, did exercise the proper degree of care to avoid injury to deceased, still the motion for a nonsuit was properly granted, as the question of defendant's negligence was immaterial, in view of the negligent conduct of the decedent. Harper v. Railway Co., 32 N. J. Law, 88; Delaney v. Railway Co., 33 Wis. 67. It is undoubtedly a well-settled principle of law that, even though a person has by his own negligence placed himself in a position of danger, it is still the duty of others who discover him in that situation to observe care in order to avoid injuring him; and it has often been held that a failure to discharge this duty will render a defendant liable for damages resulting from such neglect of duty, notwithstanding the previous negligence of the person injured. Needham v. Railroad Co., 37 Cal. 409; Meeks v. Railroad Co., 56 Cal. 513; Davies v. Mann, 10 Mees. & W. 545; Adams v. Ferry Co., 27 Mo. 95; Austin v. Steamboat Co., 43 N.Y. 75; Railway Co. v. State, 29 Md. 420. But this rule is only properly applied in those cases where the negligence of the person injured was the remote, and not the proximate, cause of the injury; that is, where the negligent acts of the parties were independent of each other, the act of the person injured preceding that of the defendant. O'Brien v. McGlinchy, 68 Me. 552; 2 Thomp. Neg. p. 1157; Murphy v. Deane, 101 Mass. 455. In the case of O'Brien v. McGlinchy, just cited, the supreme court of Maine say: "But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his property is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot and the defendant can prevent the injury. * * * But this principle cannot govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them." This, we think, may be regarded as a correct statement of the law upon this point, and as furnishing a clear and definite rule by which to determine in any case whether or not the negligence of the person injured may be said in a legal sense to have contributed to such injury; and when we apply this rule to the case here it is at once seen that, even if it should be conceded that there was negligence upon the part of the defendant in its management of the train at the time of and just preceding the accident, still the plaintiff would not be entitled to recover, as such accident could not have occurred without the concurrent and active negligence of the deceased at the time. The defendant was not the only one who could have prevented the accident, but, on the contrary, if the deceased had himself used ordinary care at the time, he could not possibly have been harmed by defendant's locomotive, which was confined to the narrow track upon which it ran. Up to the very moment that he was struck by the engine it was within his power to escape the injury which he received by simply moving to a place of safety upon the sidewalk, and he would have realized the necessity for such action on his part but for his own negligence at the time in not looking or listening for the approach of the train.

The court did not err in sustaining the objection to the offer of plaintiff to show that with the exception of this particular road, it is the "universal" custom in the operation of double-track railroads to run trains upon the right-hand track. It seems that the defendant ran its trains upon the left-hand track at the time and place of the accident, and had been doing so for two years; and it is argued by plaintiff that this offered evidence would have a tendency to show that deceased was not negligent in being near the track where he was hurt, and in not watching for the train, as he may have thought it would come upon the other track. The fact thus sought to be proven was clearly irrelevant. The road had been operated in the same manner as upon the day of the accident for the two years preceding, and the liability of defendant in this action cannot be made to depend upon the question whether deceased did or did not know of the way in which it operated its road. Judgment and order affirmed.

We concur: Beatty, C. J.; McFarland, J.; Garoutte, J.; Paterson, J.; Harrison, J.

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97 Cal. 66

ROGERS v. DUFF et al. (No. 19,045.)

(Supreme Court of California. Dec. 20, 1892.)

Pleading—Uncertainty—Issues not Found—Appeal.

1. A complaint alleging that plaintiff, a broker, at the request of defendants, advanced $697.69 for them in the purchase of produce; that defendants promised to pay the same; and that they have failed to do so, though requested by plaintiff,—is not demurrable, as being uncertain, on the ground that it cannot be determined from the complaint whether the action was brought for the sum of $697.69 or to recover the price of produce sold and delivered, Code Civil Proc. § 454, providing that a party need not set forth in his complaint the items of an account therein alleged.

2. A complaint alleged that defendants were indebted to plaintiff for "commissions" on the purchase by plaintiff for defendants of various articles of produce. *Held*, that a finding that defendants were indebted to plaintiff "for labor performed for them at their request" is not a finding outside of the issue, in that the allegation in the complaint necessarily implies that plaintiff performed services, i. e. labor, for defendants in purchasing such articles.

3. Error cannot be predicated on a failure to find on issues raised by the pleadings, where no evidence has been introduced as to such issues.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Rogers against Duff and others on an account. Judgment for plaintiff. Defendants appeal. Affirmed.

B. F. Thomas, for appellants. *C. A. Starke*, for respondent.

Sharpstein, J. The plaintiff states two causes of action in his complaint. Defendant Kitzmiller demurred to the complaint on the grounds that it is uncertain and ambiguous, because it cannot be ascertained from it whether the action is brought for the sum of $697.69, or any sum of money, advanced for the use and benefit of defendants, or whether said action is brought to recover for the price of beans sold and delivered by plaintiff to defendants, and for commissions on various articles of farm produce, and for money paid out for defendants' use. The demurrer was overruled, and that ruling is one of the errors relied on by appellants.

The first cause of action is stated in the complaint in the following language: "That plaintiff is, and at all times hereinafter mentioned has been, doing business as a broker and buyer on commission in the county of Santa Barbara, state of California; that as such broker, between the 26th day of July, 1889, and the 29th day of March, 1890, plaintiff advanced in Santa Barbara, in the county and state aforesaid, the sum of six hundred and ninety-seven dollars and 69-100 dollars for defendants, at defendants' instance and request, in the purchase of certain Lima and other beans, and other products of California; that defendants promised to pay the same to plaintiff, and, although often requested so to do, defendants have neglected, and still neglect, to pay the same to plaintiff, or any part thereof." We discover no uncertainty or ambiguity in this language. "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after demand thereof, in writing, a copy of the account, or be precluded from giving evidence thereof." Code Civil Proc. § 454. We think plaintiff set forth all that he was required to under this provision of the Code, and this applies as well to the statement of the second cause of action as to that of the first. The demurrer was properly overruled.

After the demurrer was overruled, the defendant Kitzmiller filed an answer to the complaint, in which he denied that he or the firm of P. Duff & Sons is indebted to the plaintiff in any sum whatever, and for cause of counterclaim alleges that plaintiff is indebted to defendants on breach of contract in not delivering Lima beans to defendants according to a contract between plaintiff and defendants. After hearing the evidence and arguments of the respective parties, the cause having been submitted to the court for decision, the court found "that defendants, at the date of the commencement of this action, and ever since, have been, and still are, indebted to plaintiff in the sum of $547.88 for labor which plaintiff performed for defendants at their request, for moneys expended by plaintiff at their request in the purchase of Lima and other beans and of agricultural products of California between the 1st day of August, 1889, and the 2d day of May, 1890."

Appellants contend that the finding that defendants are indebted to plaintiff for labor performed at their request is a finding outside of the issues. There is no mention of labor in the complaint. But it is alleged that the defendants are indebted to the plaintiff in the sum of $697.69 for the balance of an account for beans sold and delivered by the plaintiff to the defendants, and for commissions on the purchase by plaintiff for defendants of various articles of farm produce; * * * the whole furnished, done, and performed at the request of the defendants. "Commissions" are the compensation to agents, factors, and other persons who manage the affairs of others in recompense for their services, and we think the allegation that defendants are indebted to plaintiff for commissions on the purchase by plaintiff for defendants of various articles of farm produce implies that plaintiff performed services, *i. e.* labor for defendants in purchasing said articles. The purchase of farm produce necessarily involves more or less labor. We think the findings within the issues. There is no finding upon the issue raised by the counterclaim, and appellants insist that the omission to find upon that issue is a fatal error. We do not know and cannot assume that any evidence was introduced upon that issue. "This court will not reverse for want of a finding upon an issue where there is no evidence in relation to such issue." Wise v. Burton, 73 Cal. 174, 14 Pac. Rep. 683; Himmelman v. Henry, 84 Cal. 104, 23 Pac. Rep. 1098; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. Rep. 504. Judgment affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

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97 Cal. 52

PERRIN et al. v. McMANN, Sheriff. (No. 14,233.)

(Supreme Court of California. Dec. 14, 1892.)

TRESPASS BY SHERIFF—RELEASE OF ATTACHMENT—TENDER OF FEES.

In trespass against a sheriff, it appeared that he held the property under an attachment sued out by plaintiff S. against plaintiff P.; that after the levy a settlement was effected between S. and P., in which P. paid to S. the estimated costs of the attachment; that on the same day B., the attorney of S., filed with the clerk of the court a direction to dismiss the action, and went to the office of defendant, whose term as sheriff had on that day expired, and whose successor had qualified, and gave to M., who had been defendant's bookkeeper, but who advised B. that he no longer represented defendant, notice to release the attachment; and that a few days thereafter B. gave defendant a written notice to release, and tendered him his fees to the date of settlement and dismissal of the action, with which notice defendant refused to comply, unless upon payment of his fees down to the day of release. *Held*, under St. 1871–72, p. 778, providing that a sheriff may retain the property levied under an attachment until his fees and expenses are paid, that the sheriff was entitled to his fees until notice of the release was served on him.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Trespass by one Perrin and another against one McMann, as sheriff, for retaining the possession of property taken under a levy. From a judgment for defendant, plaintiffs appeal. Affirmed.

P. F. Benson and *R. N. Taylor*, for appellants. *R. B. Mitchell*, for respondent.

HARRISON, J. A writ of attachment issued in the action of Sayre v. Perrin was placed in the hands of the defendant, as sheriff of the city and county of San Francisco, for execution; and under it he levied upon certain personal property of the plaintiff herein, January 4, 1889, and placed the same in charge of a keeper. On the 7th of January a settlement of the controversy was effected by the parties to the suit, in which the plaintiff herein paid to Sayre the estimated costs of the action, and Sayre's attorney filed with the clerk a direction to dismiss the action "without costs to either party." A little after 4 o'clock in the afternoon of that day, Sayre's attorney, Benson, went to the sheriff's office for the purpose of directing a release of the property held under the attachment. The 7th of January was the first Monday of that year, and the day on which the term of office of the defendant herein as sheriff expired and that of his successor, Laumeister, began. Laumeister had assumed his duties as sheriff, and taken possession of the office, in the morning of that day; and Simon, to whom Benson handed the direction to release the property, had been the bookkeeper of McMann during his term of office, but at its expiration had been appointed bookkeeper for Laumeister, and was then acting only for him. McMann, as the outgoing sheriff, retained in his custody the property held by him under the attachment, (Sagely v. Livermore, 45 Cal. 613;) and the management of his unfinished business was in the charge of O'Connor, who had been his undersheriff. When Benson handed the directions to Simon, he was told by Simon that McMann's term of office had expired, and that he no longer represented him, but was merely the representative of Laumeister, his successor. Benson, however, insisted that the delivery to Simon was sufficient, and made no effort to find McMann or any one who represented him. On the 9th of January, Benson and Sayre saw O'Connor, and had some conversation about the release of the property, but O'Connor refused to release it except upon the payment of the sheriff's fees, which he then claimed to be $30. Benson, however, refused to pay more than $18, the amount which had accrued at the date of the settlement and dismissal of the action. On the 11th of January, Benson gave to McMann a written notice to release, with which he refused to comply except on payment of the fees; and thereupon this action was brought to recover $5,000 for the alleged trespass of the sheriff in retaining possession of the property for 10 days. Judgment was rendered in favor of the defendant, and plaintiff has appealed.

The defendant was not required to release the property levied on under the writ of attachment until his fees and expenses were paid. The sheriff is the agent of the plaintiff in levying an attachment, and the plaintiff cannot relieve himself from liability for the expenses incurred in such agency by a dismissal of the action, or a mere direction to release the property. Neither can the parties to the action, by an agreement between themselves for its dismissal, deprive the sheriff of his fees, or compel him to look to the solvency or caprice of the plaintiff therefor. Hence, for the purpose of protecting the sheriff against such contingency, it is provided by statute that he may retain the property levied on under an attachment until his fees and expenses are paid. St. 1871–72, p. 778; Robinett v. Connolly, 76 Cal. 56, 18 Pac. Rep. 130. See, also, Hall v. Reflector Co., 66 How. Pr. 31. This statute, providing that he may retain the property until his fees are paid, in effect gives him a lien thereon for their amount, which he may enforce in any suitable mode. Bowe v. Reflector Co., Id. 41. The right of the defendant to compensation for "all damages which he may sustain by reason of the attachment" is protected by the undertaking which the plaintiff in the action is compelled to give to procure the issuance of the writ, (Code Civil Proc. § 539;) and any moneys which he may pay to the sheriff for the release of the property would be a part of such damages, or would form a part of his costs, to be included in any judgment that might be rendered in his favor in the action. If, however, he chooses to effect a settlement with the plaintiff, and accept a dismissal of the action, instead of a judgment in his favor, and thereby waive his right to proceed upon the undertaking, he should see to it that the terms of settlement include the release of the property. If he omit to do so, he cannot correct his omission by throwing his loss upon the sheriff, nor can he compel that officer to look to the plaintiff for the expenses incurred in the attachment.

In the present case, the plaintiff herein paid to Sayre the money with which to defray the sheriff's expenses incurred in keeping the property attached, but, when Benson went to the sheriff's office to direct the release, he made no offer to make such payment, although he knew that the expenses had been incurred at his request; and there was no offer on the part of Sayre to make any payment until the 9th of January. At that date the expenses had amounted to $30, but he refused to pay more than $18, which was the amount that had accrued on the 7th, when the settlement was effected. When Benson went to the sheriff's office to procure the release of the property, he was not only charged with public notice, by virtue of the statute defining the sheriff's term of office, that McMann was no longer sheriff, but he was expressly notified by Simon that he no longer represented McMann, and that the office was in the occupancy of Laumeister. He knew that Laumeister could not release property held by McMann under the attachment, and that any notice given to Laumeister would be unavailing to affect McMann's right to retain the property. It was his duty then, if he wished to procure its release, to seek out McMann, or his representative, and procure the release from him. It was his failure to do so, and not any delinquency on the part of McMann, that caused the additional expenses to accrue, and consequently those additional expenses should have been paid by him before he could demand a release of the property.

The judgment and order are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

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97 Cal. 101

HEINLEN v. HEILBRON et al. (No. 14,489.)

(Supreme Court of California. Dec. 30, 1892.)

QUIETING TITLE — CONFLICTING EVIDENCE — REVIEW ON APPEAL—DISQUALIFICATION OF JUDGE.

1. Where, in an action to quiet title, the finding of the trial court as to the ownership of the lands in controversy depends on the determination of a question of fact in which there is testimony on both sides, an appellate court will make no inquiry as to the preponderance of the evidence.

2. The admission, on plaintiff's request, of diagrams, each purporting to be a "certified copy of a copy" of a swamp-land survey, was harmless error, when plaintiff afterwards introduced patents from the state for the land embraced in the survey.

3. On motion for a new trial, defendants presented affidavits to the effect that after the submission of the cause, and prior to the decision, the judge purchased lands which formed a part of the same original tract as patented, to which, according to defendants, the lands in suit belonged. No facts were presented, however, to show that the judge's title to the lands which he purchased in any way depended on

the evidence or law involved in determining the rights of the parties to this action. *Held*, that the judge was not disqualified.

Department 1. Appeal from superior court, Fresno county; WILLIAM W. CROSS, Judge.

Action by one Heinlen against one Heilbron and others. From a judgment in favor of plaintiff and an order denying a motion for a new trial, defendants appeal. Affirmed.

S. N. Welch, (*Daggett & Adams*, of counsel,) for appellants. *G. A. Heinlen*, (*R. E. Houghton*, of counsel,) for respondent.

HARRISON, J. Action to quiet title. The plaintiff claims title to the lands in question by virtue of certain patents issued to him by the state of California, and the defendants claim that the lands are included within the boundaries of the Rancho Laguna de Tache, of which they are the owners. The lands in question were listed and patented to the state of California by the United States as a portion of the swamp and overflowed lands granted by the act of congress of September 28, 1850, while the patent for the Rancho Laguna de Tache was issued upon a grant made by the Mexican government in January, 1846, to Manuel Castro, and subsequently confirmed to him by the United States court; and the question controverted before the court below was whether the lands in question were a portion of those embraced in the patent for the rancho. The lands included in this patent are described as bounded on the south and east by the meanders of Kings river, so that the real question to be determined was the location of Kings river. The court found that the plaintiff was the owner of the lands in controversy, and that the defendants have no interest therein, and rendered judgment in favor of the plaintiff, from which, and from an order denying their motion for a new trial, the defendants have appealed.

1. In their motion for a new trial the defendants assigned as one of the grounds the insufficiency of the evidence to justify the decision of the court, and specified as the particulars thereof that the evidence showed that the lands were a portion of the Rancho Laguna de Tache. The finding of the court of the ultimate fact that the plaintiff was the owner of the lands in question includes, as one of the probative facts upon which it depends, the fact that the lands in question are situated to the south and east of Kings river, and this probative fact is the point of attack made by the appellants upon the findings of the court. But upon this controverted point there was testimony upon both sides before the court, and it is a sufficient answer to the appeal that the court has heard the evidence, and rendered its decision thereon. Upon an appeal from that decision, no inquiry can be made respecting the preponderance of evidence. If there be any evidence in support of the finding, the action of the court must be affirmed. It is only when there is no evidence in the record in support of a finding that a decision of the trial court will be reversed upon the ground that it is unsupported by the evidence. The location of Kings river, with reference to any particular tract of land, was a question of fact, to be determined upon the testimony of witnesses. Whether any particular section or tract of land is upon one or the other side of the river was also a question of fact, and the determination of these facts depended upon the knowledge which the witnesses had of the river and the land. If the land were a well-defined inclosure, it would be open to the observation of any one, while, if its location depended upon an actual survey, it would be more difficult of ascertainment. It cannot be assumed, however, that the location of a township section can be shown only by one who has made an actual survey of its lines. It may be that its position is established by boundaries as definite and well known as those between two coterminous states or nations. Upon the trial herein there was much positive testimony that the lands in question were situated upon the south and east of Kings river, and, unless there was evidence to the contrary sufficient to overcome the effect of this testimony, the trial court was justified in so finding. The competency of the witnesses to so testify, as well as their knowledge of the subject, were open to the cross-examination of the opposite party, and it was for the court to determine, after such examination, how much weight was to be given to their testimony. Similar testimony was also given by Norboe, a surveyor, called on behalf of the plaintiff, who also testified that he had made an actual survey of the lands in question, and that they were situated to the south and east of Kings river. The extent and accuracy of such survey were also to be passed upon by the court, and his testimony is not to be entirely rejected because he did not "run around the whole section with a compass and chain." If he had ascertained that the north and west lines of the section were to the south and east of the meanders of Kings river, the location of the other lines of the section was not essential in order to determine whether the section was included within the rancho.

It was claimed by the defendants that what is sometimes called "Button Willow" slough is in reality Kings river, and is the line of boundary designated as Kings river upon the map attached to the patent. On the other hand, it was claimed that Kings river, as delineated upon that map, is located to the north and west of Button Willow slough. In support of their contention the defendants called a surveyor, Choice, who did not profess to have made any survey of the lands in question, but testified merely that he had compared the plat of a survey made by him with the map attached to the patent of the rancho, and that the lines agreed very closely, "except at the lower end, where there was some difference." He also testified that at this end there was a difference of a half mile in the location of Button Willow slough; that the map on the patent located it a half mile further west than he did. This, in reality, corroborated Norboe's evidence, and when Choice was interrogated thereto he testified that he was unable to say that the survey incorporated in the patent followed Button Willow slough. The trial court had before it the witnesses, as well as various maps and diagrams offered in evidence. The statement used upon the motion for a new trial speaks in many places of references made by witnesses to these maps and diagrams, by pointing to places and lines thereon which are not reproduced in the record before us, but which we must assume were pertinent to the decision, and may have given weight to the plaintiff's contention. There was at least such a conflict in the evidence that we would not be justified in attempting to review its sufficiency.

2. Upon the trial of the cause the plaintiff offered in evidence two diagrams, each of which purported to be a "certified copy of a copy" of a swamp-land survey, to which the defendants objected, upon the ground that the same was irrelevant and immaterial and incompetent, in that it was not a certified copy of an original document, but merely a certified copy of a copy. This objection was overruled, and the action of the court is now assigned as error. It is unnecessary for us to determine whether these documents were admissible in evidence in the form in which they were presented, inasmuch as at a later stage of the trial the plaintiff offered in evidence the patents from the state for the land embraced in the surveys. The evident object of introducing the copies of the surveys was to show the several steps by which the plaintiff had become entitled to the patent for the lands therein described; but, as the patents were themselves the highest evidence of the transfer from the state of its title to the lands, and also evidence that all the steps prescribed for their issuance, including the survey, had been properly taken, they superseded all proof of these previous steps, and rendered any evidence thereof immaterial and unnecessary. Even if it should be regarded that the evidence was incompetent, it would not diminish the effect of the patent, and, inasmuch as the patent itself was the highest evidence of the transfer of the state's title, these documents could not add to its effect. The error, therefore, if any there was, was innocuous.

3. Upon the motion for a new trial the defendants presented certain affidavits for the purpose of showing that the judge who had tried the cause was disqualified to sit or act in the case, and that his decision therein was therefore without any authority, and should have been set aside. These affidavits are to the effect that after the submission of the case, and prior to his decision, he purchased certain lands in the vicinity of Kings river which the defendants claim to be a portion of Rancho Laguna de Tache. They do not, however, present any facts from which it can be seen that his title to those lands in any respect depends upon the evidence or law involved in determining the rights of the parties to this action, or which were litigated herein; and we cannot assume that the facts or law involved in any controversy that may arise respecting his title thereto are the same as those here involved. Those lands are several miles distant from the lands involved in this action, and, for aught that is shown by the affidavits, the title thereto may depend upon facts entirely distinct from those here presented. The main question in this case, as we have seen, was the location of Kings river in the vicinity of the lands claimed by the plaintiff; it being contended, on the one hand, that Button Willow slough is a branch of that river, and the line designated on the patent for the rancho as one of its boundaries, and, on the other hand, that it is a distinct and independent waterway. Button Willow slough, however, terminates many miles to the south of the lands claimed to have been purchased by the judge, and the determination of its location cannot be involved in any controversy that may arise between him and the defendants. While it is essential that a judge before whom a cause is tried shall be wholly disinterested in the result, in order that his decision may be entirely impartial, it must at the same time be considered that any person who holds the responsible position of a judge will always be sensitive to any suggestion of his interest in a matter before him, and quick to free himself from any opportunity of acting in a case in which he is disqualified. It must also be considered that the same desire to be faithful to his office which will cause him to decline to sit or act in such a case will be his reason for acting in any case in which he is not disqualified. He has no more right to refuse to act in a matter before him where he is not disqualified than he has to act in a cause in which he is disqualified, either from interest, or from any other reason. The fact that a judge has acted in the trial and decision of any cause must be held conclusive that in his own opinion he was competent to act; and, in such a case, he who would attack his right to act therein must show his disqualification by facts of a positive and unequivocal character. The presumption which attaches to the integrity of any act which he may perform under the sanction of his official oath cannot be overcome by inference or conjecture. As the facts presented in the affidavits herein do not sustain the charge against the judge of interest in the question litigated before him, they cannot be considered as a ground for setting aside his decision.

The judgment and order are affirmed.

We concur: Garoutte, J.; Paterson, J.

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97 Cal. 83

Ex parte BROWN. (No. 20,976.)

(Supreme Court of California. Dec. 27, 1892.)

Violating Election Laws—Evidence—Production of Ballots.

Pol. Code, § 1265, provides that, on receipt of the package of ballots cast at an election, the clerk must file it, and keep it unopened for a year, after which he shall burn it, without examining the contents, if there is no contest about such election. Section 1266 provides that, if a contest is commenced within a year, he must keep the package unopened, unless ordered to produce it by the court in which the contest is pending, so that evidence may be had of its contents. *Held*, that a court has no power to compel the production of a package of ballots cast at an election, for the purpose of obtaining evidence in a preliminary investigation of a criminal charge against an election officer for violating election laws.

In bank.

W. A. Brown, a register of voters, was, by order of court, commanded to produce a package of ballots, that evidence of their contents might be used in the investigation of a charge of felony alleged to have been committed by an election inspector; and, on his refusal to produce the package he was committed to jail for contempt, and sued out a writ of *habeas corpus*. Discharged.

Matt I. Sullivan and *Chas. Heggerty*, for petitioner. *Mr. Beatty* and *Crittenden Thornton*, for respondent.

BEATTY, C. J. The petitioner is registrar of voters of the city and county of San Francisco. His duties as such are in all material respects the same as those imposed by law upon county clerks in the other counties of the state. Act March 18, 1878, (St. p. 299, § 4;) Pol. Code, (New,) § 1216, added by Act March 20, 1891, (St. p. 165, § 32.) It appears from his petition, and the return to the writ issued herein, that the Honorable C. W. SLACK, one of the judges of the superior court of San Francisco, acting in the capacity of a committing magistrate, caused the arrest of one Napthaly upon a charge of felony alleged to have been committed by him as inspector of one of the election precincts of said city and county, at the recent general election. While conducting the examination of said charge, in his capacity of committing magistrate, said judge made, and caused to be duly served upon the petitioner, an order requiring him to produce and open the sealed package of ballots returned from the precinct at which said Napthaly acted as such inspector. The petitioner refused to produce the package of ballots, for the purpose of opening them, and for such refusal was adjudged guilty of contempt, and committed to the county jail, whereupon he sued out this writ for the purpose of testing the legality of his imprisonment.

It is the settled law of this state that no court or judge has power to punish as a contempt the violation or disregard of an unlawful order. To attempt to do so, by means of imprisonment, is an excess of jurisdiction remediable by the writ of *habeas corpus*. The question for decision, therefore, and the only question discussed by counsel, is the legality of the order made by the committing magistrate, requiring petitioner to produce in court, and open, the sealed package of ballots. I say "committing magistrate," because a judge of the superior court, acting in that capacity, has no authority over the registrar of voters or the county clerk which is not fully shared by every police judge and justice of the peace in the state. If he can order a sealed package of ballots to be opened for the purpose of obtaining evidence supposed to be material in the preliminary investigation of a criminal charge, so may any one of them. There is, indeed, no middle course between holding that the ballots must be kept as the law in terms directs them to be kept, *i. e.*, sealed and in the exclusive possession of the registrar or county clerk, or that any judicial officer of any grade may, in any judicial proceeding, civil or criminal, take them out of the possession and control of the officer charged with their custody, open them, and keep them during such time, and subject to such precautions, as he may deem necessary for the purposes of his investigation and the preservation of their integrity. The statutory provisions in regard to the preservation and custody of the ballots are contained in sections 1259 to 1266 of the Political Code. It is thereby made the duty of the precinct election officers to securely seal up the ballots as soon as they have been counted and to deliver them to the county clerk, (or registrar, in San Francisco,) by the hands of one of their own members, or by the nearest postmaster, or a sworn express agent. The duty of the clerk or registrar is prescribed by sections 1265 and 1266 of the Political Code, which read as follows: "Sec. 1265. Upon the receipt of the package, the clerk must file the one containing ballots, and must keep it unopened and unaltered for twelve months. After which time, if there is not a contest commenced in some tribunal having jurisdiction about such election, he must burn the package, without opening or examining its contents. Sec. 1266. If, within twelve months, there is such a contest commenced, he must keep the package unopened and unaltered until it is finally determined, when he must, as provided in the preceding section, destroy it, unless such package is, by virtue of an order of the tribunal in which the contest is pending, brought and opened before it, to the end that evidence may be had of its contents, in which event the package and contents are in the custody of such tribunal." It is manifest that the duty thus imposed upon the clerk or registrar is not performed, according to the terms of the statute, if he parts with the custody of the ballots, or opens the packages, or permits them to be opened, or fails to destroy them at the expiration of a year without examination, except in the single case of a contest before a competent tribunal, when, and when only, he may, upon a proper order of such tribunal, deliver the ballots into its custody, to be opened and used as evidence.

It is not pretended that the proceeding pending before Judge SLACK is a "contest," within the meaning of the statute. On the contrary, it is admitted that a contest means a proceeding by a candidate apparently defeated, according to the face of the returns, in which he seeks to impeach the returns by evidence of a higher character, as, for example, by a recount of the ballots. Nevertheless, it is contended that the magistrate had the power in this proceeding to compel the registrar, under penalty of fine and imprisonment, to do that which the law has forbidden him to do under the same penalties. If this is so, it must be because the law is unconstitutional, or that it does not mean what its terms import, or that the power of the courts is, in this matter, superior to that of the legislature. As to the first proposition, I need only say that the constitutionality of the law has not been assailed. As to the last, it is not denied that with respect to rules of evidence, generally, the courts are strictly bound by the laws enacted by the legislature. The only question, therefore, is as to the proper construction of the statute, considered in relation to other statutes and rules of law *in pari materia*. As to this point the contention of counsel is, in substance, that the literal terms of the statute must give way to the general legal principle that all courts have the power to compel the production of the best evidence within the reach of their process, and material to the issue to be tried, and that the parties to the litigation have a right to the production of such evidence for the enforcement or the defense of their rights. The correctness and the importance of this principle are conceded, but at the same time it cannot be denied that it is within the power of the legislature to set it aside in pursuance of a policy which it deems of paramount importance. A familiar instance of such a law and such a policy is the privilege accorded to communications made to a priest, a physician, or an attorney, by penitent, patient, or client. Such communications would in many instances conclusively establish the truth of criminal charges or the invalidity of property claims; and yet the law prohibits their disclosure, because, by protecting such confidential communications, a greater mischief is prevented than results from the loss of a particular kind of evidence. And so with regard to these ballots. If the legislature, in pursuance of a paramount object, has determined that they shall not be inspected after they have left the hands of the precinct officers, except for one specific purpose, the courts can no more lay hands upon them, as a means of proof, than they can compel a lawyer, doctor, or priest to disclose communications made to him in his professional character, and under the seal of professional confidence.

What, then, is and has been the policy of the legislature with respect to election ballots? Ever since the system of voting by ballot came into use it has, of course, been possible for election officers to commit frauds in counting, the best evidence of which would be furnished by an inspection of the ballots themselves. But, in spite of this fact, the election laws of many of the states provided that the ballots should be destroyed as soon as counted. Such was the law of this state from 1850 to 1863. St. 1850, p. 104, § 35; St. 1863, p. 354, § 5. Now, whatever may have been the object of this provision,—whether the preservation of the secrecy of the ballot, or something else,—it was plainly inconsistent with any use of the ballots for the purpose of proving fraud; and when it was amended by the act of 1863 so as to require the ballots to be returned under seal to the county clerk, to be kept by him for at least six months, it was provided by the same amendment that any person denying the correctness of the returns could demand a recount of the ballots,—a clear indication that the object of the amendment was to furnish a new ground of contest to candidates apparently defeated. There is nothing, however, in the terms of this first amendment, inconsistent with the use of the ballots as evidence for other purposes than a contest; and, if the law had remained as then enacted, I should have entertained no doubt that they could be used as evidence to sustain a criminal accusation. But the law was not allowed to remain as then enacted. On the contrary, it was substantially changed by the adoption of the Political Code, and the note of the code commissioners to section 1266 shows the motive of the change, viz. to preserve the evidence of the actual vote, and protect it by all the safeguards that can be conveniently thrown around it, until it can be examined in a tribunal authorized to try contested election cases. This, then, was the object of the law, evident not only from the language and all the provisions of the statute, but expressly set forth by the commissioners who framed it. It was to preserve the best evidence of the actual vote for the trial of contested elections, and to protect it by all the safeguards that could be conveniently thrown around it. This being done, the same amendment provided, *ex industria*, that the ballots, being no longer needed for a contest, should be destroyed without examination. It is therefore not only inconsistent with the terms of the law, but destructive of its policy to hold that the ballots, for the security and integrity of which such careful provision is made, are subject to be removed from the custody of the registrar, opened, handled, and exposed to the danger of all sorts of changes and mutilations, as often as any judicial officer may conclude that they contain evidence material to an issue depending before him; for, when once the terms of the statute are set aside, not only judges of the highest character and position can order the sealed ballots to be produced and opened, but every judicial officer in the state may do the like, and it will depend wholly upon his individual judgment and discretion what precautions shall be taken to prevent them from being tampered with. The object of the law being to afford the means of impeaching the returns of the election officers, not only all candidates, but the entire public, are interested in preserving the integrity of the sealed packages of ballots; for they cannot be produced in evidence without satisfactory preliminary proof that they remain in the same condition in which they were taken from the ballot box. McCreary, Elect. (2d Ed.) § 277, and cases cited; Coglan v. Beard, 67 Cal. 303, 7 Pac. Rep. 738. When they have been kept by the clerk or registrar, such proof is an extremely simple matter. When they have been beyond his control, it becomes extremely difficult, and in many cases impossible.

We are asked by counsel how the declared intention of the legislature to punish frauds by election officers can be reconciled with an intention to prevent the use of the best means of proving such frauds. It might as well be asked how the plain injunction of the statute that the ballots must be destroyed at the end of one year can be reconciled with the law which authorizes a prosecution to be commenced at any time within three years. Both these questions may be answered in the same way. The different provisions are in neither case absolutely inconsistent; and, if it is true that the preservation of the ballots as the law directs is an obstacle to the enforcement of the newly-provided penalties for frauds of election officers, this result flows from the fact that the legislature in this instance, as in so many others, has failed in revising the old law, to co-ordinate its different parts so as to bring them into perfect harmony with its new policy. This failure of provision, however, if, indeed, there was such failure, cannot be remedied by the courts, but must be left to the legislature itself for amendment. If it is thought necessary to make the ballots available as evidence in criminal proceedings, the legislature can do so, under such limitations and restrictions as may be deemed essential to their integrity. The courts cannot open them for inspection without destroying all safeguards, except as each particular judge who may order them into court shall see proper to apply, nor without impairing in all cases, and possibly destroying in many, their value as evidence for the only purpose for which the law has directed their preservation. The prisoner is discharged.

We concur: PATERSON, J.; McFARLAND, J.; GAROUTTE, J.; DE HAVEN, J.; HARRISON, J.

SHARPSTEIN, J., not having heard the argument, did not participate.

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3 Cal. Unrep. 714

TOWER v. McDOWELL, Sheriff. (No. 19,004.)

(Supreme Court of California. Dec. 29, 1892.)

TROVER—EVIDENCE—LEVY AFTER EXPIRATION OF EXECUTION.

1. Where, in trover against a sheriff, who claimed to hold by virtue of a levy under an execution, plaintiff introduced in evidence the execution under which defendant justified the taking, and his return thereon, showing the levy and sale and amount received from such sale, the exclusion of oral testimony as to what the property sold for is not harmful to the defendant.

2. Where it appeared by the sheriff's return on an execution that a levy under it was not made until after the expiration of the life of the execution, such levy by a sheriff is without jurisdiction.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

Trover by Virginia A. Tower against S. A. McDowell, sheriff. From a judgment for plaintiff, defendant appeals. Affirmed.

Sprigg & Barber, for appellant. *Shaw & Holland*, for respondent.

VANCLIEF, C. Action in the nature of trover to recover the value of certain personal property of plaintiff's alleged to have been wrongfully taken and converted to his own use by the defendant. The defendant denied that the plaintiff owned or possessed the property at the time it was taken, and alleged that it was then owned and possessed by F. C. Tower, plaintiff's husband, and F. E. Bates, from whom defendant, as sheriff, took it by authority of a writ of execution against them in favor of the First National Bank of San Diego. It was further alleged in the answer of defendant that F. C. Tower and F. E. Bates made a bill of sale of the property to plaintiff without consideration, and for the purpose of defrauding their creditors, and that the sale was not accompanied by an immediate delivery of the property, nor followed by an actual or continued change of possession thereof. The cause was tried without a jury, and the court found the facts on all the material issues in favor of the plaintiff, and rendered judgment accordingly for the sum of $3,349.39. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

The evidence, though conflicting, on the issues as to value, immediate delivery, and continued change of possession of the property, is sufficient to justify all the findings of fact, and the findings support the judgment; nor do appellant's counsel seem to contend with much confidence to the contrary, but in their reply brief say: "The principal error complained of by appellant on the trial, on the motion for new trial, and on this appeal, is the refusal of the trial court to permit evidence of the sums for which the property sold at a well attended, fairly conducted auction sale, at which the bidding was spirited, and the competition sharp." This refers to the sheriff's sale of the property in question, consisting of the stock of a livery stable,—horses, buggies, wagons, and appliances, about fifty in number. Indeed, the only possible ground for reversal available to appellant is that the court erred in excluding or admitting evidence touching the issue as to the value of the property, since the defendant did not offer in evidence the execution under which he justified the taking, nor any execution whatever, nor the return upon any execution. The plaintiff, however, in rebuttal, put in evidence the execution under which defendant justified (issued March 5, 1889,) and the sheriff's return thereon, showing that he received the execution on March 5, 1889, levied it on July 13, 1889, and sold the property on July 29, 1889, in separate parcels, for the aggregate sum of $2,355.42. It thus appears that the best evidence of what the property sold for was introduced by the plaintiff, so that the rejection of oral evidence offered by defendant, even if competent, could not have injured him. Besides, it does not appear that the court excluded oral evidence of the aggregate sum for which all the property sold. Defendant asked one of his witnesses the following question: "Do you know whether or not the sheriff's sale of the property described in the complaint was advertised by printed handbills scattered through the cities of San Diego and Coronado?"

This question being objected to, the defendant's attorney made the following offer: "We offer to prove by the witness and by others that the sale by the sheriff was thoroughly advertised in San Diego and Coronado Beach; that a large number of bidders were present at the sale, and there was great competition in the purchase of the property, and that the property described in the complaint brought on the sale less than $2,000." Upon objection to this offer the court said: "I shall sustain the objection to the question. There is a part of the offer that is competent. The objection to the offer will be overruled." Yet the defendant did not then or afterwards offer evidence of any part of what he had offered to prove, except that he afterwards asked another witness what a single hack sold for, which was immaterial, without an offer to prove what all the property sold for.

By the introduction of the execution in evidence it further appeared that the alleged levy was not made until long after the expiration of the life of the execution, it having been issued on March 5th, and not levied until July 13th. Upon the execution are the following indorsements: "S. A. McDowell, Esq., Sheriff of S. D. County—Sir: The within execution and judgment is properly assigned to C. L. Barber by the bank. We have further authority to represent said judgment. July 12, 1889. Yours, etc., Sprigg & Barber, Att's." "The within execution is hereby renewed, and the time of its return extended sixty days. July 13, 1889. Sprigg & Barber, Plaintiff's Att'ys." These indorsements did not revive or renew the execution, and counsel for appellant do not so contend. At the time the defendant attempted to execute it by taking the property in question it was *functus officio*, and afforded no jurisdiction for the taking, and the defendant is liable for the taking to the same extent he would have been without any writ in his possession. Freem. Ex'ns, § 106, and case there cited. If the views above expressed are correct, all other questions mooted are immaterial. I think the judgment and order should be affirmed.

We concur: Belcher, C.; Haynes, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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97 Cal. 108

HEFT v. PAYNE. (No. 14,356.)

(Supreme Court of California. Dec. 31, 1892.)

Street Assessments — Foreclosure of Lien — Defenses — Time for Completing Work—Extension—Estoppel of Property Owner.

1. In an action to foreclose a lien for a street assessment, the complaint showed that the work was not completed within the time named in the contract, but alleged as an excuse that the city failed to furnish a steam roller, as provided in the specifications, until too late to do the work within the specified time. *Held*, that a demurrer to the complaint was properly sustained; the lot owner not being a party to the contract, and the city's failure to furnish the roller not being binding on him.

2. In an action to foreclose a lien for a street assessment, the complaint averred that the street commissioner accepted the work and issued his warrant; that the lot owners, including defendants, appealed to the city council and filed objections; that at the hearing thereof they waived all objections which they might have by reason of a failure to complete the work within the contract time; and that the council, relying on such representations, set aside the assessment and warrant, and ordered further work to be done, which, when completed, was accepted by the council. *Held* that, it not being an action to enforce a personal liability, defendant was not estopped from setting up that the work was not done within the contract time.

3. The action of the city council in setting aside the first assessment and warrant, and in directing further work, did not operate as an extension of time; the act under which the work was done providing that if the owners or contractor fail to complete the work within the time limited, "or within such further time as the city council may give them, the superintendent of streets shall report such delinquency to the city council, which may relet the unfinished portion of said work."

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by one Heft against one Payne. Judgment for defendant. Plaintiff appeals. Affirmed.

J. J. Burt, for appellant. *A. S. Kittredge*, for respondent.

Paterson, J. This is an action to foreclose the lien of a street assessment. Judgment in favor of defendant was entered in the court below on demurrer to the complaint, and plaintiff has appealed.

The work was not completed within the time named in the contract, nor within the time of any extension given, but, to avoid the effect of the failure of the contractor to complete the work within such time, it is alleged that in the specifications for the work it was provided that the city (San Jose) should furnish a steam roller for rolling the rock used in macadamizing the street, and that the city, though often called upon to furnish the roller, has neglected to do so, until it was too late for the contractors to perform the work within the time. It is alleged that the contractors applied to the city council for an extension of time, but the council failed to act on the application, and that their failure to complete the work within the time allowed was due to the failure of the city to furnish the roller, as provided in the contract. We think that the excuse offered for the failure to perform within the time agreed upon is insufficient. The lot owner, in such cases, is in no sense a party to the contract, except as one of the public upon whose property the burden of payment for the improvement is placed. The city does not act as his agent to bind him personally, but in its sovereign capacity, as in matters of taxation; and the failure of the city to furnish the steam roller is no more binding upon him than would be the failure of any other person who may have agreed to furnish the contractor with machinery, teams, or material to be used in the work required by the contract. His liability arises out of no agreement, express or implied, between him, in his individual character, and the street contractor. He has nothing to say in determining whether the work shall or shall not be done by the contractor, nor—in the absence of fraud—whether the work has been done according to the contract; but he can "question the regularity of the proceeding resulting in the assessment, in the same manner and upon the same principles as the validity of a tax may be questioned." Emery v. Bradford, 29 Cal. 84; Meuser v. Risdon, 36 Cal. 245. Dyer v. Barstow, 50 Cal. 654.

In the second count it is alleged that the street commissioner accepted the work and issued his warrant; that the defendant and other lot owners appealed to the city council, and filed objections; that the latter appeared and took part in the hearing of the objections, and expressly waived all objections which they might have by reason of the failure of the contractors to complete the work within the time fixed or any extension thereof, and stated that all they wanted was a completion of the improvement to the satisfaction of the council, and when that was accomplished no further objections would be made, and the assessment for the work would be paid; that the council, relying on the good faith of said representations, set aside the assessment and warrant, and ordered further work to be done; that plaintiff, relying on the good faith of said promises, went on and completed the work to the satisfaction of the proper officers and of said council, and the work was, by resolution, accepted, a new assessment made, and a warrant issued and recorded, demand for payment made, etc. It is contended that the defendant is estopped, by his representations and promise, from claiming that the work was not done within the time required. But this is an action purely to foreclose a lien on the land for the cost of a public improvement. There is no personal liability, and to such proceedings the doctrine of estoppel *in pais* has no application. Meuser v. Risdon, supra. If there is no lien, there can be no recovery. The lot alone is liable; and, if there was no lien at the time it is claimed a waiver was made, we do not see how any could have been created by the oral statements of the defendant. Whether the alleged conduct of the defendant created any personal liability on his part to pay a portion of the work done on the public highway is a question which we are not called upon to decide.

It is claimed that the act of the city council in setting aside the first assessment and warrant, and in directing further work, operated as an extension of time. We do not think this contention is warranted by the provisions of the act under which the work was done. It provides that "if the owners or contractor who may have taken any contracts do not complete the same within the time limited in the contract, or within such further time as the city council may give them, the superintendent of streets shall report such delinquency to the city council, which may relet the unfinished portion of said work after pursuing the formalities prescribed hereinbefore for the letting of the whole." This is substantially the same provision found in other statutes, and which has been given a construction in several cases adverse to appellant's contention. Beveridge v. Livingstone, 54 Cal. 56; Fanning v. Schammel, 68 Cal. 429, 9 Pac. Rep. 427; Dougherty v. Coffin, 69 Cal. 455, 10 Pac. Rep. 672; Raisch v. City and County of San Francisco, 80 Cal. 1, 22 Pac. Rep. 22. The decision in Taylor v. Palmer, 31 Cal. 246, upon which appellant relies, was based upon an amendment to section 7 of the act of 1862, passed April 25, 1863, (St. 1863, p. 526.) Turney v. Dougherty, 53 Cal. 620; Beveridge v. Livingstone, supra.

The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(97 Cal. 135)

BUCK v. CITY OF EUREKA. (No. 14,561.)

(Supreme Court of California. Jan. 6, 1893.)

CHANGE OF VENUE — DEMAND BY ATTORNEYS — RESIDENTS OF COUNTY—TOWNS.

1. Code Civil Proc. § 396, provides that, where an action is commenced in the wrong county, defendant must, in order to obtain a change of venue, make a written demand therefor. *Held*, that a demand signed by defendant's attorneys, saying that "we demand," instead of that defendant demands, is sufficient, though not a literal compliance with the statute.

2. A town is a resident of the county in which it is located, within Code Civil Proc. § 395, providing that certain actions shall be brought in the county in which defendant resides.

Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by S. M. Buck against the city of Eureka to recover for legal services performed for defendant. From an order granting a change of venue, plaintiff appeals. Affirmed.

Chas. J. Heggerty and *S. M. Buck*, (*W. C. Belcher*, of counsel,) for appellant. *J. N. Gillett* and *Haven & Haven*, for respondent.

BEATTY, C. J. The defendant is a municipal corporation, composed of the inhabitants of a city in Humboldt county. The action, which is for the value of legal services performed at San Francisco, was commenced in the superior court of the city and county of San Francisco. On motion of defendant, the court made an order changing the place of trial of the action to Humboldt county. The plaintiff appeals from this order.

The first point made in support of the appeal is that the defendant made no written demand for a change of the place of trial, such as is required by section 396 of the Code of Civil Procedure. There was a written demand filed at the proper time in the following form: "To the Honorable Judge of said Court, and to Chas. J. Heggerty, Esq., Attorney for Said Plaintiff. We hereby demand that the place of trial of this cause be changed to the proper county, viz. the county of Humboldt, California. Dated this 1st day of September, 1890. J. N. GILLETT, Eureka, California. HAVEN & HAVEN, San Francisco, California." It is contended that this was a demand, not by the defendant, but by its attorneys; and in favor of such construction it is insisted that the provisions of the statute relating to change of the place of trial must receive a strict construction. We know of no reason why they should be subjected to a strict construction. The rule, on the contrary, is that remedial statutes should be liberally construed in favor of the remedy, and rules of procedure are remedial in their nature. The law advises the plaintiff as to the proper county in which to commence his action, and he ought to follow the rule prescribed. He is indulged so far, however, that when the county in which the action is commenced is not the proper county for the trial, the action may nevertheless be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands in writing that the trial be had in the proper county. Code Civil Proc. § 396. With respect to the demand here required, nothing appears to have been deemed essential except that it be made in writing, like motions generally, and that it be made promptly before the court in which the action was commenced has been called upon to deal with its merits. Subject to these reasonable conditions, the fullest recognition should be accorded to the right of the defendant to have the case transferred to the proper county. The cases in which it has been held that, in addition to written notice of his intention to move for a change of the place of trial, the defendant must also serve and file another paper in the literal form of a demand for a change, (a proceeding entirely superfluous,) seem to have gone as far in the way of strictness as there is any call for. Here we have, in addition to a notice of the motion, a demand in writing, the only objection to which is that the attorneys of the defendant, describing themselves as such, say that they demand instead of saying that the defendant demands. It may be that they do not formally comply with the literal terms of the statute, but they have satisfied its reason by a substantial compliance, and that is sufficient.

Coming to the merits of the order, we will notice, in the first place, the contention of appellant that the right to commence the action and have it tried in San Francisco is given by section 16 of article 12 of the constitution. To this view we cannot assent. The twelfth article of the constitution relates exclusively to private corporations, and consequently the provisions of section 16 have no application to a suit against a public municipal corporation. The statute alone must be looked to for a definition of the right of defendant as to the place of trial of this action, and, as there is no specific provision on the subject of actions against municipal corporations, other than counties, the question is narrowed down to this: whether the defendant is a resident of Humboldt county, within the meaning of the general provision (Code Civil Proc. § 395) requiring actions like this to be tried in the county in which the defendant resides. It is argued that a municipal corporation cannot be said to reside anywhere, because it is an entity, incapable of having a residence. This is undoubtedly true in the ordinary and restricted sense of the word "residence." But in this respect a municipal corporation occupies a position at least as favorable as an ordinary trading corporation, and it is settled law in this state that a domestic trading corporation, within the meaning of this statute, resides in the county where it has its principal place of business. This was first decided in 1863, in the case of Jenkins v. Stage Co., 22 Cal. 537, and remained unquestioned at the time our present Code of Procedure was adopted. It must, therefore, be assumed that the legislature, in adopting section 395, intended it to apply to corporations. One of the departments of this court, it is true, did criticise the doctrine of Jenkins v. Stage Co., in two cases decided here in 1884, and seems to have intended to overrule it. California S. R. Co. v. Southern Pac. R. Co., 65 Cal. 394, 409, 4 Pac. Rep. 344, 388. In another case, reported in the same volume, p. 601, (Thomas v. Mining Co., 4 Pac. Rep. 641,) the other department also seemed to doubt the correctness of the decision in Jenkins v. Stage Co. But in a later case, decided by the court in bank, the doctrine of Jenkins v. Stage Co. was distinctly reaffirmed, as we think it ought to have been, and the question must be considered closed. Cohn v. Railroad Co., 71 Cal. 488, 12 Pac. Rep. 498. By an obvious mistake, in a reference, the case in 65 Cal. 394, is cited as authority in Fresno Nat. Bank v. Superior Court, 83 Cal. 497, 24 Pac. Rep. 157, where it is evident the case of Jenkins v. Stage Co. was meant, for the doctrine of the earlier case is distinctly reaffirmed. It is then, as we have said, settled law of this state that a domestic trading corporation resides, within the meaning of section 395 of the Code of Civil Procedure, in the county where its principal place of business is; and if so, a municipal corporation *a fortiori* resides where its territory is, and where all its constituents reside. The defendant, therefore, had a right to demand a transfer of this cause to Humboldt county. Order affirmed.

We concur: McFARLAND, J.; HARRISON, J.

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97 Cal. 93

KENNEDY v. CALIFORNIA SAV. BANK et al. (No. 19,052.)

(Supreme Court of California. Dec. 28, 1892.)

ATTACHMENT—ACTION FOR MONEY—JOINT DEFENDANTS.

1. The personal liability of a stockholder for his proportion of the corporate debts, under Const. art. 12, § 3, is an obligation arising on a contract, within Code Civil Proc. Cal. § 537, providing for an attachment in an action on a contract for the direct payment of money.

2. Where an attachment is issued against a corporation and its stockholders jointly, and the complaint demands different amounts from the several defendants, the writ must conform to the complaint, and direct the attachment of so much property of the respective defendants as will secure the amount alleged to be due from each.

In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action by Kennedy against the California Savings Bank and its stockholders jointly on certificates of deposit. The defendant Havermale makes a motion to dissolve an attachment, and, from an order dissolving the attachment, plaintiff appeals. Affirmed.

Works & Works, for appellant. *Wellborn, Stevens & Wellborn* and *Sprigg & Barber*, for respondents.

DE HAVEN, J. This is an appeal from an order dissolving an attachment. The action is upon certificates of deposit issued to plaintiff by the defendant the California Savings Bank, a corporation in which the other defendants are the stockholders, and the relief demanded is for a judgment for the amount of money represented by such certificates, and against each of the defendants for the proportionate part thereof for which he is liable as a stockholder. The motion to dissolve the attachment was made by the defendant Havermale alone, and was upon these grounds: *First*, that said action is upon a statutory liability, and not upon a contract; *second*, that the writ of attachment, in its statement of plaintiff's demand against him, is not in conformity with the complaint. These grounds are widely different, the first going to the right of the plaintiff to any attachment in the action, and the last relating only to an irregularity in the writ itself, which could be avoided by the issuance of another; and, unless it was the intention of the court to sustain the motion upon the first ground, it should have specified in the order granting the same that it was based upon the latter ground alone, thus leaving the plaintiff free to take the proper steps in the action to procure the issuance of a writ conforming to the complaint. The order of the court was general, and it is therefore necessary to examine both grounds of the motion in order to fully dispose of all questions affecting the right of the plaintiff to an attachment in the action.

1. The first ground stated in the motion presents the question whether an action against a stockholder for his proportion of the debt of a corporation of which he is a member is upon a "contract," within the meaning of section 537 of the Code of Civil Procedure, relative to attachment; and that it is such an action we entertain no doubt. In a general sense, the action is founded upon a contract, and it is none the less so because under the provisions of section 3 of article 12 of the constitution of this state, and section 322 of the Civil Code, the stockholder is made liable to perform the contract in part. The constitution, in the section above referred to, declares: "Sec. 3. Each stockholder of a corporation or joint-stock association shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association." This section prescribes the terms upon which individuals are permitted to transact business through the medium of a corporation, and the necessary legal effect of the conditions thus prescribed is that a corporation when created becomes the agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and its articles of incorporation; and the contracts which it thus makes bind the stockholders to the extent named. As said by the supreme court of Ohio, in Brown v. Hitchcock, 36 Ohio St. 678: "The corporation itself is a mere legal entity, existing only in legal contemplation, and is created for the convenience and benefit of the stockholders. All its dealings are for and on their account. It can contract no debts except under the authority, express or implied, of the stockholders, and through their corporate agents. Our constitution and laws, therefore, make it an essential condition to persons thus availing themselves of the instrumentality of a corporation for the transaction of business that the security of their personal liability shall attach to and attend all of the corporate liabilities." It would seem, therefore, that an action against a stockholder to recover his proportion of the amount due upon a contract made by a corporation, which is only an agency adopted by him for the transaction of business, was essentially an action founded upon a contract. Norris v. Wrenschall, 34 Md. 496; Corning v. McCullough, 1 N. Y. 47; Hawthorne v. Calef, 2 Wall. 10; Dennis v. Superior Court, 91 Cal. 548, 27 Pac. Rep. 1031; Cook, Stock. & S. § 223; Allen v. Sewall, 2 Wend. 327; Ex parte Van Riper, 20 Wend. 616. In the case of Dennis v. Superior Court, above cited, the question whether an action like this was one arising upon contract was directly involved, and we there said: "We think that the personal liability of a stockholder of a corporation for his proportion of the indebtedness of the corporation is an obligation arising upon contract, within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court in actions arising upon contract for the recovery of money when the amount claimed is less than $300." The views here expressed are not in conflict with what was decided in Green v. Beckman, 59 Cal. 545, and the other cases following it which are relied upon and cited by defendant. In those cases the question was whether an action like this against a stockholder was upon a "statutory liability," within the meaning of section 359 of the Code of Civil Procedure, which provides that actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, must be brought within the time there specified. The court, in Green v. Beckman, supra, held that it was; that the legislature must have intended the section to apply to such an action; otherwise it was meaningless, in so far as it related to actions against stockholders. The court in that case said: "The construction of section

359 of the Code of Civil Procedure is not free from difficulty. * * * Our attention has not been called to any provision of the statute which imposes any 'penalty' or 'forfeiture' upon a stockholder for any act as such, and no effect can be given to the words 'liability created by law,' unless we apply it to the liability which the law imposes when one becomes a stockholder, and thus establishes the relation to the creditors of the corporation to which the law affixes the responsibility." There is no intimation in this language, nor did the court there intend to hold, that such an action might not also be regarded as based upon "contract," within the general meaning of that phrase, or as used in other chapters of the Code of Civil Procedure; but the court simply held that for the purposes of that section, and in the connection in which they there appear, the words "liability created by law" should be construed as referring to actions, such as this, to enforce the liability of stockholders.

2. The corporation and the other defendants are jointly sued, and the complaint shows the indebtedness of the corporation to plaintiff to be $45,500, of which amount the defendant Havermale is only liable for one fifth. The writ of attachment recited that the action was brought to recover from the defendant $45,500 and costs, and commanded the sheriff "to attach and safely keep all the property of said defendants, * * * or so much thereof as may be sufficient to satisfy the plaintiff's demand, as above mentioned." The question presented by the second ground of the motion to discharge the attachment is whether this writ, as thus framed, was irregularly issued as to the defendant Havermale. We think that it was, and the motion to discharge the attachment was properly granted for this reason. Section 540 of the Code of Civil Procedure provides that the writ of attachment must require the sheriff "to attach and safely keep all the property of such defendant within his county, * * * or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint," etc. In this case, as to defendant Havermale, the writ did not state the amount of plaintiff's demand against him, in conformity with the complaint, but stated a very much larger sum, and by it the sheriff was directed to seize property of his sufficient to satisfy the entire amount due to plaintiff from the corporation, although he was only liable for one fifth of that amount. When the complaint demands different amounts from the several defendants in the action the writ must conform to the complaint, and direct the attachment of so much property of the respective defendants as will secure the amount alleged to be due from each. The clerk is not authorized to issue a writ of attachment against the property of any defendant for an amount exceeding the demand which is made against such defendant in the complaint, and, if he does, the writ must be discharged as to such defendant on his motion. The law upon this point is thus very clearly stated by the supreme court of Utah in Bowers v. Bank, 4 Pac. Rep. 225: "The statute leaves no discretion in any way as to the amount which shall be stated in the writ of attachment. It is a plain, direct, and specific instruction and direction, which the clerk has no right to or authority to disregard. The process of attachment is a special statutory remedy, and in resorting to it the terms of the law conferring it must be strictly pursued. If the clerk had stated any other sum in the writ than that in conformity with the demand in the complaint, it would have been a material departure from the requirements of the statute, and would have vitiated the proceeding, and rendered it utterly void. The requirements of the statute are so plain that there is no room left for construction or speculation." It is urged, however, that as no more of defendant Havermale's property than is sufficient to satisfy the demand against him was attached, he cannot complain, and his motion to discharge the writ should have been denied. But section 556 of the Code of Civil Procedure provides that the motion to discharge an attachment irregularly issued may be made before any actual levy under the writ; and section 558 of the same Code further declares: "If upon such application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged." Under these sections it is immaterial whether much or little or any property of a defendant has been actually levied upon, but the court must, upon proper application therefor, discharge the writ of attachment thus wrongfully issued, leaving the plaintiff to obtain a new writ, which shall conform to the requirements of the law in its statement of the demand which is made in the complaint. The order in this case will therefore be affirmed, upon the second ground stated in the motion of defendant.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; HARRISON, J.; PATERSON, J.; GAROUTTE, J.

MCFARLAND, J. I concur in the judgment of affirmance, but I express no opinion on the question whether or not the liability of a stockholder, under the constitution and statute, for his proportionate part of such debts as the corporation may afterwards incur, is the result of "a contract for the direct payment of money" made by the stockholders, within the meaning of section 537 of the Code of Civil Procedure. There has been no decision in this state holding that an attachment will lie in such a case; and the opinion of the court in Green v. Beckman, 59 Cal. 545, is rather the other way. In Dennis v. Superior Court, 91 Cal. 548, 27 Pac. Rep. 1031, no such question arose or was discussed; and it is not claimed in appellant's brief that in any case cited from other states the direct point here involved was definitely decided. An attachment is a harsh statutory process, by which the property of an alleged debtor is violently taken away from him, prior to an adjudication of the debt, and it should be confined to cases which clearly come within the terms of the statute; and it is not clear to me at the present time that the liability of a stockholder for something that may possibly happen is within the clause of the statute above quoted.

(99 Cal. 39)

MERCED BANK v. ROSENTHAL et al.[1]

(No. 14,871.)[1]

(Supreme Court of California. Dec. 28, 1892.)

NOTICE OF APPEAL — ADVERSE PARTY — APPEAL FROM JUDGMENT—JUDGES — TERMS OF OFFICE—DE FACTO JUDGE—MORTGAGE OF HOMESTEAD.

1. Where a defendant is not served with summons, and makes no appearance, and no judgment is entered against him, and judgment is entered against the other defendants, who are served and appear, the defendant not served is not an "adverse party," within the meaning of Code Civil Proc. § 940, requiring in case of appeal an undertaking to be filed unless the same be waived "by the adverse party, in writing."

2. Where a proceeding is in form a judgment, which, although void, is entered of record, so that it might be made oppressive by the issue of final process thereon, it constitutes a grievance, which may be remedied on appeal to a tribunal for the correction of errors.

3. Const. art. 6, § 6, provides that "the term of office of judges of the superior courts shall be six years from and after the first Monday of January next succeeding their elections." Article 20, § 20, provides that the terms of officers provided for by the constitution "shall commence on the first Monday after the 1st day of January next following their election." *Held*, that article 20 applies to superior judges, and controls, it being intended to provide generally the exact date of commencement, so that all officers of the state should take office on the same day.

4. Where the judge elect was attorney in a proceeding pending, and his predecessor in office assumed jurisdiction by the entry of judgment on the first Monday of January, which was also the first Monday after the 1st day of January, both judges acting in good faith, and believing that the term of the judge elect did not commence till Tuesday, the judge acting was a de facto judge.

5. Const. art. 17, § 1, requires the legislature to protect by law the homestead from forced sale. Civil Code, § 1241, declares a mortgage foreclosure sale a "forced sale." Section 1242 provides that "the homestead of a married person cannot be conveyed or incumbered unless the instrument is executed and acknowledged by both husband and wife." *Held*, where a husband and wife conveyed their homestead by a deed, absolute on its face, and by a contemporaneous oral agreement made the conveyance a mortgage for an existing indebtedness and for future advances to the husband, that the premises retained their homestead character, and the incumbrance for future advances being a mere oral agreement, constituting power in another to incumber at will, and not executed and acknowledged by husband and wife, it was not enforceable. Bull v. Coe, 18 Pac. Rep. 808, 77 Cal. 54, distinguished.

Commissioners' decision. Department 2. Appeal from superior court, Merced county; C. H. MARKS, Judge.

Action by the Merced Bank against A. Rosenthal and others. Judgment for plaintiff. Defendants appeal. Reversed.

Frank H. Farrar, for appellants. *T. C. Law* and *Breckinridge & Peck*, for respondent.

TEMPLE, C. This action is brought to have a deed, absolute on its face, declared a mortgage, and to obtain a foreclosure of the same. It is brought against A. Rosenthal and S. Peckerman, as copartners, doing business under the style of Rosenthal & Peckerman, and against A. Rosenthal and S. Peckerman and Betsy Rosenthal, wife of A. Rosenthal. It is averred that on and prior to July 20, 1883, the copartnership and A. Rosenthal and S. Peckerman were indebted to plaintiff in the sum of $2,900; and "being desirous of establishing a further credit with plaintiff, and of securing the payment of said moneys then due plaintiff, and of securing the payment to plaintiff of any and all other sums of money and advances that might thereafter become due to plaintiff from said defendants, or any of them, and also of securing any and all balances that might thereafter be found due from said defendants, or any of them, to plaintiff in the course of their dealings, whether such indebtedness should be evidenced by promissory notes then or subsequently given or otherwise, the defendants A. Rosenthal and Betsy Rosenthal, on the 20th day of July, 1883, to secure the plaintiff in the principal sum then due, and thereafter to become due, to plaintiff for moneys thereafter to be advanced to said defendants, and the interest thereon, as hereinabove stated, according to the tenor of any promissory notes or other instruments then or thereafter to be given, * * * on said 20th day of July, 1883, executed to plaintiff a deed for the mortgaged premises, absolute on its face, but intended to be and in fact a mortgage, to secure the payment to plaintiff of all money then due at the day of its date, and all moneys to become thereafter due, from said defendants Rosenthal & Peckerman, and A. Rosenthal and S. Peckerman." It is also alleged that Rosenthal and Peckerman were partners, and that certain indebtedness accrued from them to plaintiff subsequent to July 20, 1883, part of which was evidenced by promissory notes, which are set out at length in the complaint. Judgment is asked against defendants Rosenthal & Peckerman for $1,412, with interest at 1¼ per cent. per month from June, 1884, for costs, and for an attorney's fee, a decree of foreclosure and sale of the premises, and for a judgment for the deficiency, if any, against defendants Rosenthal & Peckerman. The defendants A. Rosenthal and Betsy Rosenthal appeared and answered at length, and as between them and plaintiff a trial was had. It does not appear that Peckerman was served with summons, and he did not appear in the case. No default or judgment is entered against him. A decree was entered in favor of plaintiff against A. Rosenthal and Betsy Rosenthal, declaring the deed to be a mortgage, and for a sale of the premises; for the payment out of the proceeds of the sale of the sum of $2,306.95 found due, with direction to the sheriff to report the deficiency, if any, to the court. This appeal is taken by A. Rosenthal and Betsy Rosenthal from the judgment, and from an order refusing them a new trial. The notice of appeal was served upon the plaintiff, but not upon S. Peckerman, and an objection is now made to the jurisdiction of this court to hear the appeal, because the notice was not served on Peckerman. It is contended that the judgment discharges Peckerman from the debts so far as plaintiff is concerned; that upon a reversal he may be brought in and made responsible. He, therefore, it is argued, has an interest in maintaining the judgment, and is an "adverse party," within the meaning of section 940 of the Code of Civil Procedure.

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[1] Rehearing granted.

But was Peckerman a party to the judgment? It does not appear that he was served with summons, or that he appeared in the case. The issues were made up between the plaintiff and appellants, who went to trial without objection on the ground that Peckerman was not served. The judgment, then, is neither for nor against him. If he had not been named as a party at all, the judgment would have had the same effect upon his interest as now, and upon the reversal of such a judgment he might be brought in and made responsible as now; but, though his interests might be affected by the appeal, he would not, in such case, be an adverse party, nor is he now, as the case stands.

The first point made by appellants is that the judgment is void, because not rendered by a superior judge, but by one Charles H. Marks, who at the time had no official character whatever. It appears that J. K. Law, one of the attorneys for plaintiff, had been elected superior judge of Merced county, at the election in 1890, to succeed Judge Marks, whose term would expire in January following. Judge Law had duly qualified as such judge. This case had been tried some months before, but no findings or judgment had been entered. On Monday, January 5, 1891, that being the first Monday of January following the election of Judge Law, findings were signed by Judge Marks, and an order for judgment made. On the same day judgment was entered "on motion of J. K. Law, Esq., counsel for plaintiff," upon the findings attested as follows: "Done in open court the fifth day of January, 1891. C. H. MARKS, Judge of the Superior Court." Appellants claim that Judge Marks' term of office expired with the 4th day of January, 1891, and Judge Law's term began with the first instant of January 5, 1891. Therefore Marks was not judge when the findings and judgment were made, and the judgment is void. Respondent, in reply to this point, contends: (1) The question is not properly presented, and cannot be raised on this appeal; (2) Judge Marks' term did not expire until 12 o'clock Monday night; and (3) Marks was at least judge *de facto*.

1. Respondent concedes that an appeal may be taken from a void judgment,—that is, from an apparent judgment which is no judgment,—and that on such appeal the court may determine that the lower court committed such error as will render its proceeding void. This is to review the action of a court, and is in line with its usual functions. The appellant in such a case by appealing does not concede that there is a proper judgment, but only that there is a judgment in form, which he claims is erroneous, even to the extent of rendering it void. But an appeal is necessarily, he contends, from a court to a court, and therefore the appeal concedes that the act which appellants ask to have reversed is the act of a court known to the law, and whose judgments may be reversed here on appeal. One cannot assume the fact of the existence of a court simply to appeal in order to have it declared that such fact does not exist. An objection might be urged to the proposed act of a court that it would be without jurisdiction, but how could one raise the objection that the tribunal was no tribunal? To raise the question would be to ask that the point be sustained; that is, to recognize the tribunal as such. Can an objection be raised on appeal which could not in any mode have been submitted to the lower court? And, then, how in such a proceeding can the respondent show that the acting judge was a judge *de facto*,—that he was actually holding the place, was reputed to be a judge, and that his acts as such had been acquiesced in? This reasoning on the part of appellants is certainly specious and plausible, but I think only so. It has been held that this court will entertain an appeal from a void judgment under a law giving it jurisdiction of appeals from judgments. A judgment rendered by a court which has no jurisdiction is a judgment made by one who was not legally a judge in that case. Legal phraseology has always designated such a proceeding as *coram non judice*, and therefore void. Still, as in this case, it would be in form a judgment, entered in the records of a court upon which final process might be issued, which, although void, might through judicial machinery be made oppressive to individuals. It is therefore a grievance which may properly be remedied by a tribunal which exists for the correction of errors. This is not saying that an appeal is the only remedy the aggrieved party may have; and, since the respondent has no opportunity to prove extrinsic facts which might show that Marks was *de facto* judge, perhaps the inquiry on that point must be limited, and facts presumed to exist, if in the nature of things any could have existed, which would establish the regularity of the proceeding.

2. Since I think it must be held that Marks was at least a *de facto* judge, it will not be necessary to discuss the second point made by respondent at much length. Some idea of the claim of Judge Marks that his term continued until Tuesday is necessary, however, to show that both he and Judge Law were acting in good faith in claiming that Judge Marks' term had not yet ended. Section 6 of article 6 of the constitution provides: "The term of office of judges of the superior courts shall be six years from and after the first Monday of January next succeeding their election." It is contended that the whole term must be after Monday; that the use of either word "from" or "after" would exclude Monday, and by using both words an intention is manifested to make this clear. The expression cannot be made to mean "from and including," as interpreted in section 69, Code Civil Proc. To sustain

this position, numerous authorities are cited; and, if the question depended upon this language alone, I think the position of respondent would be impregnable. But it is not the only provision in the constitution affecting the question. Section 20 of article 20 is: "Elections of the officers provided for by this constitution * * * shall be held on the even-numbered years next before the expiration of their respective terms. The terms of such officers shall commence on the first Monday after the first day of January next following their election." Respondent contends that this provision does not apply to superior judges, because their term is to commence on the first Monday in January, which might be the 1st day of January, when according to section 20 of article 20 the term would commence on the 8th, and not on the 1st. On the supposition that the provision fixing the length of the term was intended to fix the commencement of it, the two provisions would be repugnant; and on the same supposition section 20 of article 20 is repugnant to all the provisions in the constitution in regard to the terms of all other officers provided for, except railroad commissioner and members of the legislature. Section 2, art. 5, provides: The governor shall hold his office four years "from and after the first Monday after the first day of January," plainly excluding Monday. All the executive officers hold office for the same term as the governor. Section 3, art. 6: "The term of office of the chief justice and the associate justices of the supreme court shall be twelve years from and after the first Monday after the first day of January." These provisions are as clearly repugnant to section 20, art 20, as the provision in regard to superior judges, for they exclude Monday. The only way to reconcile them is to suppose, as no doubt the fact was, that in fixing the length of the term the attention of the convention was not distinctly called to the exact date of the commencement, but the last section was intended to perform this office, and to provide that all officers of the state should take office on the same day. Having provided for this generally, no reason can be imagined for providing a different date for the commencement of the term of superior judges. And very seldom would there be any difference. A calculation made for me shows that the terms of none of Judge Marks' successors in office will commence in a year when Monday will be the 1st day of January until 1945. Certainly a different rule could not have been intended for them from that provided for other officers. And supposing section 6, art. 6, is to control, there would then occasionally happen a time when the term would be more or less than six years, or we would have occasionally two judges legally holding the same office, and occasionally none at all. This would happen whenever the new term commenced on a different day of the month from that on which the old term commenced. On the whole, even if it must be concluded that section 6, art. 6, and section 20, art. 20 are repugnant, the latter must control.

3. Now, was Marks a *de facto* judge? It appears that he was in fact holding court on that day. Judge Law was before him as an attorney. We must conclude that both believed that Marks' term included Monday; and, as we have seen, the constitution is quite capable of that construction. In fact, if we look only to the provision providing specially for the terms of superior judges, such construction would be inevitable. Under the authorities, which it is unnecessary to criticise, Marks was clearly a judge *de facto*. State v. Carroll, 38 Conn. 449; Petersilea v. Stone, 119 Mass. 465; Cromer v. Boinest, 27 S. C. 436, 3 S. E. Rep. 849; Gilliam v. Reddick, 4 Ired. 368; Brown v. Lunt, 37 Me. 423; Hamlin v. Kassafer, 15 Or. 456, 15 Pac. Rep. 778; Leach v. Cassidy, 23 Ind. 449; State v. Durkee, 12 Kan. 308; Braidy v. Theritt, 17 Kan. 468; Carli v. Rhener, 27 Minn. 292, 7 N. W. Rep. 139; Woodside v. Wagg, 71 Me. 207.

We come now to the questions involving the merits of the case. To the consideration of the motion for a new trial the respondent raises the objection that the notice of intention was not served on Peckerman. This question is identical with that discussed in regard to the notice of appeal, and need not be further considered.

A very serious question is also raised as to the statement of the grounds of the motion, so far as it involves the sufficiency of the evidence. It is admittedly sufficient in its statement as to alleged errors of law excepted to. As I think there is a point which is distinctly raised in these, which could in fact as well have been presented on the judgment roll on the appeal from the judgment, which must be held to be fatal to the judgment and to plaintiff's right to recover at all, it will not be necessary to pursue that matter further.

The court found, in accordance with the allegations of the complaint, that the defendant Rosenthal conveyed the mortgaged premises to plaintiff by a deed absolute on its face, and for an expressed consideration of $1,250; that by a contemporaneous agreement, which the evidence shows was not in writing, the conveyance was converted into a mortgage to secure an existing indebtedness, and for future advances, to be made by the bank to A. Rosenthal and S. Peckerman or either of them, and the interest thereon, according to the tenor of any promissory notes thereafter to be given for such indebtedness; that nearly one year after the date of the deed the firm of Rosenthal & Peckerman, and the partners individually, executed to plaintiff two notes to secure the balance for such advances then due. One note was for $600, and the other for $812. Both were due one day from date, and bear interest at the rate of 1½ per cent. per month. This suit was commenced June 20, 1888. The answers of the defendants admit that the deed was intended as a mortgage, but deny that it was given to secure further advances, and aver that it was to secure the precise sum of $1,250, then borrowed from the bank, which sum they aver had been fully paid before the commencement of this action. Other defenses are pleaded, among them the discharge of both Peckerman and A. Rosenthal in insolvency. It is also shown, and it is so found by the court, that the mortgaged premises, at the time the conveyance was made, composed the homestead of A. Rosenthal and Betsy Rosenthal, which had been carved out of their community property. It was claimed in the court below, and now urged here, that the mortgage, under such circumstances, is void, at least as to future advances. It is also insisted here that the acknowledgment is void because taken before Bates, who was president and manager of the bank, and represented as plaintiff in this action. It has been held that an acknowledgment taken before the grantee of a deed is void. Brown v. Moore, 38 Tex. 645; Groesbeck v. Seeley, 13 Mich. 329; Beaman v. Whitney, 20 Me. 413; Wilson v. Traer, 20 Iowa, 231; Stevens v. Hampton, 46 Mo. 404; Proff. Not. § 35. Where the only effect of the acknowledgment is to impart notice by recording the deed, it would seem that, to be void, it must appear on the face of the instrument. Where, however, the acknowledgment is essential to the validity of the deed, I see no reason why the objection would not be as good against an acknowledgment taken before the agent of the grantee as before the grantee himself. However, this objection does not seem to have been made in the court below, and the other point is sufficient. This question need not, therefore, be now decided.

The constitution requires the legislature to protect by law the homestead from forced sale. Section 1, art. 17. Section 1241 of the Civil Code declares that a sale upon foreclosure of a mortgage is a forced sale. It provides: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained. * * * (3) On debts secured by mortgages on the premises, executed and acknowledged by the husband and wife, or by an unmarried claimant." The next section is as follows: "Sec. 1242. The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." What character or quality does the law add to the tenure by which the homestead is held as so much property to make it a statutory homestead? I think it must be answered that this consists in the restrictions placed upon the power to alienate or incumber its exemption from forced sale under execution, and in the disposition made of it upon the death of either. If the deed, absolute on its face, could be said to convey the fee, it might perhaps be argued that by it the homestead was destroyed, but the fee did not pass by the deed. It was a mortgage only, both at law and in equity, and could be shown not to be a conveyance whenever any rights were asserted under it. Smith v. Smith, 80 Cal. 323, 21 Pac. Rep. 4, and 22 Pac. Rep. 186, 549; Locke v. Moulton, (Cal.) 30 Pac. Rep. 957. The premises retained their character as a homestead after the execution of the conveyance; for it is the homestead that may be incumbered, and which may be sold upon a judgment obtained upon a debt secured by a mortgage upon it. I think it proper, also, to call attention to the fact that the word in section 1242 is "incumbered" rather than "mortgaged," thus specifically calling attention to the act which burdens the property. By what, then, is the homestead incumbered? Is it by the conveyance absolute on its face, or by the contemporaneous oral agreement that a debt may be created which shall be an incumbrance upon the homestead, or by both? Plainly it requires both to create the incumbrance,—to burden the estate with a debt. It must therefore follow that the incumbrance here was not created by an instrument executed and acknowledged by the husband and wife; and, if it would be held good for the present indebtedness, would not every new advance be a fresh burden or incumbrance, not created by such instrument? Such a conveyance, even if expressly securing future advancements, would constitute a power in another to incumber at his will. It has been held that the homestead cannot be conveyed by either husband or wife or both, where one acts through an attorney in fact. In Lies v. De Diablar, 12 Cal. 328, it was said that the homestead was for the benefit of the family, including the children; and husband and wife, both together, could dispose of it only as the legislature might authorize. Barber v. Babel, 36 Cal. 11, holds, as does Flege v. Garvey, 47 Cal. 371, that husband and wife must personally join in the conveyance of the homestead. In Gagliardo v. Dumont, 54 Cal. 496, it was expressly decided that the homestead could not be conveyed by husband and wife when the execution by the husband was through an attorney in fact. It should be noticed that even as to the husband, under the homestead act, the acknowledgment is an essential element in the conveyance. But even if it can be maintained that a mortgage expressly given for further advances in an indefinite amount, and on terms as to time and rate of interest to be agreed upon, by a person other than the mortgagor, would be valid, because it can be argued that it is included in the instrument, it cannot be held so here, for in no way is there any such authority in the instrument executed and acknowledged by the husband and wife. It is contended that the case of Bull v. Coe, 77 Cal. 54, 18 Pac. Rep. 808, is opposed to these views. But in that case this point does not appear to have been raised. The property there was the separate property of the wife, and the point discussed was as to the sufficiency of the acknowledgment as a conveyance of the wife's separate property. The deed there also recited that the deed was in trust, the conditions of which were set out in a paper referred to. It was held that the deed was properly acknowledged, notwithstanding the fact that the paper expressing the terms of the trust was not signed until after the deed was so acknowledged. Whether that conclusion was right or wrong does not affect this case. The discussion there was in regard to the statute concerning acknowledgments, and not in regard to the homestead right. I think the judgment and order should be reversed, and the court below directed to enter judgment for the defendants on the findings.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the court below is directed to enter judgment for the defendants on the findings.

PEOPLE v. MORAN. (No. 20,936.)

(Supreme Court of California. Dec. 27, 1892.)

CRIMINAL LAW—APPEAL—FAILURE TO FILE BRIEF—AFFIRMANCE.

Where defendant in a criminal case, on appeal by him, files no brief, and no error is apparent of record, the judgment will be affirmed.

In bank. Appeal from superior court, Los Angeles county; B. N. SMITH, Judge.

John Moran was convicted of a criminal offense, and appeals. Affirmed.

Hugh J. & William Crawford, for appellant. *Atty. Gen. Hart*, for the People.

PER CURIAM. Appellant having filed no brief, and perceiving no error in the record, the judgment is affirmed.

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3 Cal. Unrep. 740

PEOPLE v. MORAN. (No. 20,936.)

(Supreme Court of California. Jan. 12, 1893.)

APPEAL—REHEARING—MISTAKE OF CLERK.

A motion for rehearing made on account of the clerk's failure to record appellant's brief, so as to bring it to the attention of the court, will be denied, where an examination of the brief fails to disclose anything that would justify a reversal.

In bank. Appeal from superior court, Los Angeles county; B. N. SMITH, Judge.

Motion by John Moran to set aside a judgment obtained against him by the people, and for a rehearing. Denied.

For former report, see supra.

Hugh J. & William Crawford, for appellant. *Atty. Gen. Hart*, for the People.

PER CURIAM. The clerk, by mistake, having failed to make a record of the filing of appellant's brief in the foregoing action, it was not brought to the attention of the court, upon the consideration of the merits of the appeal. Appellant now moves to set aside the judgment and grant a rehearing of the cause for that reason. Upon an examination of the specifications of error relied upon in appellant's brief, we find nothing to justify a reversal of the judgment.

Let the motion be denied.

(97 Cal. 232)

In re HAAS' ESTATE. (No. 19,107.)

(Supreme Court of California. Jan. 19, 1893.)

PROBATE COURTS—JURISDICTION—TITLE TO PROPERTY.

On a final settlement by an executor, a legatee under the will objected, on the ground that the executor had personal property of the estate in his possession, not accounted for. The executor set up that such property did not belong to the estate, and that he held it as guardian of E., a minor, whose property it was. *Held* that, the legal title to such property being directly in issue, the probate court had no jurisdiction to hear and determine to whom it belonged, and a finding by such court that the property was a part of the estate, and a decree charging the same to the executor in his account, is beyond its power.

Department 1. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

James F. Mooney, executor of Christian P. Haas, deceased, filed his account with the probate court for a final settlement of the estate, and a legatee under the will objected to the settlement on the ground that the executor had personal property of the estate in his possession not accounted for. From a decree charging such property to the executor, he appeals. Reversed.

Chas. L. Batcheller, for appellant. *Albert M. Stephens*, for respondent.

GAROUTTE, J. This is an appeal by the executor, James F. Mooney, from an order settling his annual account. When the executor filed his account, a legatee under the will objected thereto upon the ground that he had a large sum of money, and also other personal property, in his possession, which was the property of the estate, and for which he had not accounted. In answer to these objections the executor set out that he was the duly appointed, qualified, and acting guardian of Ella V. Haas, a minor; that said property was her property, and he held it as such guardian, and had returned it to the court in his inventory and appraisement of her estate; and he thereupon objected to the court's hearing and determining these matters, upon the ground that as a court of probate it had no jurisdiction thereof. The court proceeded to a trial of the issues raised by the pleadings, made findings of fact to the effect that this property was the property of the estate, and by the decree charged the same to the executor in his account.

In the present *status* of this case the executor occupies a position which is not at all pleasant to him, viewed from a pecuniary standpoint, for he is now charged with this property in the estate of his ward, and also in the estate of the deceased, Haas; and for that reason he has such an interest in the final determination of the appeal as to justify his appearance in this court. But his two positions of trust are in direct antagonism upon the question of property rights involved in this proceeding, and, if it were not for the prospective personal liability against him in one or the other of these estates, he should not be heard here at all, for in representing both trusts he would necessarily misrepresent one. The minor, Ella V. Haas, was not a party to this proceeding in the trial court, and is not a party to this appeal, although the decree of that court which is before us holds this property to be the property of the estate. The necessary effect of this decree is to declare that she has no title therein, for the question of her title was the only issue involved. The executor was not in a position to represent the ward at the trial of that issue, for the reasons already stated; and the affirmance by this court of the judgment of the trial court would in no degree quiet the title to this property as between the respective claimants. The issues raised by the objections of the legatee to the account, and the answer of the executor to such objection, directly involved the question as to where the legal title to this personal property rested, and that was an issue the probate court had no power to hear and determine. There are many matters relating to the estates of deceased persons of which the probate court has no jurisdiction, and the determination of the question of title to property is essentially one of them. When it became apparent from the pleadings that matters of title to property were at issue, such matters should have been left to other courts for determination; care being exercised that all parties interested should be fairly and fully represented at the trial. We think the judgment of the court was one beyond its power, and for that reason let it be reversed, and the cause remanded.

We concur: PATERSON, J.; HARRISON, J.

(97 Cal. 184)

SCHMID v. BUSCH et al. (No. 19,098.)

(Supreme Court of California. Jan. 14, 1893.)

ENFORCEMENT OF MECHANIC'S LIEN—PAYMENT OF CONTRACTOR IN LAND.

1. In an action to foreclose a laborer's lien, the complaint alleged that on July 6, 1891, defendant owed the contractor, for repairs on his house, money sufficient to pay plaintiff's claim for work done on the house for the contractor. Defendant answered that the contractor agreed to take his pay in land, to be conveyed when the contractor paid him $25 borrowed money, and that he owed the contractor nothing on July 6, 1891, or at any time, under said contract. Plaintiff proved his claim for work, and rested. *Held*, that the answer denied only that any sum of money was due under the contract, and that, if plaintiff was entitled to any relief under the contract set up and admissions made by defendant, the court erred in granting a nonsuit.

2. Under Code Civil Proc. §§ 1183, 1184, 1201, providing that laborers shall have a lien for work done, and that the whole contract

price, except that part due the contractor, shall be payable in money, without regard to any contract made between the landowner and contractor, the laborer may enforce a lien, though the contract price is less than $1,000, and payable in something other than money, when it remains unpaid at the time the lien is filed and the action begun.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Action by K. H. Schmid against W. Busch and another to foreclose a laborer's lien. From a judgment of nonsuit as to the lien, plaintiff appeals. Reversed.

John R. Aitken and *A. D. Jordan*, for appellant. *L. L. Boone* and *C. F. Humes*, for respondents.

BELCHER, C. This an action to recover from the defendant Busch the value of certain work and labor, and to foreclose a laborer's lien for the same upon the property of defendant Boone. It is alleged in the complaint that, at all the times named therein, the defendant Boone was the owner and reputed owner of a described lot of land in the city of San Diego, with a frame dwelling house thereon; that on a day named he entered into a contract with the defendant Busch, under and by which Busch was to furnish certain work, labor, and material to be used in the repair of the said dwelling house; that the contract was for less than $1,000, to wit, about $800, and was never recorded in the office of the recorder of San Diego county; that Busch commenced the work of repairing the said house about the 1st of May, 1891, and fully completed the same, under and according to the terms of his contract, on the 6th day of July, 1891, and "that there remains due and unpaid from said defendant B. F. Boone to said defendant W. Busch, upon and for the repair of said dwelling house under said contract, the sum of not less than two hundred dollars, which said sum became due and payable on the 6th day of July, 1891;" that, under a contract with Busch, plaintiff agreed to do and perform work and labor for him in repairing the said house, and under and pursuant to the contract he did perform such work and labor for 40½ days; that Busch agreed to pay plaintiff the reasonable value of his services on demand, as soon as the said repairs were complete, and that the reasonable value thereof was $5 per day, and the total value $202.50; that plaintiff had often demanded payment of the amount due him, but had received only $39.50, leaving still due him and unpaid on account of his work and labor, after deducting all just credits and offsets, the sum of $163. The complaint then sets out the execution and filing for record by the plaintiff of a proper claim of lien upon the house and lot of defendant Boone.

Busch failed to answer, and his default was entered. Boone anwered, and set up a written contract made between himself and Busch, whereby the latter agreed to do certain work in repairing his house, and in consideration of said work he agreed to convey to Busch certain lands situate in the county of San Diego. He then denied that all the work and materials were of the value of $800, or of any greater value than $400, and alleged that all the work and labor done, and all the materials furnished, by Busch in and upon said house, during the period covered by plaintiff's complaint, were done and furnished under the contract above set out; denied that any sum was due from him to Busch on the 6th day of July, 1891, or at any other time, or at all, pursuant to said contract or otherwise; alleged that on the 19th day of June, 1891, he loaned to Busch the sum of $25, and that Busch then made a written agreement, which was attached to the contract before set out, and by which he agreed to repay the sum loaned, with interest at the rate of 1 per cent. per month, and also agreed that the lands described in the attached contract might be held by Boone as security for said sum, and the latter should be under no obligation to convey the same until said sum should be paid; and, further, that the said sum had not been paid, nor any part thereof. At the trial the plaintiff proved that he performed labor on the house of Boone, under a contract with Busch, and the amount and value thereof, as stated in his complaint; but he offered no evidence as to the terms of the contract between the owner and contractor, or that there was any contract between them. He then rested his case, and the defendant moved for a nonsuit on the ground "that there has been no evidence to show, or tending to show, that there ever was at any time, either at the time alleged in the complaint, or any other time, anything due under any contract, or otherwise, from the owner of this building to the contractor Busch." The court took the motion under advisement for a time, and subsequently granted it, and from the judgment thereupon entered the plaintiff appeals.

In support of the judgment it is claimed by respondent that, to entitle the plaintiff to the relief demanded, it was necessary for him to prove that a contract, substantially the same as that stated in the complaint, was entered into between the owner and contractor, and that a sum of money remained due thereunder from the former to the latter sufficient to meet the plaintiff's demand; and that, no such proof having been made, the nonsuit was properly granted. The answer does not deny that a valid contract was entered into between the parties for the work in question, but, on the contrary, it sets up a written contract, which is not materially different from the one stated in the complaint, except that the work was to be paid for by conveyance of land. The answer also, in effect, admitted that the value of the work to be performed was $400, and that that sum, less $25, had not been paid by a transfer of the land or otherwise. The denial, therefore, "that any sum was due from him to said Busch on the 6th day of July, 1891, or at any other time, or at all, pursuant to said contract or otherwise," must be treated as a denial only that any sum of money was due under the contract. Under these circumstances, we think, the plaintiff could rest upon the contract set up and the admissions made by the defendant; and, if under them he was entitled to any relief, then the court erred in granting the nonsuit.

It is further claimed by respondent that the plaintiff had no lien, and was not entitled to any relief, as against him, because the contract price of the work to be done by the contractor was less than $1,000, and was payable in property other than money; and this seems to have been the view taken by the court below. Section 1183 of the Code of Civil Procedure provides that "all persons and laborers of every class, performing labor upon, or furnishing materials to be used in," the construction, alteration, or repair of any building, "shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished." Section 1184 provides that "as to all liens, except that of the contractor, the whole contract price shall be payable in money;" and section 1201 provides "that it shall not be competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and any term to that effect shall be null and void." Respondent contends that sections 1183 and 1184, above cited, relate only to cases where the contract price exceeds $1,000, and hence that they do not in any way sustain and justify the claim of appellant; and, in support of this position, Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. Rep. 932, and Lumber Co. v. Cummings, 86 Cal. 22, 24 Pac. Rep. 814, are cited. After carefully reading the opinions in the cases referred to, we fail to see how they can be said to sustain respondent's contention. It is true that the sections named were commented upon and construed with reference to the questions there involved, but those qustions were entirely different from the one presented here. Contractors' and laborers' liens have many times been foreclosed when the contract price was less than $1,000, and in such a case, and under the sections of the Code above cited, the laborer, in our opinion, may enforce a lien, notwithstanding the contract price was to be paid in something other than money; it not having been in fact paid when the claim of lien was filed and the action commenced. It follows that the nonsuit was improperly granted, and that the judgment should be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

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97 Cal. 81

PIO v. AIGELTNIER. (No. 15,097.)

(Supreme Court of California. Dec. 27, 1892.)

DISMISSAL OF APPEAL—CERTIFICATE OF CLERK.

1. Under Court Rule 6, providing that, on a motion to dismiss an appeal for failure to file the transcript, there shall be presented a certificate of the clerk below, stating the date of entry, the amount and the character of the judgment, notice of the appeal, and the court to which the appeal is taken, a certificate of the clerk of a superior court, giving the date of entry, the amount and the character of the judgment, and then stating "that, after the rendition of said judgment, the said defendant filed a notice of appeal in said action" is sufficient to indicate from what judgment, and to what court, the appeal is taken.

2. In such case a request to file an additional certificate is not an abandonment of the right to have the motion to dismiss determined on the original certificate.

Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by one Pio against one Aigeltnier. From an order dismissing an appeal from a judgment for plaintiff, defendant files a motion to set aside the dismissal order. Motion denied.

Bert Schlesinger, for appellant. *G. S. Langan*, for respondent.

PATERSON, J. The defendant appealed from the judgment of the superior court on November 19, 1891. On June 17, 1892, he procured an order granting him 15 days from the last-named date, within which to serve and file his transcript. On July 8, 1892, the respondent served a notice of motion to dismiss the appeal, on the ground that no transcript had been filed, and that the time for filing the same had elapsed. The transcript was filed on July 13, 1892. At the hearing of the motion, counsel for the appellant objected to the sufficiency of the certificate of the clerk presented by the respondent. No ruling was made on the objection, but counsel for respondent stated that he would file another certificate. The appellant objected to the filing of any additional certificate, claiming that the motion must be determined upon the certificate on file. On the following day this court, regarding the certificate filed as sufficient, and the appellant without excuse for the delay, granted the motion to dismiss. Thereafter the appellant filed and served a notice of motion to set aside the order dismissing the appeal on the grounds that the first certificate was insufficient; that, before the order dismissing the appeal was made, counsel for respondent waived his right to have the motion determined on the clerk's certificate then on file, and had no right to file the additional certificate after the hearing of the motion to dismiss.

Our rules provide that the transcript shall be filed and served within 40 days after the appeal is perfected, and, if not filed within that time, the appeal may be dismissed on motion, upon notice given; that, on motion to dismiss the appeal for failure to file the transcript within the prescribed time, there shall be presented the certificate of the clerk below, stating certain enumerated things. Rule 6. The only fault found with the certificate first presented is that it did not state what judgment or order of the superior court the appellant had appealed from, nor to what court he had appealed. The certificate gives the date of the entry of judgment, the amount and character of the judgment, and immediately thereafter states "that, after the rendition of said judgment, the said defendant filed a notice of appeal in said action," etc. This is sufficient. There was but one appeal taken, and the appellant could not have been misled. It would be entirely superfluous to state in a certificate that the appeal was taken to this court; there could be no appeal to any other court from a judgment or order of the superior court. Furthermore, the right of the respondent to have the appeal dismissed does not depend upon the filing of a certificate before the transcript is filed or the motion is heard, and there is no reason why we should not consider the amended certificate if it were material.

Respondent's request to file an additional certificate was not an abandonment of his right to have his motion determined on the original certificate; it was merely an offer to produce additional evidence to overcome appellant's objections. The rule provides that if the transcript, though not filed within the time prescribed, be on file at the time the notice is given, that fact shall be sufficient answer to the motion. Rule 5. The certificate is merely the evidence of certain facts which the rule requires the respondent to present on the hearing of the motion.

The affidavits filed on behalf of the respective parties show that the appellant is without excuse for his failure to file the transcript within time. There was an attempt to compromise after the notice of appeal was filed, but the appellant was informed by counsel for the respondent, repeatedly and emphatically, that he would accept no less than a certain amount in satisfaction of the judgment. Motion denied.

We concur: Garoutte, J.; Harrison, J.

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97 Cal. 155

CHAPMAN v. BANK OF CALIFORNIA.

(No. 14,158.)

(Supreme Court of California. Jan. 12, 1893.)

Accounting—Laches—Parties.

1. In an action brought in March, 1889, for an accounting, it appeared that in October, 1875, plaintiff, being indebted to a bank, executed a deed of lands by a conveyance absolute in form, but as security for the indebtedness; that in August, 1876, this indebtedness and the conveyances were assigned to defendant; that in September, 1876, plaintiff, being largely indebted to defendant, executed several notes to the amount of his indebtedness, payable to one F., who was also indebted to defendant, and which were by F. indorsed to defendant; that, at the same time, F. executed several notes to the amount of his indebtedness, which notes were payable to plaintiff, and were by him indorsed to defendant; that in November, 1876, the defendant executed to plaintiff and F. an instrument designated as a "deed of trust," in which defendant declared that it held all the land assigned it by the bank as security for these notes; that in September, 1879, plaintiff conveyed the lands in fee simple in payment of his indebtedness to defendant, who canceled the debt, and surrendered to him his promissory notes, as well as those of F. *Held*, that plaintiff's right of action, if any, was barred by his laches and the statute of limitations.

2. In such case, a contention by plaintiff that he is entitled to the proceeds of a sale by defendant of lands conveyed to defendant by F. as security for the notes will not be considered on appeal, where F. is not made a party defendant, and where there is no prayer in the bill asking for such relief.

Department 1. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by one Chapman against the Bank of California for an accounting upon conveyances of realty. From a judgment for defendant, plaintiff appeals. Affirmed.

T. M. Osmont, for appellant. *Newlands, Allen & Herrin*, for respondent.

Paterson, J. The findings of the court below disclose the nature of the action and relief sought. They are in substance as follows: In October, 1875, the plaintiff executed and delivered to McKinley, Glenny, and Latham, conveyances of certain real estate, comprising 20,041 acres, undivided, in a larger tract of 86,000, situated in the counties of Kern and Tulare, and at the same time conveyed certain other lands belonging to him, comprising 38,134 acres, situated in the counties of Fresno, Merced, Stanislaus, and Mariposa. About the same time he conveyed to McKinley and Glenny about 26,330 acres situated in the counties of Alameda, San Mateo, Santa Cruz, Solano, Napa, Merced, Fresno, San Luis Obispo, and San Francisco. These conveyances, though absolute in form, were intended and accepted merely as security for the payment of certain indebtedness due from the plaintiff to the Bank of British North America. Thereafter said indebtedness, so secured, was assigned to the defendant, and on August 28, 1876, McKinley, Glenny, and Latham conveyed to the defendant all the lands transferred to them as aforesaid. In September, 1876, the plaintiff was indebted to the defendant in the sum of $214,523.97, and Isaac Friedlander was indebted to the defendant in the sum of $500,358.46. The plaintiff executed six promissory notes in divers sums, aggregating his indebtedness to the defendant, which were made payable to Friedlander, and by the latter indorsed and delivered to the defendant. At the same time Friedlander executed six promissory notes, aggregating the amount of his indebtedness to the defendant, which were made payable to the plaintiff, and by him indorsed and delivered to the defendant. On November 25, 1876, the defendant executed and delivered to the plaintiff and Friedlander an instrument designated as a "declaration of trust," in which it declared that it held all of the lands conveyed by McKinley, Glenny, and Latham as security for the payment of said 12 promissory notes. In August, 1879, "the plaintiff, overwhelmed with debt, and unable to meet his liabilities, at the Bank of California and to others, proposed to and urged the Bank of California to make a settlement with him, and to take all the said lands then held in security, in fee simple absolute, in discharge and full satisfaction of said indebtedness." The bank agreed to this settlement, and accepted the plaintiff's proposition. On September 6, 1879, in pursuance of the agreement, and to carry out the settlement, the plaintiff delivered to the bank 10 deeds, (including the conveyance for the 20,041 acres of land which had been set off to the plaintiff out of the 86,000-acre tract,) absolute in form, conveying to the defendant all of said lands, and the bank thereupon canceled and discharged all of said indebtedness, and surrendered the 12 promissory notes to the plaintiff, who has ever since held the same. Said 10 conveyances were not executed to secure, and were not intended to secure, said indebtedness, or any part thereof, but were executed by plaintiff to the bank in full satisfaction and payment of all his indebtedness. No part of the lands was ever sold by the bank until after the delivery of said 10 deeds. There was no fraud, oppression, or unfairness on the part of the bank. The settlement was fair, and for a full consideration. At the time of said settlement the plaintiff made and delivered to the bank a promissory note for $20,000, payable two years after date. This note was never secured by any of the deeds, nor in any manner. Plaintiff never paid the note, but after its maturity, in 1881, the bank surrendered the note to the plaintiff. Plaintiff never complained of the transaction, and never informed the defendant in any way that he was not satisfied with the settlement, until April, 1887, when he demanded an accounting. The court further found that the allegations of the answer relating to the intention of the parties, and the nature of the transaction between them, were true. It was found that the plaintiff's cause of action was barred by his laches, and by the provisions of sections 318 and 343 of the Code of Civil Procedure. Judgment was entered in favor of the defendant, and plaintiff moved for a new trial. The motion was denied, and from the order and the judgment he has appealed.

The findings cover all the material issues, and we think they are supported by the evidence. The question is discussed in the briefs at great length, as to whether the bank, under the McKinley et al. deeds and the so-called declaration of trust, was a mortgagee or a trustee, but, in view of the conclusion we have reached on another question, we do not deem it necessary to determine whether the appellant's contention in that regard is sound or not. We think that a complete answer to the appellant's claim for relief—except in so far as it relates to the Friedlander lands, at least—is found in the defendant's plea of the statute of limitations and laches. The 10 deeds were delivered to the bank in August, 1879, and a final settlement was completed on September 6, 1879, when the bank surrendered the 12 notes to the plaintiff, and discharged the indebtedness. Mr. Chapman's intention to give the notes and convey the property in fee simple to the bank is found by the court, and the finding is supported by the evidence. The settlement was not brought about through any importunities on behalf of the defendant, but through the earnest solicitation of the plaintiff himself. In his letter to the bank, prior to the settlement, he stated that it was needless for him to say that if he could not free himself from the burden resting upon him, he might as well give up the struggle, and that his indebtedness to the bank was of such magnitude, and so publicly known, that it destroyed his credit. His proposition was accepted, and, although a new note of $20,000 was given by him to the bank, no attempt was ever made to claim it, and it was finally surrendered to him without payment. The note was given without consideration, and never could have been collected by the bank. If there was any consideration for it, it was an unlawful one. The finding of the court, therefore, that the conduct of the bank was not unconscionable or oppressive, is fully sustained by the evidence. Defendant's action was based upon the express request of the plaintiff, who was at the time embarrassed financially, and believed that his only escape from utter ruin was the acceptance by the bank of his proposal. Conceding that the McKinley et al. deeds and the defeasance created an express trust, such trust was terminated by the final settlement of September 6, 1879. It was expressly understood and agreed that the plaintiff was to convey the title of the lands in payment of the indebtedness. If any trust arose under the 10 deeds of 1879 it was an implied trust, and plaintiff's remedy was barred four years after the settlement and delivery of the deeds and notes, (section 343, Code Civil Proc.,) and, regardless of the question as to whether there has been a plea of the statute of limitations, a court of equity will refuse to entertain a suit brought after unreasonable delay, (Harris v. Hillegass, 66 Cal. 79, 4 Pac. Rep. 987; Bell v. Hudson, 73 Cal. 287, 14 Pac. Rep. 791.) The refusal to grant relief is not put upon the presumption of payment or analogy to the statute of limitations, but upon considerations of public policy, and the difficulty of doing entire justice between the parties in consequence of the unreasonable delay. The principal factors in determining whether the plaintiff had been guilty of laches are acquiescence and lapse of time; but other circumstances are also material, such as that a change in the value or character of the property has taken place. The matter is one which is left to the sound discretion of the chancellor in each case. The learned judge of the court below found that the plaintiff's cause of action was barred by his laches, and the finding must stand. The plaintiff never intimated any dissatisfaction with the final settlement until nearly eight years after the same had been effected, when for the first time it was claimed that the 10 deeds had been given merely as additional security; and it was not until March 11, 1889, that the plaintiff, by his amendment to his complaint, claimed that the deeds were delivered in consideration of the cancellation of the indebtedness, and "that by reason of the circumstances * * * and of plaintiff's helpless situation, he was compelled to submit to said agreement." If plaintiff was imposed upon, it is incredible that he did not discover it earlier than he did.

Plaintiff was aware of the sales that were being made, and made frequent inquiries in regard to the same. He has allowed the bank to pay taxes on the lands ever since the settlement; has never offered to return any of the notes surrendered to him by the bank, or to pay the interest or any part of the principal, nor has he ever requested any extension of time for such payment. In the meantime the notes which were surrendered to him had become barred by the statute of limitations. A party who sleeps upon his rights so long has no equity. His claim is stale, and the court will not enforce it. Bailey v. Fox, 78 Cal. 389, 20 Pac. Rep. 868.

Appellant contends that he is entitled to the value of the Friedlander lands, or at least to the proceeds of the sale, with interest thereon. The court below made no finding with respect to the Friedlander lands, and treated the action as one in which the plaintiff was seeking an accounting and redemption as to his own lands only, and not for subrogation to and enforcement of the rights of the bank in the land conveyed by Friedlander as further security. There is no description of the Friedlander lands in the complaint,—simply a reference in one of the schedules to the deeds of conveyance made by Friedlander to the bank, giving the names of the grantor and grantee, date of the deed, date of recordation, and volume and page of the record. Perhaps this would be a sufficient description, however, as the plaintiff does not claim a conveyance of the land, but only an accounting for the value of the proceeds of the land, which has already been sold by the bank. As there was no prayer for such relief, and the record did not disclose to the court below that this particular claim was made, we think the contention comes too late. Friedlander's representative would be an indispensable party to an action in which plaintiff desired such relief, and plaintiff ought to have made him a party defendant herein, and by direct allegation called the attention of the court to the facts upon which he claimed the right to an accounting as to the proceeds of the Friedlander lands.

Judgment and order affirmed.

We concur: Harrison, J.; Garoutte, J.

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97 Cal. 15

GUMPEL v. CASTAGNETTO et ux. (No. 14,394.)

(Supreme Court of California. Dec. 12, 1892.)

Appeal—Record—Mortgages.

1. Where an appeal is taken from an order denying a motion by defendants for a new trial, it is not proper practice for plaintiff to move to dismiss the appeal on the ground that the notice of motion for new trial was not given in time, but such objection to the notice may properly be considered on the hearing of the appeal.

2. Plaintiff accepted service of defendants' notice of motion for a new trial, "reserving the objection that the notice is not served within the time allowed by law," and also objected to the settlement of defendants' bill of exceptions on the ground that the notice was not served and filed, or either, in the time allowed by law. *Held*, that the objection to such notice was properly presented and preserved.

3. In a proceeding to compel defendants to reconvey certain land conveyed by plaintiff to defendants, a complaint which alleges that, when plaintiff signed the deed, she was led by defendants to believe that it was simply a mortgage to secure a loan made by them to her, and that she had no intention to make an absolute conveyance, is sufficient to support a decree for the reconveyance, on repayment of the loan, though the complaint also charges that defendants procured the conveyance to them by fraud.

4. The fact that plaintiff was by the decree compelled to pay more than the amount named in the complaint is no ground of complaint for defendants.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action brought by Helena Gumpel, in which A. C. Freese was substituted as plaintiff, to compel G. Castagnetto and wife to reconvey certain land to her. From a judgment for plaintiff, and an order overruling a motion for a new trial, defendants appeal. Affirmed.

George D. Collins, for appellants.

Plaintiff did not properly present and preserve her objecion to defendants' motion for a new trial. Cottle v. Leitch, 43 Cal. 322; Hobbs v. Duff, Id. 492; Quivey v. Gambert, 32 Cal. 304; Gray v. Nunan, 63 Cal. 220; Hegard v. Insurance Co., 72 Cal. 536, 14 Pac. Rep. 180.

J. D. Sullivan, *J. H. Whittemore*, and *H. H. Lowenthal*, for respondent.

McFarland, J. Judgment went in the trial court for plaintiff, and defendants appeal from the judgment, and from an order denying a new trial. Respondent objects to the consideration of the points made by appellants on their appeal from the order denying the motion for a new trial, and moves to dismiss said appeal, upon the ground that the notice of motion for a new trial was not given in time. The motion to dismiss, in such case, has been held not to be proper practice; but the objection to the notice of motion is a proper matter for consideration on the hearing of the appeal. Barnhart v. Fulkerth, 92 Cal. 155, 28 Pac. Rep. 221. As was said in Quivey v. Gambert, 32 Cal. 309: "If the notice and statement, or either of them, is not filed in time, he [respondent] may safely rely upon such facts as fatal to the motion, when brought to a hearing." Where the notice of motion has not been filed in time, and respondent presents his objection to it at the proper time, and in the proper manner, an order denying the new trial will be affirmed here, without looking further into the record.

Appellants contend that in the case at bar respondent did not properly present and preserve her objection to the notice, but we think otherwise. The decree was entered January 29, 1890. It refers to a decision rendered December 9, 1889; but as findings were waived, and none made, the reference must have been to some oral statement of the judge of what the judgment would be. On the day of the rendition of the decree, the attorney of plaintiff served on attorney for defendants the following notice: "You will please take notice that a decree, a copy of which is herewith served upon you, has been this day entered in this action, in accordance with the decision rendered by the above court on the 9th day of December, 1889, that defendants reconvey the premises,” etc.,—giving the substance of the decree. This was a sufficient notice, under section 659 of the Code of Civil Procedure. More than 10 days thereafter, on February 12, 1890, defendants served on plaintiff a notice of intention to move for a new trial; and the bill of exceptions shows affirmatively “that previous to said 12th day of February, 1890, the time to serve and file a notice of intention to move for a new trial in this action had not been extended by an order of the court, or otherwise.” Counsel for plaintiff accepted service of the notice, with this reservation “Reserving the objection that the within notice is not served within the time allowed by law.” The bill of exceptions further shows as follows: “That thereafter, and before the settlement of the foregoing bill of exceptions, and at the time of presenting her amendments thereto, the plaintiff objected to the settlement of said bill of exceptions on the following grounds: (1) That the notice of intention to move for a new trial, served and filed in this action, was not served and filed, or either, within the time allowed by law. (2) That the defendants did not prepare and serve their bill of exceptions to be used upon the hearing of said motion within the time allowed by law. (3) That the court overruled the objections aforesaid to said bill of exceptions, and to the settlement thereof, and allowed the same, to which ruling plaintiff excepted.” And it is difficult to imagine what more plaintiff could have done to preserve her rights in the premises. The cases cited by appellant merely hold that, if a party desires to take advantage of the failure of his opponent to give notice of a motion for a new trial in time, he must not indulge in acts or omissions which will amount to a waiver of that advantage, and that if he file amendments to a statement or bill of exceptions, and proceeds to its settlement, without protest, it will be presumed either that the time for giving the notice had been properly extended, or that objection on that score had been waived. But no case can be found where such a presumption has been indulged upon a state of facts like that presented by the record in the case at bar. It does not appear upon what ground the court below denied the motion for a new trial. It may be that it was denied upon the objection to the notice, and that the trial judge nevertheless settled the bill of exceptions in accordance with certain intimations of this court that such is the better practice, so that the whole matter may be reviewed on one appeal, and a writ of mandate or other independent proceeding or appeal avoided. See Quivey v. Gambert, supra. At all events, the order denying the motion for a new trial must be affirmed, for the reasons above given.

2. The only other question is, does the complaint warrant the decree? And we think that it does. The purpose of the complaint is to procure a decree compelling defendants to reconvey to plaintiff a certain city lot, formerly conveyed by her to defendants, by a deed absolute in form. The decree adjudges that the conveyance was made to defendants as security for certain moneys, and that defendants reconvey the same upon the payment of such moneys. It is true that the complaint contains certain charges of fraud against defendants, by which it is alleged plaintiff was induced to make the conveyance; but it is also averred that she understood that it was given as security for $400, and “that this plaintiff never intended to make or execute a conveyance absolute to defendants, or to either of them, but was led to believe by them that such paper, so purporting to be a deed, as aforesaid, was simply a mortgage to secure the said payment of said $400 to defendants, as aforesaid.” These averments, we think, support the decree. The fact that the judgment compels the plaintiff to pay defendants more than the amount named in the complaint is something of which defendants cannot complain. Judgment and order affirmed.

We concur: De Haven, J.; Sharpstein, J.

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97 Cal. 91

JACKS v. BALDEZ et al. (No. 14,424.)

(Supreme Court of California. Dec. 28, 1892.)

VACATING JUDGMENT — NOTICE OF OVERRULING DEMURRER.

A judgment cannot be set aside on motion on the ground that the moving parties were not served with notice of the decision of the court overruling their demurrer to the complaint, and allowing them 20 days to answer, for under Code Civil Proc. § 473, a judgment can only be vacated on motion when its invalidity is apparent from an inspection of the judgment roll; and section 670, which provides what documents shall constitute the judgment roll, makes no mention of any paper proving service of the notice of decision overruling a demurrer.

Department 1. Appeal from superior court, Monterey county; John K. Alexander, Judge.

Action by David Jacks against Carlos Baldez and others. From an order setting aside a judgment entered in his favor, plaintiff appeals. Reversed.

S. O. Houghton, W. M. R. Parker, and *B. V. Sargent*, (*Charles E. Mongues*, of counsel,) for appellant. *R. M. F. Soto*, for respondents.

Garoutte, J. This is an appeal from an order setting aside a judgment. The motion was made 11 months after the judgment was entered, and was based upon the grounds that the moving parties, the defendants, were not served with notice of the decision of the court overruling their demurrer to the complaint, and allowing them 20 days to answer. The motion to set aside and vacate this judgment was not made under the provisions of section 473 of the Code of Civil Procedure, and, aside from the power there granted, a judgment can only be vacated upon motion when it is void upon its face. Moore v. Superior Court, 86 Cal. 495, 25 Pac. Rep.

22. A judgment is void upon its face when that fact is made apparent by an inspection of the judgment roll. People v. Harrison, 84 Cal. 609, 24 Pac. Rep. 311. Respondents' motion was based upon the fact that they received no notice of the decision of the court in overruling the demurrer, and giving time to answer. Under section 670 of the Code of Civil Procedure, which provides what documents shall constitute the judgment roll, we find no mention of any paper proving service of the notice of decision upon an order overruling a demurrer. In Catanich v. Hayes, 52 Cal. 338, the court said: "The notice of the overruling of the demurrer to the complaint, if one was given, would not, of itself, form part of the judgment roll." It follows that at the time the motion to set aside the judgment was granted the judgment was not void upon its face, for a judgment roll was presented, which, upon inspection, appears to be complete and entire in all its parts. The motion not having been made under section 473 of the Code of Civil Procedure, and the judgment not being void upon its face, it follows that the order of the court in setting it aside was erroneous. Let the order be reversed, and the cause remanded.

We concur: Paterson, J.; Harrison, J.

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3 Cal. Unrep. 717

ROUSSET v. REAY et al. (No. 14,368.)

(Supreme Court of California. Jan. 3, 1893.)

Ejectment—Alias Writ of Possession—Adverse Possession.

1. Plaintiff having obtained judgment in ejectment, a writ of possession was issued and executed in 1882 against defendants and one M., who was not a party to the suit, and a few months later M. re-entered, and remained thereafter in exclusive possession. In 1889, plaintiff moved for an alias writ of possession against defendants and M. *Held*, that M. could show on such motion that he was not a member of defendants' family, and that his possession was open and notorious, and that he was the owner of the premises in dispute, and was not a party to the ejectment suit.

2. Where M.'s possession was adverse for more than six years from the time of his re-entry, and ripened into a new title, it could not be affected by the former judgment.

3. A motion for an alias writ of possession should not be entertained where the lapse of time after re-entry is sufficient to create a title in an adverse possessor, and bar an action of ejectment.

4. Where judgment for plaintiff in ejectment is fully executed by putting plaintiff in possession, an alias writ of possession cannot issue except upon an adjudication that the person against whom the writ is to run is guilty of a contempt. Huerstal v. Muir, 2 Pac. Rep. 33, 64 Cal. 450, followed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

(Not to be published in California reports.)

Ejectment by Paul Rousset against Joseph W. Reay and others and William McGrath. From an order granting plaintiff's motion for an *alias* writ of possession, William McGrath appeals. Reversed.

T. M. Osmont, for appellant. *Smith & Murasky* and *J. F. Smith*, for respondents.

Haynes, C. Appeal from an order granting a motion for an *alias* writ of possession. In 1873, Rousset recovered judgment in ejectment against Peter McGrath and three other defendants for the possession of certain lands, and that judgment was affirmed on appeal in May, 1882. 60 Cal. 328. August 24, 1882, a writ of possession was issued thereon, which was fully executed August 28, 1882, and under which appellant, among others, was removed from the premises. In November, 1882, appellant, who was not a party to the ejectment suit, re-entered upon the premises, and took possession for himself, and ever since has remained in the exclusive possession. Frederick Hess and Patrick Slater, the successors in interest of Rousset, the plaintiff, moved the court in said cause for an *alias* writ of possession against appellant and two others, neither of whom were defendants in the ejectment suit. The order was granted, and appellant took a bill of exceptions presenting the facts.

The appellant offered to prove by his own testimony the following: "(1) That at the time of the commencement of this action, to wit, on the 5th of June, 1873, and for a long time prior thereto, he, the said William McGrath, was in the open and notorious possession of said premises, claiming to own the same, and that he was the owner thereof. (2) That he was not, and is not, a party to this action, and that ever since his re-entry upon said premises, (in November, 1882,) as aforesaid, as well as during all the period from and prior to the commencement of this action, down to the time of his ejection under said writ, he claimed, held, and possessed said premises in his own right, and under his own independent title. (3) That he was not a member of his father's (Peter McGrath's) family at the time of the commencement of this action, nor at any time since." To each of these offers Hess and Slater objected on the ground of irrelevancy and immateriality, and the objections were each sustained by the court, and the evidence excluded.

The court erred in not permitting appellant to prove the facts which he offered to prove, as it would have shown that he occupied no such relation to the defendants as to justify his dispossession under the writ. Appellant further contends that, if respondents' rights were otherwise plain, they have slept on it too long to invoke this summary remedy.

The judgment was affirmed in March, 1882, and this motion was made in January, 1889. The writ of possession was executed and appellant dispossessed in August, 1882, and appellant re-entered in November 1882, and was in possession more than six years after his re-entry,—a period more than sufficient to quiet title by adverse possession; and if the possession were adverse, as it may have been, and had ripened into a title, it was then a new title, which could not be affected by the former judgment. Without undertaking to fix a limitation as to the time within which proceedings of this character generally may be taken, but confining ourselves to cases where the proceeding is taken against one who was not a party to the judgment, there can be no doubt that, where the lapse of time after the re-entry is sufficient to create a title in an adverse possessor and bar an action of ejectment, the motion should not be entertained. It is not necessary to consider, and we do not decide, whether in any case under section 1210, Code Civil Proc., an *alias* writ can issue after the judgment becomes dormant. In the case at bar, as we have seen, the judgment having been fully executed by putting the plaintiff in possession, an *alias* writ could not issue except upon an adjudication that appellant was guilty of a contempt, and there was no such adjudication. The order, as made, was simply that an *alias* writ issue, and that seems to have been the sole object of the motion. Appellant here occupied a situation precisely similar to that occupied by Elizabeth Muir and Peter Baker in the case of Huerstal v. Muir, 64 Cal. 450, 2 Pac. Rep. 33, where an appeal from a similar order was entertained. The exclusion of the evidence offered by appellant requires a reversal of the order, but we think the facts disclosed by the evidence put in by Hess and Slater, the moving parties, show that the motion should not be entertained. We therefore advise that the order appealed from be reversed, with a direction to the court below to dismiss the motion.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, with a direction to the court below to dismiss the motion.

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97 Cal. 114

FALLS v. SAN FRANCISCO & N. P. R. CO.

(No. 14,110.)

(Supreme Court of California. Jan. 5, 1893.)

CARRIERS—INJURY TO PASSENGER AT STATION—OBSTRUCTED PLATFORM.

In an action to recover for injuries received on the platform at one of defendant railroad company's stations, plaintiff testified that there were about 100 people at the station, returning from a picnic; that, as the train approached, plaintiff passed along the platform to reach the rear end of a car she intended to board, and tripped against some milk cans which were lying on the platform, and fell. Plaintiff testified that when she fell she was looking to see where she could get on the train, that it was perfectly light at the time, and that the cans were about 30 feet from where she had been sitting, but she did not see them until she stumbled over them. It appeared that the station was only a flag station; that defendant kept no agent there; that there were daily shipments of milk from the station, the empty cans being returned the following day; that there was no other place than on the platform where the cans could conveniently be left; and that they were near the middle of the platform, with room enough to pass on either side. *Held*, that the accident could not have been reasonably anticipated by defendant, and therefore the failure to remove the obstructions did not constitute actionable negligence.

Department 1. Appeal from superior court, city and county of San Francisco; E. R. GARBER, Judge.

Action by Amelia S. Falls against the San Francisco & North Pacific Railroad Company to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

Hassett & Tevlin, for appellant. *Charles F. Hanlon*, for respondent.

PATERSON, J. This is an action to recover damages for personal injuries received by plaintiff upon the defendant's platform at Reed's station, Marin county. The jury returned a verdict in favor of plaintiff for the sum of $7,500, and judgment was entered accordingly. Defendant appealed from the judgment and from an order denying its motion for a new trial.

The plaintiff testified that on the 19th day of May, 1888, she went from San Francisco to Reed's station, to attend a Sunday school picnic. She returned to the station about 4 o'clock in the afternoon, and sat on the side of the platform until the train came along on its way from San Rafael to Tiburon. While waiting for the train, about 100 people who attended the picnic were passing up and down the platform and sitting along on the ties. As the train approached, she arose, and, while passing along the platform to reach the rear end of a car which she intended to board, she tripped against something, and fell. As she fell she noticed that the obstacles were milk cans fastened together. Upon attempting to rise, she found it impossible to do so, and subsequently discovered that she had sustained a fracture of the pelvis and dislocation of the left hip. On cross-examination plaintiff testified that she did not know how far she walked after she arose from the side of the platform, and she could not tell how many people were upon the platform at the time, but they seemed to be all around her. When asked as to how far along the platform she could see as she was walking, she replied that she was not looking at the platform at all, but was looking to see where she could get on the car; that she might have been in a little hurry, but did not know; that the cars were perfectly still at the time; that when the crowd started to go aboard she followed; that it was perfectly light at the time; that the cans were lying about 30 feet from the place where she had been sitting, but she did not see them till she stumbled over them. At the station there is a wooden building, 14 by 24 feet, with a platform in front of it, extending to the first rail, and 30 feet in length. Between the rails of the track nearest the building the space is planked the same length as the platform attached to the station. Adjoining this there is a raised platform, 5 feet in width and 183 feet in length, raised 8 inches above the cross-ties. The station is one where trains stop for passengers or freight only upon receiving flag signals. The company keeps no agent there, and all freight received is left on the platform by the consignor, and taken up by the conductor, and billed as per marks and instructions thereon. It is left upon the platform until the consignees take it away. There is a daily shipment of butter and milk from this station to the city. It is received at 6:20 A. M. and 5 P. M., and the empty cans and boxes are returned from San Francisco at 9:20 A. M. and 6:15 P. M. of the following day. The evidence shows that the cans could not conveniently be left at any other place than on the platform. The milk cans and butter boxes are carried in the baggage car. At the time of the accident there were upon the platform two or more butter boxes, and some milk cans alongside of them. The cans and boxes were about the middle of the platform, with room enough to pass upon either side,—more room between the packages and the car than on the other side. The butter boxes were 2½ feet wide, 3 feet long, and 12 or 14 inches high.

The foregoing is the substance of all the testimony introduced, except that relating to the character of the plaintiff's injuries and her sufferings.

The negligence complained of consists in the alleged failure of the defendant "to provide sufficient and safe access through and along the same [station] to its said cars, to wit, by allowing obstructions to be and remain therein," and the question is whether, upon the facts shown, the defendant was guilty of negligence. It is claimed by the appellant that, if negligence be conceded, contributory negligence on the part of the plaintiff is clearly shown, and for that reason she cannot recover; but, in view of our conclusion upon the question of defendant's negligence, it is unnecessary to pass upon that contention. In Thompson's Carriers of Passengers it is said, (page 104:) "The carrier's liability in respect of the condition of his premises is neither greater nor less than that of any person to another, who by invitation or inducement, express or implied, has come upon his premises for the purpose of transacting business. A duty of protection is owed to such persons by the carrier, but it is needless to remark that this does not amount to a warranty of the safe condition of the premises; neither is the carrier held bound to bestow upon their condition that extraordinary degree of vigilance which the law, from motives of the soundest policy, imposes upon upon him in regard to the carriage of his passengers. The passenger while in actual progress upon his journey is exposed to countless hazards, gives himself wholly in charge of the carrier. * * * But a rule properly ceases with the reason for it; therefore, as a passenger's entrance to the carrier's station is characterized by none of the hazards incident to the journey itself, the rigor of the rule above announced is justly relaxed, in that at such a time and place the carrier is bound to exercise only a reasonable degree of care for the protection of his passengers." Pennsylvania Co. v. Marion, 104 Ind. 242, 3 N. E. Rep. 874. "The rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended." Kelly v. Railroad Co., 112 N. Y. 443, 20 N. E. Rep. 383. Whether there has been an exercise of such care depends upon the circumstances of the case,—the nature of the road and the character of the traffic and place where the accident occurred. Thus it has been held that "at a mere way or flag station, where trains do not regularly stop for the reception and discharge of passengers, and only stop when they are flagged, or to discharge a special passenger, a passenger need not expect or rely upon the company's having furnished a platform or other convenient place for the reception and discharge of passengers." Railroad Co v. Peters, 80 Ind. 172. Accommodations of the same character cannot be expected in the cities and at way stations. Flag stations like the one under consideration are established for the convenience of the inhabitants of sparsely settled territories as well as for the benefit of the company, and would have to be discontinued if the railroad companies were required to keep and maintain freight and passenger depots, with agents to care for the same. At such stations the companies have the right to use the platform for depositing freight and for the accommodation of passengers. Railway Co. v. Canman, 52 Ark. 525, 13 S. W. Rep. 280. The only question is, therefore, whether the defendant, acting as a reasonable person would under the circumstances, ought to have foreseen that such an accident might have happened. If such an accident might reasonably have been anticipated by the defendant, the failure to remove the obstructions constituted actionable negligence; "for negligence, in a legal sense, is no more than this: the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." Barrett v. Southern Pac. Co., 91 Cal. 302, 27 Pac. Rep. 666. We do not think it can be fairly said that the defendant ought to have anticipated that an accident would occur in broad daylight in consequence of leaving the packages on the platform. "The company, as held in some cases, cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the everyday incidents of railway traveling, and the company could do business upon no other basis." Malcom v. Railroad Co., 106 N. C. 64, 11 S. E. Rep. 187. It is the duty of railroad companies to give their passengers a reasonable time and opportunity to approach and leave their trains, and the duty is reciprocal. Passengers owe it to themselves and to the company to act with reasonable care in alighting from and boarding trains. McDonald v. Railroad Co., 116 N. Y. 548, 22 N. E. Rep. 1068; Railroad Co. v. Lyons, 129 Pa. St. 119, 18 Atl. Rep. 759. In Cornman v. Railroad Co., 4 Hurl. & N. 781, it appeared that the company had on its platform, standing against the pillar which pasengers passed in going to and from the train, a portable weighing machine, the foot of which was elevated about six inches above the level of the platform. Plaintiff was at the station on Christmas day, inquiring for a parcel, when he was driven by the crowd against the machine, in which his foot became entangled, and was injured. The court held that there was no evidence of negligence to go to the jury, the machine being located where it might easily have been seen, and the accident not being one which could have been reasonably anticipated. Reported in Thomp. Carr. p. 76. In Stokes v. Railroad Co., 107 N. C. 178, 11 S. E. Rep. 991, it appeared that the bridge across a ditch leading to the defendant's track was in good condition, except that one plank was slightly shorter than the other. The plaintiff in the daytime attempted to get on the train, but stepped into the hole caused by the short plank, and was injured. The court held that it was not actionable negligence. The case is a sad one, the injuries and sufferings of the plaintiff being of a most distressing nature, but we cannot, without injustice to the company, and establishing an unwarranted and dangerous precedent, allow the verdict to stand on the evidence before us.

Counsel for respondent claims that the specifications of particulars in which the evidence is insufficient to support the verdict are fatally defective, but in this we think he is in error. They fully present all the points upon which the defendant relied on its motion for a nonsuit and the motion for a new trial.

Judgment and order reversed.

We concur: Garoutte, J.; Harrison, J.

(3 Cal. Unrep. 720)

FOERST v. MASONIC HALL ASS'N OF SOUTH SAN FRANCISCO. (No 14,184.)

(Supreme Court of California. Jan. 5, 1893.)

Mortgages—Failure to Pay Interest—Election to Declare Principal Due—Excuse for Nonpayment.

1. A mortgage given to plaintiff by defendant association provided that there should be quarterly payments of interest, and that, on failure to so pay, the whole sum, at plaintiff's election, should become due. After the papers had passed, defendant's officers agreed that plaintiff could have the payments monthly, by calling for them, to which plaintiff assented, and for several months thereafter called and received her interest. Later, she failed to call, the interest was not paid, and plaintiff sought to have the whole debt declared due. *Held* that, after plaintiff's promise to call for the interest, defendant was excused from seeking her, to make payment, and, since the failure to pay was caused by her own act, she could not exact a penalty for such failure.

2. The fact that plaintiff called for the interest once, when defendant's president, who always paid her, was not in, does not aid her claim of forfeiture, when it does not appear that she demanded the interest from any one else, nor that, at the time she called, any interest was due.

3. A finding that plaintiff authorized an agent to collect the interest, and that he demanded it from defendant's president, who refused to pay unless he brought a written order from plaintiff, is contrary to the evidence, when the only testimony on the subject is that of the agent, who stated that he called on defendant's president, and asked him about the interest, and the president said that the money was ready for plaintiff, but that he would like to have an order before paying it, to which request the agent made no objection.

4. A finding that plaintiff's attorney, both before and after October 1st, which was more than three months after the last payment, demanded payment of the interest, and that such payment was refused unless he had written authority, if true, would not be conclusive of a default; for the question would still be open as to whether defendant had reasonable ground to doubt the attorney's authority.

5. Where plaintiff knew that defendant's agents were looking for her, to pay the interest, but she did not inform them where she was, or that she had authorized an agent to receive the money, failure of defendant to pay the interest within the prescribed time does not constitute a default.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J P. Hoge, Judge.

Action by Minna Foerst against the Masonic Hall Association of South San Francisco to foreclose a mortgage. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. & Geo. Leviston, for appellant.
F. J. Castelhun, for respondent.

Temple, C. This is an action to foreclose a mortgage, in which the plaintiff had judgment, and the defendant appeals from the judgment, and from an order refusing a new trial.

A preliminary objection is made to the statement, on the ground that it was not served in time. The judge made an order extending the time 30 days, in which "to serve notice of intention to move for a new trial, and the proposed bill of exceptions." Within that time the notice of intention was duly served and filed, and within 10 days thereafter another order was made, extending the time to prepare and serve a bill of exceptions and statement of the case 30 days, in addition to the time allowed by law. The statement was prepared and served within the period of the extension, and was therefore in time.

Among other necessary allegations the complaint contains the averment, that on the 28th day of November, 1888, defendant executed to plaintiff its note for $7,000, payable 4 years from date, with interest at the rate of 7 per cent. per year, payable quarterly, which note further provided "that if default is made in the payment of the interest, as it becomes due, the same shall be added to, and become and form a part of, the principal, and bear a like rate of interest, or that the whole amount, of both principal and interest, shall become due and immediately payable upon such default, at the option of the payee." A proviso to the same effect was also inserted in the mortgage. It is also alleged "that on the 28th day of August, 1889, there became due and payable to plaintiff, as interest on said note for the two months immediately preceding said date, the sum of $81.66; that said sum was not paid until on or about the 5th day of October, 1889, on which day said defendant paid to plaintiff the sum of $122.50, as interest on said note, for the three months ending September 28, 1889; that immediately before and after said payment was made, the plaintiff notified said defendant that she elected to consider the whole amount of the principal and interest due on said note as immediately due and payable," etc. Defendant answered, denying that either before or after September 28, 1889, or at any time, plaintiff notified defendant that she elected to consider the whole amount of principal and interest of said note as immediately due and payable, and defendant avers that shortly after the execution of said note and mortage plaintiff requested that the interest be paid monthly instead of quarterly; that the defendant consented to pay the interest monthly, instead of quarterly, if plaintiff would call for the interest monthly at the office of Dr. Todd, the president of defendant, in the afternoon of the 10th of each month; that plaintiff agreed to this, and did call and receive and collect her interest monthly, in pursuance of the agreement, for several months, but thereafter failed to call for the interest, and concealed herself from the defendant, its officers, and agents, with intent to evade the payment to her of said interest; that the defendant, and its officers and agents, ever since the failure of plaintiff as averred, made diligent search and inquiry as to her whereabouts, in order to tender to her the interest, but have not been able to find her, by reason of her concealing herself, and finally, on October 5, 1889, learning that Castelhun would receive payment for her, promptly paid the amount to him for her; that this was the first opportunity defendant had to pay said interest; that defendant was at all times ready and willing to pay the interest according to the terms of the note. The case was tried by the court without a jury, and findings were filed, to which exceptions are taken on the ground that they are contrary to and not supported by the evidence.

The first finding is almost in the language above quoted from the complaint, to the effect that plaintiff notified defendant, before and at the time of the payment of interest on October 4, 1889, that she elected to consider the whole amount of principal and interest due. Under the view I take in this case, I doubt if this finding is material, but I find no evidence whatever which proves, or tends to prove, that before the payment a syllable was ever uttered in regard to such election. Plaintiff's attorney, Mr. Castelhun, was the only witness for plaintiff in regard to this matter. He shows considerable correspondence in regard to some alleged defects in the title to the mortgaged property prior to October 4th, but not a word in regard to any such option. In regard to the payment on the 4th, he said: "Mr. Shaw gave me that check for the interest, and I gave him the following receipt, [here follows a receipt for the money,] without waiving any rights, and exercising the option of considering the whole amount of said note now due." He then says: "I informed Mr. Shaw, right then and there, that we elected to consider the whole amount of the note and mortgage due." This is all there is in regard to the matter, and it does not appear that a word was said in regard to the option to consider the whole amount due until Castelhun had the check in his hand.

The second finding is to the effect that defendant never authorized any one to agree that the interest should be paid monthly at the office of Dr. Todd. The point of this finding is said to be that the board of directors of defendant did not authorize or ratify the agreement. There is no conflict in the evidence showing that plaintiff did agree with the officers of defendant that she would call monthly upon Dr. Todd, and collect the interest. Dr. Todd, the president of defendant, testified that plaintiff called upon him, and complained that the interest was payable quarterly, when she understood it would be paid monthly, and said she must have it monthly. He told her to see Dunshee, the secretary, and he thought they could arrange the matter if she would call about the 10th, in the afternoon. She saw Dunshee about it. She did call monthly, and collect her interest until July, when she received two months' interest. Dunshee testified that he conversed with her about the matter, and finally told her that they would pay her if she would call after the first week at Dr. Todd's for it. "She said she would, and she was very glad to have it that way." This testimony is not controverted, but it is shown that there was no action on the subject by the directors. But, for the purposes of the defense, it was not necessary that there should have been a valid contract, changing the terms of the note. It was enough that she had promised to call in person for the interest, to excuse defendant from seeking her to make tender or payment. That they failed to do so was caused by her own act, and she cannot exact a penalty for the failure. If she desired to retract her promise, and stand upon her rights under the mortgage, good faith required that she should have first notified the agents of the defendant that she would call no more.

The third and fourth findings relate to the same subject, and are sufficiently discussed.

The sixth finding is to the effect that plaintiff called at the office of Dr. Todd in the latter part of the month of August, once for her interest, but no interest was paid to her. Perhaps this is verbally true, but, as applying to any issue in the case, it is misleading, and unsupported by the evidence. Plaintiff testified that she called twice, but Dr. Todd was not in, and it does not appear that she demanded her interest from any one. At that time the officers of defendant had no cause to suppose that she did not intend to keep her promise to call personally for her interest. Furthermore, it does not appear that when she called any interest was due her. It fell due on the 28th, and the latter part of August would include time prior to that date.

The seventh finding is to the effect that plaintiff, in September, authorized one Rosekamp to collect the interest, and that the agent demanded it from Dr. Todd, who refused to pay unless he brought a written order from plaintiff. This finding is not only unsupported by the evidence, but is contrary to all the testimony upon the subject. Rosekamp is the only witness who gave testimony relating to the matter. He said, after showing his authority: "I went there, and asked the doctor about it, and he said he would like to get an order from Mrs. Foerst to pay that. That was all the conversation I had about the matter. I told him that I was authorized by Mrs. Foerst to collect the interest. I had known Dr. Todd 15 years, and he knew my official position. Cross-examination: Dr. Todd said that the money was ready for Mrs. Foerst, but that he would like to have an order before paying it." This testimony, so far from showing that Dr. Todd declined to pay the interest, shows his entire readiness so to do. He expressed a desire for a written order, and plaintiff's agent made no objection to this reasonable request, but, on the contrary, seemed to acquiesce in it. Dr. Todd had no reason to suppose that his request was or could be construed into a refusal to pay. The request was a reasonable one, and should have been complied with. The fact that oral authority is sufficient to authorize the agent to collect does not affect the question. Rosekamp was a public officer, and was not an employe of plaintiff. Defendant had a right to have the payment indorsed upon the note, or a receipt from plaintiff for the money. He had a right to reasonable evidence of the agency. Rosekamp did not have the note with him. Under such circumstances, fair dealing required, at the very least, that defendant's agent should have been made to understand that a failure to pay without a written order would be taken as a refusal to pay. The agent of plaintiff not only did not make an absolute demand for payment without the order, but apparently acquiesced in the request.

Finding 8 is to the effect that plaintiff's attorney, Castlehun, both before and after October 1st, demanded payment of the interest, and that such payment was refused unless he had written authority. If true, this finding would not be conclusive of a default. The question would still be open as to whether defendant had reasonable ground to doubt Castlehun's authority. One must be satisfied with reasonable evidence of the authority of an agent, when required to pay money, or refuse to do so at his peril. But such reasonable evidence he is entitled to demand. But the evidence does not support the finding that such demand was made before October 1st, or that payment was ever declined unless written authority was produced. Some evidence there is that Castlehun told Leviston, defendant's attorney, about October 1st, that Castlehun was authorized to receive the money. Leviston was then, so far as appears, only employed in reference to alleged defects in the title of defendant to the mortgaged premises, and it does not appear that this statement was ever communicated to defendant's agents. Such a demand was made by Castlehun on defendant, October 1st, and apparently at the first interview thereafter between Shaw and Castlehun the interest was paid, to wit, October 4th.

The tenth finding is to the effect that plaintiff did not conceal herself with intent to evade the payment of interest to her. In this finding the court probably intended only to say that the concealment was not with the intent to evade the payment of the interest; but even in this it is against the evidence, and on this point there is no conflict. It must be remembered that parties occupying this continued relation owe each other, all the way through, fair and honest dealing. It was the duty of plaintiff to inform defendant of her address, or her agent's; and if she did not do so, and defendant made reasonable effort to find her, and failed, there was no default. On this subject plaintiff testified: "I know that the defendant's agents were looking for me. Question. Well, didn't you conceal yourself from them? Answer. Nonsense! What did I want to do that for? Q. Could they have found you? A. Well, indeed, I did not want them to find me, for I did not want to deal with them any more. I had two men employed to attend to my matters. The Court: Q. Did you tell them that these gentlemen would collect the interest for you? A. Tell who, sir? Q. The association, or the officers of the association? A. No, I did not tell the officers. You know I told Dr. Todd when I collected the interest the last time. I said, 'I don't know who collects the interest next month,' for I intended then to go back east or to Germany. He said, 'It makes no difference;' and then I sent Mr. Rosekamp. Q. Well, did you tell him that you would send Mr. Rosekamp? A. No, sir; but they knew Mr. Rosekamp for ten or twelve years, if not longer. He is an officer out there. He is sergeant of the police. Q. Did you ever notify them you had two men employed to attend to your matter? A. They knew, three weeks before I authorized Mr. Castlehun to collect the interest, that I had employed some one, for they gave Mr. Castlehun the deed of the lot which was mortgaged to me. So they must have known that he was employed in the matter. I didn't tell any of the officers of the association that these two gentlemen were authorized to collect interest for me. I didn't tell them that I would send Mr. Rosekamp. I knew that the officers of the association were looking for me after the interest became due, but I didn't want to see them. I did not want to deal with them any more after the president of the German bank told me that the mortgage was not a perfection, and that it was very hard for me, a lone-standing woman, to look after the matter." It is difficult to doubt the motives of plaintiff, after reading her testimony. What knowledge the officers of the association had of the authority of her agents has been sufficiently considered.

The eleventh finding is to the effect that defendant did endeavor to find plaintiff, but failed, and its officers were informed that she did not wish to meet them, but that her attorney had full power to transact her business. The last clause of the finding is entirely unsupported by the evidence, so far as it is applicable to the condition of things prior to October 1st.

The twelfth and thirteenth findings are unsupported by a *scintilla* of evidence, but, on the contrary, are against the evidence, which is without conflict.

It follows that the judgment must be reversed, and a new trial had. The other points, under the circumstances, are not mentioned.

We concur: BELCHER, C.; VANCLIEF, C.

McFARLAND and HARRISON, JJ. For the reasons given in the foregoing opinion the judgment is reversed, and a new trial ordered.

DE HAVEN, J. I concur in the judgment. I think the evidence sufficient to support finding No. 1; but, in respect to other questions discussed, I concur in the foregoing opinion.

(97 Cal. 125)

HARDY v. HARDY. (No. 14,259.)

(Supreme Court of California. Jan. 5, 1893.)

PERMANENT ALIMONY—DESERTION—RES JUDICATA.

1. In an action for permanent alimony on the ground of desertion under Civil Code, § 137, it appeared that plaintiff met defendant in 1887, and demanded support as his wife. Defendant made no reply. Twenty-seven years before this, plaintiff had abandoned her home, and for more than 20 years, and until his death, had lived in adultery with one W., whose name she assumed, and to whom she bore children. *Held*, that she had forfeited all right to be received by defendant as his wife.

2. The fact that at the time plaintiff began to live with W. she had been informed by him and believed that defendant had procured a divorce from her, did not exonerate her; neither did information given her to the same effect by another within three months after she left defendant.

3. Plaintiff, in February, 1888, commenced an action against defendant for permanent support and maintenance, setting forth as her cause of action the same facts as in the present action. Defendant demurred to that complaint on the ground that it did not state facts sufficient to constitute a cause of action, which was sustained. *Held*, that that judgment is a bar to this action, and plaintiff cannot maintain that the cause of action set forth in the present complaint is different from that in the former action for the reason that at that time the desertion claimed to have taken place in December, 1887, had not become a ground of divorce, because it had not been continued a year.

Department 1. Appeal from superior court, Alameda county; JOSEPH P. JONES, Judge.

Action by Emma S. Hardy against Hiram P. Hardy to recover permanent alimony on the ground of desertion. From a judgment for plaintiff, defendant appeals. Reversed.

Eli R. Chase and *John L. Chase*, for appellant. *Edward C. Robinson*, for respondent.

HARRISON, J. The plaintiff brought this action under the provisions of section 137, Civil Code, to recover permanent alimony from the defendant without seeking a divorce. The complaint is framed with two counts, but, as a demurrer to the first count was sustained, and the cause was tried upon the issues presented by the answer to the second count, only the matters therein alleged can be considered. The court rendered judgment in favor of the plaintiff, awarding her $20 a month, from which, and from an order denying a new trial, the defendant has appealed.

The court finds that the defendant deserted the plaintiff on the 19th of December, 1887, and also that she had not deserted him, but that by reason of his cruelty towards her she was compelled to leave his house, and live separate from him. These findings are challenged in the statement as unsupported by the evidence, and it is also contended on the part of the appellant that the evidence shows that the plaintiff deserted the defendant in 1860.

The plaintiff and defendant were married in 1853, and lived together as husband and wife in the vicinity of Martinez for nearly seven years. In February, 1860, the plaintiff left the defendant, and went to live at the house of a friend near Pacheco. After remaining there a short time, she went to live at the house of another friend, a few miles out of Pacheco, where she met a man by the name of Wagner, whom she had previously known, and who appears to have aided her with his money and friendship. About a year after she left the defendant she was married to Wagner in San Francisco by a civil contract between them, and immediately went with him to Humboldt county, in this state, where they lived together as husband and wife, and continued to live in that vicinity, and in Oregon, until his death in 1883. During this period she bore five children to Wagner, and assumed his name, and was known as Mrs. Wagner, not only where they lived, but also in her former place of residence in Contra Costa county, and in other parts of California, and corresponded with her friends under that name. The defendant continued to reside in the vicinity of Martinez, and at some time in the year 1887 the plaintiff returned to that place, and on the 19th of December of that year, in the presence of a Mrs. Lander, with whom she was stopping, and whom she had asked to accompany her as a witness, saw the defendant at the county treasurer's office in the courthouse in Martinez, and said to him: "Mr. Hardy, I demand that you receive and support me as your wife." The defendant made no reply, but turned and went away, and thereafter the plaintiff commenced this action.

1. Section 137 of the Civil Code provides: "When the husband deserts the wife, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance for herself, or for herself and children." Although in some of the states the right of the wife to maintain an action for permanent maintenance, independent of any suit for a divorce, is recognized whenever she is living separate and apart from her husband without any fault on her part, yet in this state the legislature has limited the right of maintaining such action to the single case of desertion on the part of the husband, and has

not authorized it to be maintained upon the ground of neglect, intemperance, cruelty, or any other act on his part which might be a sufficient ground for a divorce. Proof of willful desertion by the husband is, therefore, an essential element in the plaintiff's cause of action. The wife cannot abandon the dwelling place which he may have provided for her, if it be a reasonable place, and then seek support at his expense by virtue of this statute; nor is she entitled to maintain the action for his mere neglect to provide her with suitable support. Hence if, at the time she institutes the action, she is living separate and apart from him, it is essential for her to show that it is by reason of his desertion, or that by reason of his cruelty, or threats of bodily harm, she was forced to leave the family dwelling place. It is, moreover, just as essential that the wife who is seeking this relief should be without fault on her own part, in order that she may compel her husband to give her the support which this section provides. The foundation of her right to maintain the action is the obligation of the husband to support her, and whenever the husband has become freed from such obligation this action cannot be maintained against him. The same grounds which would justify him in leaving her, and living separate from her, or which would be a sufficient defense to any action by her for a divorce from him, will be a defense to this action. She must have the right to be received and treated by him as his wife in order to enable her to maintain the action, and if, in case of his desertion of her, her conduct after such desertion has been such as to forfeit her right to be received as his wife, he cannot be made liable under this section.

The finding of the court that the defendant deserted the plaintiff on the 19th day of December, 1887, and that he still willfully deserts her and keeps away from her, is unsupported by the evidence. The only evidence of any desertion by the defendant at that time was his refusal to comply with the aforesaid demand of the plaintiff. Literally construed, this refusal would be evidence merely of a neglect or failure on his part to give her support; but even if it could be considered, under proper circumstances, as tending to prove desertion by him, it would not, under the circumstances of this case, have any such effect. When the plaintiff had shown by her own testimony that she had left the defendant by abandoning their dwelling place more than 27 years prior to this demand, and had never thereafter returned, she could not rely upon this refusal as desertion, unless she should show that her leaving their dwelling place had been caused by his cruelty or threats, and the record shows no evidence of any such cruelty or threats.

The failure of the defendant to comply with the demand of the plaintiff in December, 1887, did not constitute desertion. The plaintiff and defendant had not been living together for more than 27 years. She had commenced to live in adultery with Wagner about a year after she left the defendant, and, having continued that life for more than 20 years, and until the death of Wagner, she had forfeited all right to be recognized or received by the defendant as his wife; and, even if it had been fully shown that he had originally deserted her, she would not, under these circumstances, have been entitled to receive any support from him. Even at the time of her demand she did not go to his house, and ask to be reinstated therein as his wife and the mistress of his household, but met him at the courthouse; and, as was said in the case of Jenkins v. Jenkins, 104 Ill. 136: "The circumstances of her visit excites strongly the suspicion that what she sought was not a home in the house of her husband, where she might live as a dutiful wife, but rather evidence of a refusal on his part of shelter, so that she might institute a suit for separate maintenance." The fact that at the time she began to live with Wagner she had been informed by him and believed that the defendant had procured a divorce from her, does not exonerate her from the consequences of her act. If she consented to rely upon such statement without any further verification, she assumed the risk of her conduct being unlawful in case it proved otherwise. The information to the same effect, claimed by her to have been given by Shock in March or April, 1860, could not have given her a *bona fide* belief that the defendant had procured a divorce from her, since that information was given to her within three months after she left the defendant, and it was within her personal knowledge that no summons in any such action had been served upon her. Neither can the letter from the defendant to her daughter, in 1862, be of any avail to her, inasmuch as this letter was not written until nearly a year after she had commenced to live with Wagner.

2. The plaintiff, in February, 1888, commenced an action against the defendant for permanent support and maintenance, setting forth as her cause of action in her complaint therein the same facts as are set forth in the complaint herein. To this complaint the defendant demurred upon the ground that it did not state facts sufficient to constitute a cause of action, and, upon the demurrer being sustained, judgment was entered against the plaintiff. The defendant's plea herein that this judgment is a bar to the present action should have been sustained. The contention of the plaintiff that the cause of action set forth in the present complaint is different from that in the former action, for the reason that at that time the desertion claimed to have taken place on the 19th of December, 1887, had not become a ground for a divorce because it had not been continued for a year, cannot be maintained. The desertion by the husband which will authorize the wife to maintain an action for permanent support must be of the same character as would authorize her to maintain an action for a divorce; but, while the statute prescribes that her application for a divorce must be denied unless the desertion has continued for a year, it has not placed any such limitation upon her right to maintain this action. See Hulett v. Hulett, 80 Ky. 364. The right to maintain this action is independent of the right to

maintain an action for divorce, and, being based upon the obligation of the husband to support the wife, may be instituted at any time after his desertion of her when he fails to give such support. In view, however, of the good order of society, and to preserve the stability of the marriage relation as much as possible, the legislature has provided that a divorce shall not be granted, unless such desertion shall have continued for a year. The same evidence which the plaintiff would have introduced to establish the allegations of her complaint in the former action was essential to establish those of the present complaint. She does not allege or claim any other act of desertion on the part of the defendant than was claimed in her former complaint, and the judgment at that time that the facts alleged were insufficient to entitle her to the relief asked is a bar to her right to maintain the present action. Los Angeles v. Mellus, 58 Cal. 16; Parnell v. Hahn, 61 Cal. 131. The lapse of time since the act of desertion has not given her any additional cause of action, or increased the effect of the desertion for the purpose of entitling her to maintain this action. The judgment and order denying a new trial are reversed.

We concur: Paterson, J.; Garoutte, J.

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97 Cal. 122

WILLIAMS v. SAVINGS & LOAN SOC. et al. (No. 14,586.)

(Supreme Court of California. Jan. 5, 1893.)

Foreclosure of Street Assessment—Defenses—Review on Appeal.

1. In an action by the contractor to foreclose a street assessment for sewer building, the fact that the laborers worked 10 hours per day, where the contract provided that 8 hours should be a legal day's work for the employes, cannot be taken advantage of by defendants, it being no concern of theirs on what terms such laborers worked.

2. A finding on conflicting evidence will not be disturbed on appeal.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by C. B. Williams against the Savings & Loan Society and others to foreclose a street assessment made for certain sewer work done by plaintiff. Judgment for plaintiff. Defendants appeal. Affirmed.

J. M. Wood, for appellants. *J. C. Bates*, for respondent.

Garoutte, J. Action to foreclose a street assessment made for sewer work done in the city and county of San Francisco under the street law of 1885. The appeal is prosecuted from the judgment and order denying a new trial. No demurrer was interposed to the complaint, and the judgment is supported by its allegations. The contract provided that eight hours should constitute a legal day's work for all persons employed. The contractor testified that the laborers worked ten hours for a day's work. The court found that the contractor performed all the conditions of the contract. It is now insisted that a new trial should be ordered, because the finding is contrary to the evidence. There is no merit in the appellants' position. If the finding had been in line with the evidence, the judgment would still have been the same. It is not a matter of the slightest concern to appellants as to the terms upon which the employes labored. U. S. v. Martin, 94 U. S. 403.

One of the defenses to the action is that the work for which the assessment was issued had not been performed according to the terms of the contract. The contract provided that, when the manhole was completed, "the top of the copings must be upon the official grade of the street," and the defendants averred in their answer that "the curb and top of the manhole were more than 11 inches above the official grade." In support of this averment, they read in evidence the certificate of the city surveyor, given May 16, 1888, from which it appeared that at that date the curb of the manhold was 11¼ inches above grade, but the assessment which was issued July 3, 1888, was some evidence that at that date the work had been performed according to the terms of the contract; and upon this conflict of evidence the finding of the court, that the averment in the answer is untrue, cannot be disturbed. The contractor may have caused the manhole to conform to the official grade before the assessment was issued.

This work was done at the crossing of Pacific avenue and Pierce street, and it is contended that the finding that this crossing was an open, public street is not supported by the evidence. The board of supervisors of the city and county of San Francisco attempted by resolution to establish Pacific avenue; said avenue being formed from a portion of Pacific street, a public street of said city and county. It is now claimed that said resolution is void by reason of uncertainty in the location of the boundaries of the proposed avenue. It is conceded by counsel that the resolution of the board does indicate that Pacific avenue was to be formed from some portion, at least, of Pacific street; and it was held in Brady v. Page, 59 Cal. 52, that courts take judicial notice of the streets of San Francisco, of their relation to each other, and their location. By reason of this fact, we know that Pierce street could only intersect Pacific street at one point, and that point of intersection would necessarily form the crossing where the improvement here involved is located, and that crossing would necessarily form a part of the public street.

We find nothing further in the record, demanding our attention. Let the judgment and order be affirmed.

We concur. Paterson, J.; Harrison, J.

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97 Cal. 131

SCHWARZE v. MAHONEY. (No. 14,607.)

(Supreme Court of California. Jan. 6, 1893.)

Landlord and Tenant—Appeal.

1. An objection to a person's capacity to sue for and recover rent, on the ground that she is a married woman, cannot be raised on appeal,

where it was not raised either by answer or demurrer on the trial.

2. In an action by a married woman for rent, it appeared that certain premises were leased to her in her own name, and that she sublet part thereof to defendant, and that he took possession. Defendant testified that, when he asked plaintiff what rent she would charge for the premises, she replied, "15 a month," and that he told her he would take it, but that he never promised to pay any rent. *Held,* that his acts were sufficient to lead plaintiff to believe that he would occupy the premises as her tenant, and pay rent, and that he could not afterwards deny that relation.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action of unlawful detainer by Schwarze against Mahoney. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals.

D. I. Mahoney, for appellant. *Geo. D. Shadburne,* for respondent.

PATERSON, J. This is an action of unlawful detainer. Judgment was entered in favor of the plaintiff for the sum of $540 and costs of the action. The defendant moved for a new trial, which motion was denied; and thereupon he appealed to this court from the judgment and from the order.

The principal point made on this appeal is that the respondent, being a married woman, cannot recover; that the rents, if any due, are community property, for which the husband alone can sue. This objection to the plaintiff's right to maintain the action cannot be considered, because there is no demurrer, and there is nothing in the answer indicating an intention on the part of the defendant to raise the question of the plaintiff's capacity to sue. The defendant states in his answer that plaintiff is a married woman, wife of one F. J. Schwarze; that said Schwarze is a tenant of the upper portion of the premises known as "1901 Polk Street,"—a portion of the same premises wherein the premises described in the complaint are situated,—but denies that this plaintiff ever was in the occupation of the premises described in the complaint, or that she ever had any title or interest therein. This is clearly insufficient as a plea in abatement, or of want of capacity to sue. The right of a married woman to enter into any transaction with any other person which she might if unmarried (Civil Code, § 158) gives to her a correlative right to enforce, to the same extent that she could if unmarried, any obligation which she may have received from such other person as the consideration for such transaction; and whenever, in a transaction with a married woman, another person has received from her any property or advantage for which he has given his obligation, the burden is upon him to show that the transaction was entered into by her as the agent of the community, and not for herself, if he would resist his obligation upon the ground of her marriage. Wetherly v. Straus, 93 Cal. 287, 28 Pac. Rep. 1045. In the case at bar the record shows that the premises described in the complaint, together with the upper story of the building in which they were situated, were leased to the plaintiff by a duly-authorized agent, and that, while she was in the actual, exclusive, and lawful possession thereof, she leased the lower portion of the house to the defendant at a rental of $15 per month. The defendant attempted to show that he entered into possession of the premises by virtue of his own right therein, but in this he failed. He stated in his testimony that he asked Mrs. Schwarze about the place, and what the rent would be; that she told him it would be $15 per month, and he replied that he would take it; that she told him he could take possession of the entire lower floor, as she had no use for the kitchen. He attempted to avoid the effect of this testimony by saying that he did not promise that he would pay the rent; that he "never promised to pay Mrs. Schwarze or anybody else the rent." Of course, the court below did not for a moment listen to such a subterfuge.

We find no error in the rulings of the court. The relation of landlord and tenant is clearly shown by the record, and the claim of title upon which the defendant predicates several of the contentions of error in the rulings of the court is not a proper subject of inquiry in the case. The plaintiff testified, and in this was corroborated by the agent, that she took a lease of the house in her own name and right; that her husband was not known in the transaction. It is clear that the defendant would not have been permitted to occupy the house if he had not led the plaintiff to believe that he would occupy it as her tenant, and pay her $15 per month rental. He cannot now, therefore, dispute the relationship.

Judgment and order affirmed.

We concur: HARRISON, J.; McFARLAND, J.

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97 Cal. 112

McDONALD v. DODGE. (No. 14,476.)

(Supreme Court of California. Jan. 3, 1893.)

PRESUMPTION ON APPEAL—PROTEST AGAINST PUBLIC IMPROVEMENT—APPROVAL OF MAYOR.

1. The street law of 1883, (section 3,) as amended by St. 1889, p. 158, provides that a protest against a proposed street improvement by a majority of the owners in frontage on such street shall bar further proceedings, except where, among other things, the proposed work is to be done in a block lying between blocks which have already been graded, when the work shall not be stayed, unless the city council deem proper. *Held,* on appeal from a judgment declaring valid an assessment for work protested against by the majority of the frontage owners, that the supreme court would assume that the block in question was between graded blocks, in the absence of any evidence in the record to the contrary.

2. Though the mayor of the city and county of San Francisco is vested with the veto power, he is not a part of the legislative department of the city government, within the meaning of the street law of 1883, (section 34,) which declares the city council to be such department; and hence, under the provision of such street law which requires a resolution of intention to make a public improvement to be approved by the mayor "or" a three-fourths vote of the council, a resolution passed by a three-fourths vote of the board of supervisors, which is the legislative department for the city, does not need the approval of the mayor.

Department 2. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

Action by J. M. McDonald against H. L. Dodge for a street assessment levied by the city and county of San Francisco. From a judgment in plaintiff's favor, and from an order denying a new trial, defendant appeals. Affirmed.

J. M. Wood, for appellant. *J. C. Bates*, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff in a street assessment case arising in the city and county of San Francisco, and from an order denying a new trial. There are only two points made by appellant which need special notice.

1. Appellant's counsel contends that the record shows a written protest by a majority of the frontage of the property fronting on the proposed work involved in this action, (which fact may be taken, for the present, as true,) and that, therefore, the assessment sued on was void, because section 3 of the street law of 1883, as amended by the act of March 14, 1889, (St. 1889, p. 158,) provides that such a protest "shall be a bar for six months to any further proceeding." To this counsel for respondent replies that said section provides that the work "shall not be stayed by any written or other protest unless such council shall deem proper," and neither counsel makes the slightest reference to the possibility of reconciling those two apparently incongruous provisions. But upon an examination of the section, which is a very long one, we find its provisions to be that, with respect to certain kinds of work, and certain conditions of property, a protest, of itself, stops proceedings for six months; while with respect to other kinds of work, and other conditions of property, a protest has not such effect. And, among other things, it provides that a protest shall not stop proceedings in a case where the proposed work is to be done in a block lying between blocks which have been already graded. Now, whether or not such was the condition of the block upon which the work was done in the case at bar does not appear. No such issue was raised by the pleadings, and whether or not there was evidence upon the point we cannot tell. There is nothing upon the subject in the record. This being so, we will not presume, against the validity of the judgment, that the block in question was not between graded blocks. An appellant, to be successful, must show error.

2. Appellant contends for a reversal because the resolution of intention, and the resolutions ordering the work and approving the award, were not presented to or approved by the mayor. The act clearly provides that the city council shall pass the resolution of intention, and order the work; and with respect to the award the provision is that it "shall be approved by the mayor, or a three-fourths vote of the city council." By section 34 of the act it provides that "the term 'city council' is hereby declared to include a body or board which, under the law, is the legislative department of the government of any city." In San Francisco the board of supervisors is the "body or board" which forms the legislative department of the government of the city. It is true that the mayor, by virtue of his right of veto in certain cases, has some of the lawmaking power of the municipality; but the charter of the city does not make him a part of the "legislative department," in the sense that no independent power is, or can be, given to the latter. See Brooks v. Fischer, 79 Cal. 173, 21 Pac. Rep. 652. Throughout the street law, above referred to, there is a distinction between the city council and the mayor, independent duties and powers being assigned and given to each. In the case at bar, all the necessary proceedings, to and including the ordering of the work, were duly taken by the board of supervisors, and the award was approved by a three-fourths vote of said board. This was sufficient.

The other points made by appellant do not need discussion. It is sufficient to say that they are not tenable.

Judgment and order affirmed.

We concur: DEHAVEN, J.; GAROUTTE, J.

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97 Cal. 140

SOBERANES v. SOBERANES. (No. 15,021.)

(Supreme Court of California. Jan. 7, 1893.)

EQUITY—RESCISSION—GIFT BY PARENT TO CHILD.

1. A gift by a mother, old and illiterate, of all of her property to one of her sons, to the exclusion of her other children, will not be set aside at the suit of the mother, on the ground that the gift strips her of all her property, and leaves her dependent on the charity of others, where it affirmatively appears that the gift was executed by the mother while in possession of all her faculties, with a full understanding of all the facts and the effect of the transfer, and in the execution of a purpose long entertained by her, originating in a desire to show her appreciation of the son's devotion and services, and that she was not the victim of his artifices and contrivances, nor of undue influence exerted by him.

2. The mere fact that the mother did not have independent advice is no ground for setting aside the gift, made freely, and with a full understanding of its effect; nor is the age of the mother, (65 years,) standing alone, a sufficient ground.

Department 1. Appeal from superior court, Monterey county; JAMES F. BREEN, Judge.

Action by Mrs. Soberanes against Abel Soberanes to set aside a transfer of land made by plaintiff to defendant. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

D. M. Delmas, for appellant. *Myrick & Deering* and *Alexander Daugherty*, for respondent.

PATERSON, J. This action was brought to set aside a transfer of certain real estate, valued at $100,000, alleged to have been procured by defendant from his mother through the exercise of undue influence and artful schemes. The case is before us on the judgment roll alone. The court found the facts to be as follows: The plaintiff—now an incompetent person, represented by her guardian—is about 65 years of age, uneducated and illiterate.

She has never been competent to attend to, understand, or transact the ordinary business of life, except such as relates to household duties, but in the latter respect has always been the head of the family, and discharged the duties of her position as a wife and mother with full competency, wisdom, and prudence. Plaintiff at the time of the transfer was in possession of all her natural mental faculties. Francisco Soberanes, plaintiff's husband, died in 1887, leaving real and personal estate of the value of $200,000. During the latter years of his life he was mentally infirm, and surrendered the management of his business affairs to his son, the defendant, who acted as his agent and attorney in fact. The latter's administration of the father's business was not satisfactory to the other children, and this led to an estrangement between him and them, but not of a serious or lasting character. These dissensions did not extend, however, to the father and mother, nor were all the children involved therein. Soon after the father's death, disputes as to who should administer upon his estate and manage its affairs arose among the children. A family council was held, which resulted in more bitterness and distrust, and the administration of the estate was intrusted to a stranger. The estate was finally distributed to the heirs,—one half to the surviving widow, and the balance to the children, six in number, in equal shares. After the distribution of the estate, as stated, only the defendant continued to reside with his mother on that part of the rancho which had been set apart to her. At all times since the death of Francisco the defendant has been, and is now, his mother's sole agent and confidential adviser, and has had, and now has, full and absolute control over her business; but the defendant has never had control of her person, except such control as a dutiful and affectionate son should properly exercise over the person of an aged and affectionate mother. Since the distribution of the estate, personal hostility between the defendant on one side, and some brothers and sisters on the other, has been increased by business and personal difficulties. The plaintiff identified herself with Abel's business interests, but as far as possible refrained from any personal antagonism with the other children. Her motherly affection was deep and broad enough to cover them all, and she bewailed the unhappy conditions, and frequently besought them to end their quarrels; but the breach widened, and in the end the mother was estranged from all her children except the defendant, Abel, and a married daughter. While the disputes were pending and progressing, plaintiff frequently declared that she would give her property only to such of her children as would respect and adhere to her. During the time stated, defendant acquired, and now retains, plaintiff's complete confidence, and by reason thereof she gave to him absolute control of all her property, and everything pertaining thereto. This was not brought about, however, by any skillful contrivance, false representation, or concealment, nor has the defendant dominated the will or directed the judgment of plaintiff in any transaction, or in any manner exercised undue influence over her. Ever since his father's death the defendant has taken great interest in his mother's personal welfare. This interest was not unusual or pretended, but natural. On May 24, 1890, the plaintiff conveyed to defendant the lands described in the complaint. This conveyance was intended as a gift, and as a matter of fact the consideration named in the deed, viz. $500, was never paid, nor intended to be paid, to the plaintiff. The land was worth $100,000. At the same time she gave to the defendant and his married sister above referred to 500 head of cattle, valued at $8,000. At the time the deed was executed there were present, besides the plaintiff, an attorney, who drew the deed, the notary, and Dr. Gordan, a physician. The attendance of these persons was procured by the defendant to serve as witnesses to the execution of the deed, and as to the competency of plaintiff to execute it. The plaintiff did not have the advice of any person about the transaction, nor did she wish to have any advice, the deed having been executed and delivered by her freely and voluntarily. She was at that time able to comprehend and understand the nature, character, and effect of the transaction, and made the deed freely and intelligently, and fully comprehended the effect of the same. Plaintiff was at that time, however, by reason of illiteracy and want of experience and knowledge of business affairs, unable, unassisted, to properly manage and take care of her property, and by reason thereof was liable to be deceived and imposed upon by designing persons in the transaction of business. Said real and personal property was all the property owned or possessed by the plaintiff. The court found, as conclusion of law, that plaintiff was not entitled to the relief claimed, and rendered judgment in favor of the defendant. From this judgment the plaintiff, by her guardian, has appealed.

The facts found, as stated above, do not warrant the court in ascribing the deed in question to undue influence. It is apparent, if the facts stated be true, and they must be so regarded, that the plaintiff was not the dupe of the defendant's artifices, the victim of his contrivances, or in any way subjected to his sway. The defendant's position was one of high trust and confidence, and binding him, both by honor and in law, not only to abstain from anything like craft or guile, but to be generous and fair, and his conduct should be examined with the greatest scrutiny; but there is no rule which creates a disability to take a bounty under the circumstances narrated. Transactions of the kind in question should be thoroughly sifted, but a voluntary deed, free from any imputation of undue influence, executed by a mother with her eyes open, cannot be set aside merely upon the ground that an honorable man would not accept a gift which strips his mother of all her property, and leaves her dependent upon the charity of others. A person in possession of all his faculties has a right to dispose of his property as he sees fit, upon the principle stated by Lord Nottingham,—that, if he will improvidently bind himself up by a voluntary deed, he need not expect the court to break the fetters put upon himself by his own folly. To hold that gifts voluntarily made, and with full knowledge of all the facts, and of the nature and effect of the transfer, should be set aside because the donor had divested himself of his property, would be to establish a rule that no man can make a voluntary disposition of his estate except by will. Ralston v. Turpin, 129 U. S. 675, 9 Sup. Ct. Rep. 420; Saufley v. Jackson, 16 Tex. 581. There is no doubt as to the principle applicable to cases of this kind. Transactions like the one under consideration are watched by courts of equity with the most scrutinizing jealousy, and are generally held to be presumptively void. They will be set aside upon the discovery of the least fraud, and every presumption ought to be indulged against them. The person who makes the donation and bestows the confidence is not bound to show that any imposition has been practiced upon him. It is sufficient for him to establish intimate and confidential relations with the donee. Some of the cases hold that undue influence is not to be inferred from the relation of parent and child, where the gift is from the parent to the child, (Millican v. Millican, 24 Tex. 446;) but where the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and with perfect understanding of the effect of the transfer, (Todd v. Grove, 33 Md. 194; Highberger v. Stiffler, 21 Md. 352.)

At the argument some suggestions were made which, if true, lend a moral aspect to the case that strongly appeals to the sentiment of equity and justice; but they are not verified by the record, and, if they were, it would be sufficient to say that neither courts of equity nor of law have a right to enforce mere moral obligations. The findings of the court are conclusive. They show that the plaintiff's gift was made in the execution of a purpose long entertained by her, originating in a desire to show her appreciation of defendant's devotion and services, and they negative expressly and entirely all the material allegations of the complaint.

It is claimed by the appellant that the transfer should be set aside because the plaintiff did not have independent advice. No case has been cited which holds that it must be shown that the donor acted upon independent advice in transactions between parent and child, when it appears that the gift was made freely, voluntarily, and with full understanding of all the facts and the effect of the transfer. The rule in this regard is not the same as in the case of a gift from a client to his attorney. In Allore v. Jewell, 94 U. S. 506, and Richards v. Donner, 72 Cal. 207, 13 Pac. Rep. 584, cases upon which the appellant relies, it appeared that the grantor did not fully understand the nature and effect of the conveyance. All of the cases cited contain some ingredient showing undue influence sufficient to induce the conclusion that the act was not perfectly free and voluntary on the part of the donor.

We do not regard the age of the plaintiff as a controlling fact in the case. Some of the greatest men of modern times have displayed the highest abilities after passing the age of threescore and ten. Notable instances of this are found in the lives of Disraeli, Gladstone, Bismarck, and of Lord Mansfield, who left the bench at the age of 84. Chancellor Kent wrote his great commentaries after he had retired from the bench on account of having reached the period of life fixed by the constitution for judicial superannuation.

Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(3 Cal. Unrep. 730)

WILLARD v. TATUM et al. (No. 14,798.)

(Supreme Court of California. Jan. 10, 1893.)

RESCISSION OF SALE—DELAY IN RETURNING GOODS.

1. A seller of stationary engines will not be relieved from his agreement to rescind the sale, and accept their return, by the mere fact that the purchaser returned one more engine than specified in the agreement, without, however, requiring its acceptance by the seller as a condition to the return of the others.

2. A delay of eight months in shipping the engines after it was agreed that they should be returned by the purchasers from San Francisco to the sellers at Chicago, by a shipment via Cape Horn, is not so unreasonable, as matter of law, as will relieve the seller from his obligation to accept them, where it appears that they had been paid for by the purchasers; that the seller had the use of the money during all this time; that no loss was suffered by the delay; that the refusal to accept them was based on a claim that a change in the pattern of the engines rendered those returned less valuable than formerly; that some of the returned engines were in a branch house of the purchasers at Portland, Or., and had to be brought to San Francisco for shipment; and that the engines were in fact shipped by the first vessel carrying a miscellaneous cargo.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action by Charles P. Willard against H. L. Tatum and Joseph J. Bowen to recover for goods sold. Defendants interposed a counterclaim. From a judgment in defendants' favor, and from an order denying a new trial, plaintiff appeals. Affirmed.

John H. Dickinson, for appellant. *Langhorne & Miller*, for respondents.

HAYNES, C. Plaintiff is engaged in the business of manufacturing engines and other machinery in Chicago, Ill., and the defendants are copartners doing business in San Francisco. Plaintiff brought this action to recover a balance upon book account, and also the amount of a promissory note, due him from defendants for goods sold. There was no contest as to these claims, but defendants, by way of counterclaim, alleged, in substance, that prior to 1887 they purchased from plaintiff several "Davey Safety Engines,"—one of four-horse power, for $430; four of two-horse power, for $255 each; and one of one-horse power, for $191.25,—and paid for said engines $1,551.25; that they proved unsalable, and on April 27, 1887, defendants wrote plaintiff that these engines were "dead stock;" that they had sold but two, leaving on hand one four-horse power, three two-horse power, and one one-horse power; that they had ordered these engines relying on plaintiff's representations, and that the engines had not come up to them; and asking for a proposition under which they might return them; that plaintiff thereupon agreed by letter that if defendants would have the engines boxed and returned to him, freight prepaid, he would credit defendants the full amount they had paid for them. Afterwards it was agreed they might be returned by vessel around Cape Horn and via New York. March 27, 1888, defendants shipped the engines, but included one more two-horse power engine than was named in the proposition. After they were shipped, and the vessel was at sea, and on receipt of the bill of lading, plaintiff wrote defendants, refusing to give credit for the engines, but offering to take care of them, and make the best disposition he could for defendants. This change of purpose was based on an alleged change in the patterns of the engines, made after the agreement to take them back, by which it was claimed the old style was not worth so much as before. The court found for defendants for the price of the motors (excluding the extra two-horse power engine not specified in the original proposition,) less the amount of plaintiff's claim specified in his complaint, and gave judgment for defendants for $871.87 and interest. Plaintiff's motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial

Appellant's contention that the evidence is insufficient to justify the findings cannot be sustained.

1. That an extra engine was shipped is true. But defendants did not make the return and acceptance of the others conditional upon the acceptance of it by plaintiff, nor was he charged with it by the court. The cases cited by appellant do not sustain him. Stevenson v. Burgin, 49 Pa. St. 36, holds that a contract for a certain fixed quantity of merchandise, to be delivered on shipboard by the vendor, is not complied with by a tender of bills of lading for a larger quantity; and a demand of payment therefor at the price agreed on cannot be enforced by the vendor. Clark v. Baker, 11 Metc. (Mass.) 186, holds that it is the duty of the seller of a cargo of corn in bulk, part of which is damaged, to separate the good from the bad, and offer the good to the buyer. The corn was sold as of a certain quality, and the buyer could not be required to make the selection. In Brewer v. Railroad Co., 104 Mass. 593, the contract was for wood of a particular quality, and plaintiff delivered wood intermixed with that of an inferior quality. The court held that defendant would not be obliged to accept it. Croninger v. Crocker, 62 N. Y. 151, was a similar case, where wool of the quality contracted for was largely intermixed with inferior qualities. In the case at bar there was no difference in quality,—simply one engine more than was embraced in the agreement. No separation or examination was required, as they were entirely distinct, each complete in itself, and no requirement was made that plaintiff should accept it. We know of no case which goes so far as to relieve plaintiff from accepting the others for that reason.

2. It is specified by appellant that the evidence further shows that defendants never did comply with the agreement, viz. by "shipping and delivering the engines at Chicago." The court found that plaintiff received the engines, and that finding is not attacked. Besides, it may well be that defendants were relieved by the conduct of the plaintiff from a delivery at the place specified.

3. This specification is that the evidence shows there was no consideration for the agreement, and that nothing was done under it. Plaintiff answered defendants' cross complaint, and did not allege that the agreement was without consideration. But, assuming that a denial of the agreement raised that question, we think the facts showed a good and sufficient consideration.

4. The most important question presented by appellant is whether the engines were returned within a reasonable time after the agreement was made. About eight months elapsed after the mode of shipment was arranged before they were in fact shipped. "There is no precise standard of reasonable time. The true rule must be that that is a reasonable time which preserves to each party the rights and advantages he possessed, and protects each party from losses that he ought not to suffer." 2 Pars. Cont. p. 662. The question here involves the consideration of the relations and dealings of the parties, including the fact that defendants had, until after the time this agreement was made, the entire sale of plaintiff's manufactures on the Pacific coast, not on commission, but by purchase; that these engines had been paid for by defendants, and plaintiff still held and had the use of the money so paid; that no loss is shown to have accrued to the plaintiff by the delay; that plaintiff's objection to taking the engines under that agreement was not based on the fact of delay, but on the claim that after the agreement and before the shipment a change had been made in the pattern of the "Davey Safety Engine," which rendered the old make (these engines) less valuable; but on the trial this claim was abandoned. Some of these engines were in defendants' house at Portland, Or., and had to be brought to San Francisco; and defendants also gave evidence tending to show that they were shipped by the first vessel sailing to New York, carrying a miscellaneous cargo, of which they were informed. Evidence was given showing that other vessels, before the

one by which the engines were shipped, cleared for New York, but it does not affirmatively appear that they carried miscellaneous cargoes. We think the question was one of fact, which would have been properly submitted to a jury under proper instructions from the court; that there is evidence sufficient to sustain the finding, and that it should not be set aside. See Luckhart v. Ogden, 30 Cal. 558-560.

No exceptions were reserved on the trial, and the errors of law specified are fully covered by the foregoing. The judgment is sustained by the findings, and therefore the court did not err in rendering judgment for defendants. We advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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96 Cal. 518

JOSEPH v. MACOWSKY. (No. 14,595.)

(Supreme Court of California. Nov. 30, 1892.)

TRADE-MARKS—PROTECTION—DECEIVING PUBLIC—CREDIBILITY OF WITNESS.

1. The courts will not grant relief on a claim to the exclusive use of a trade-mark which contains a false representation, calculated to deceive the public, as to the manufacturer of an article, and the place where it is manufactured.

2. The credibility of witnesses is a question for the trial court, and its findings will not be disturbed, where there is evidence to support them.

Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action by one Joseph against one Macowsky. Judgment for defendant. Plaintiff appeals. Affirmed.

Wheaton, Kalloch & Kierce, for appellant. *Manual Eyre*, for respondent.

PATERSON, J. This action was brought to restrain the defendant from making or selling any razor having a stamp thereon, or upon the case thereof, showing the words, "Queen's Own," or the words, "Queen's Own Co." The plaintiff alleged that he had been for many years importing razors which he had caused to be manufactured in England; and in order that said razors might become known in the market, and easily identified, and their origin known, he had caused each one of them to be stamped upon the "tang" (which is the thick part of the razor blade, back of the cutting part) with the words, "Queen's Own Co." He alleged that, on account of said trade-mark, the razors had become known in the commercial world as the "Queen's Own" razors, and had acquired great reputation with the public for excellence of quality; that the defendant had unlawfully been selling razors which were marked in conspicuous letters, upon the blade thereof, "Queen's Own;" and that the imitations were calculated to deceive those desiring to purchase plaintiff's razors. The court found that all of the razors offered for sale by the plaintiff have stamped upon the shank on one side the words, "Queen's Own Co., Sheffield;" that, in point of fact, the razors are not manufactured by any company or firm known by the name or designation of "Queen's Own Co.," nor manufactured in Sheffield, Eng.; that the defendant has not sold any razor which, by a stamp or general appearance, was designed or calculated to mislead the public, as an imitation of the plaintiff's razors; that "there was a total dissimilarity between them, and apparent to any person upon even the slightest inspection."

The only question raised on this appeal is as to the sufficiency of the evidence to support these findings of the court. We cannot say that the findings are not supported by the evidence. It is true the plaintiff, in his direct examination, testified that the razors were manufactured in Sheffield, but in his cross-examination he admitted that he did not buy them through a Sheffield house. He said he knew they were manufactured in Sheffield only because he purchased them from Harrison Bros. & Houston, all of whose goods were manufactured in Sheffield. He admitted that there was no company in England or in this country known as the "Queen's Own Co.," and that he alone constituted the "Queen's Own Co." T. S. Conran, a dealer in cutlery, testified on behalf of the defendant that plaintiff told him he purchased the razors from Harrison Bros. & Houston, but did not know who made them. He testified, also, that said firm did not manufacture razors. The credibility of these witnesses was a matter for the court below to consider and determine, and we have no right to interfere with its decision.

Assuming the facts found to be correct,—as we must,—the plaintiff is seeking to enjoin the defendant from using a trade-mark which he himself is not, in equity or good conscience, entitled to use, because it is a fraud upon the public. The evident purpose of the defendant's stamp upon the razor, and his advertisement and label, as the court below said, were "to cause the purchasing public to believe that these razors are manufactured by a firm known as "Queen's Own Co.," and in Sheffield, Eng., when, in point of fact, he did not know where they were manufactured, nor by whom. The positive assertion of a thing not known to be true is as reprehensible as the assertion of a thing which is known to be untrue. Assuming, therefore, that the defendant did make and sell razors precisely like those sold by the plaintiff, the latter cannot complain. The plaintiff's purpose in endeavoring to make the public believe that his razors were manufactured in Sheffield is manifest. He testified that: "English cutlery is better than German. * * * In no part of the world is the manufacture equal to the English; not even American goods." Cutlery manufactured in Sheffield has a wide reputation for excellence. A person who comes into a court of equity for an injunction, in a case of this kind, must come with clean hands. He cannot be granted relief upon a claim to the exclusive use of a trade-mark, which contains a false representation, calculated to deceive the public as to the manufacturer of the article, and the place where it is manufactured. Browne, Trade-Marks, §§ 71, 474; Palmer v. Harris, 60 Pa. St. 156; Fetridge v. Wells, 13 How. Pr. 385; Hobbs v. Francais, 19 How. Pr. 571; Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. Rep. 436. In Siegert v. Abbott, 61 Md. 284, the court said: "It is a general rule of law, in cases of this kind, that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade-mark or labels.

In view of what has been said, we deem it unnecessary to consider the question whether the defendant's razors were so formed or stamped as to lead the public to believe they were of the same kind as those sold by the plaintiff. We have preferred to rest our decision upon a ground which will tend to discourage the use of false and misleading trade-marks and labels. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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96 Cal. 532

BLYTHE v. AYRES et al. (No. 14,938.)

(Supreme Court of California. Nov. 30, 1892.)

CONFLICT OF LAWS—LEGITIMATION OF BASTARD—EVIDENCE.

1. The status of a bastard, with reference to its legitimation by the acts of the father, are determinable by the laws of his domicile, and not by the laws of the domicile of the child and mother.

2. Civil Code, § 230, provides that "the father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it." *Held*, that the word "adopts" is used in the sense of "legitimates" and the acts of the father, if they fill the requirements of the statute, result in the legitimation of the child.

3. Where a putative father was at all times domiciled in California, where he resided in a lodging house with his mistress, or alone in his cabin in the mountains, and was never married, had no family or relations except in a collateral line, whom he had not seen or communicated with since the birth of his child, more than 10 years prior to his death, who resided with her mother, in England, where the child was begotten and born, and where the mother subsequently married a resident husband, and was at all times domiciled, and the father on all occasions declared the child to be his, and acknowledged her paternity to the mother and grandmother before the child's birth, and had her christened and baptized by his name, and corresponded with her as his daughter, and furnished her only $150 a year, though he was a millionaire of plain and simple habits, and made a will providing for her, which was subsequently lost or destroyed, his acts constituted a full adoption and legitimation, within the meaning of Civil Code, § 230. McFarland, J., and De Haven, J., dissenting. In re Jessup, 21 Pac. Rep. 976, and 22 Pac. Rep. 742, 1028, 81 Cal. 419, followed.

4. Civil Code, § 1387, provides that "every illegitimate child is an heir of any person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." *Held*, where a putative father wrote and signed letters in the presence of a competent witness to the child, addressing her as "My darling child," and signing himself, "From your loving father," and also wrote her grandfather with reference to having her baptized and christened with his name, and relative to her religious instructions, that such acts constituted a complete acknowledgment, within the meaning of the Code, and it was not necessary that the witness in whose presence the letters were signed should subscribe the same. Pina v. Peck, 31 Cal. 359, explained.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Action by Florence Blythe, a minor, by James Crisp Perry, the guardian of her person and estate, against Abbie Ayres and others. Judgment for plaintiff. Defendants appeal. Affirmed.

H. S. Brown, *John R. Jarboe*, *W. S. Goodfellow*, and *Edward R. Taylor*, for appellants. *W. H. H. Hart*, *Garber*, *Boalt & Bishop*, *Thos. J. Bergin*, and *W. W. Foote*, for respondent.

GAROUTTE, J. This is an action instituted under section 1664 of the Code of Civil Procedure by the plaintiff, a minor, through her guardian, to determine the heirship and title to the estate of Thomas H. Blythe, deceased. The section provides that in all estates now being administered, or that may hereafter be administered, any person claiming to be heir to the deceased, or entitled to distribution, in whole or in any part, of such estate, may, at any time after the expiration of one year from the issuance of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made. The case is most important from any view. The defendants, claiming to be collateral kindred, are numbered by the hundred, many of them represented by separate counsel of great ability and experience in the law; the property interests involved are very large; the trial in the *nisi prius* court extended continuously through the greater portion of a year; the facts are novel, and the principles of law applicable many and complicated.

Plaintiff's claim is based upon sections 230 and 1387, respectively, of the Civil Code of California. Section 230 reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon, for all purposes, legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." Section 1387, as far as it pertains to the matters involved in this litigation, provides: "Every illegitimate child is an heir of any person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child."

As a result of the trial the court filed findings of fact, and its conclusions of law based thereon are to the effect that the plaintiff, Florence Blythe, was and is the child of Thomas H. Blythe, deceased; that said Thomas H. Blythe legally adopted her under the provisions of section 230 of the Civil Code; that she is his lawful heir, and the only person entitled to have and receive distribution of the estate of said Thomas H. Blythe, deceased. The principles of law and the facts of the case bearing upon her contention under these respective provisions of the Code are entirely dissimilar, involving a separate discussion; and in the construction of section 230 our investigation also necessarily divides itself into two distinct branches: (1) Was plaintiff so domiciled, with relation to her putative father's domicile, as to have rendered any action of his looking to adoption available for that purpose? Or, placing the interrogatory in the clear and emphatic language of appellants' counsel, (to which interrogatory they all with great confidence give answer, "Yes,") was she so domiciled, or so situated, that she could not be subject to the laws of California, and be by those laws transmuted from bastardy to legitimacy? (2) If her situation endowed her with the capacity for legitimation, did the acts of Blythe bring her within the requirements of the statute?

The facts found by the court which face us while we are engaged in a consideration of the first branch of this subject may be succinctly and substantially stated as follows: (1) That plaintiff was born in England, upon December 18, 1873, and was the issue of Thomas H. Blythe and Julia Perry; (2) that Julia Perry was a native of England, domiciled therein, and continued to there reside until one month after the death of said Blythe; (3) that plaintiff remained in England until after the death of Blythe, when she came to California, and said Blythe was never at any time within any of the countries of Europe after the 29th day of August, 1873; (4) that said Blythe was a citizen of the United States and of the state of California, domiciled in said state, and died intestate therein April 4, 1883, leaving surviving him no wife, no father, no mother, and no child, save and except said Florence Blythe, the plaintiff herein; (5) that said Thomas H. Blythe and said Julia Perry never were married, and said plaintiff was begotten while said Blythe was temporarily sojourning in England, and was born after said Blythe's return to California, and that said Blythe never was married.

Before passing to the merits of the discussion, we pause a moment to say that the verb "adopts," as used in section 230, is used in the sense of "legitimates," and that the acts of the father of an illegitimate child, if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. Adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists. See law dictionaries,—Bouvier, Black, Anderson, and Rapalje. This is the distinguishing feature between adoption and legitimation, as recognized by all the standard law writers of the day who have written upon the subject; and, for the reason that the text writers and the decisions of courts to which we shall look for light and counsel treat the subject as a question of legitimation, we shall view the matter from that standpoint. The section is broad in its terms. It contains no limitations or conditions, and, to the extent of the power vested in the legislature of the state, applies to all illegitimates, wherever located, and wherever born. The legislature has not seen fit to make any exception to its operation, and, as was said by Chief Justice TANEY in Brewer v. Blougher, 14 Pet. 178, when considering a quite similar provision of a statute: "In the case before us the words are general, and include all persons who come within the description of illegitimate children; and when the legislature speaks in general terms of children of that description, without making any exceptions, we are bound to suppose they design to include the whole class." Bar, in his work on International Law, (page 434,) says: "Legitimation of bastards, either by subsequent marriage or by an act of the government, (*rescriptum principiis,*) is nothing but a legal equalization of certain children illegitimately begotten with legitimate children." In other words, the object and effect of section 230 is to change the *status* and capacity of an illegitimate child to the *status* and capacity of a child born in lawful wedlock.

This case, upon its facts, presumably stands alone in legal jurisprudence, for counsel in the exercise of great learning and unexampled industry have failed to parallel it. We have here a father at all times domiciled in the state of California, a mother at all times domiciled in England, and an illegitimate child born in England, and continuously there residing until the death of her father in California. As to the effect of our statutes upon such a state of facts, the consideration of the matter of domicile of these parties, and the principles of law applicable thereto, is a most important element to its proper determination, and it is a source of some satisfaction to be able to say that there are elementary principles pertaining to this subject of domicile, even though few in number, upon which practically all the text writers stand on common ground, to wit: (1) The domicile of the mother is the domicile of the illegitimate child, and the place of birth of the child is an immaterial element. (2) In a case of *legitimatio per subsequens matrimonium* the place of marriage does not affect the question. (3) Legitimation by a subsequent marriage depends upon the law of the domicile of the father. Dicey, Dom. p. 181, and other text writers, supported by many authorities, holding that the domicile of the father at the date of the birth is the vital inquiry, and other authority; Fras. Parent & Child, p. 52; Bar, Int. Law, p. 434; and Sav. Priv. Int. Law, p. 302,—holding that the domicile of the father at the date of marriage is the determinative fact. Inasmuch as the deceased, Blythe, was domiciled in California both at the time of the birth of the child and at the time he performed the acts which it is claimed resulted in legitimation, this question does not become an issue in the case, and we are not called upon to dispel the clouds of doubt that envelop it.

The contention of appellants that the *status* of a person residing in a foreign country, and a subject thereof, cannot be changed by acts performed in California under a provision of the law of our state legislature, cannot be supported as a rule without many exceptions, and to the extent of those exceptions a state law must be held, by its own courts at least, to have extraterritorial operation; and this principle of the foreign operation of state laws even goes to the extent that in many instances such laws are recognized and given effect by the courts of that particular foreign jurisdiction. The doctrine of extraterritorial operation of state laws is fully exemplified in the case of Hoyt v. Thompson, 5 N. Y. 340, where the court says: "It is a conceded principle that the laws of a state have no force *proprio vigore* beyond its territorial limits, but the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice where neither that state nor its citizens will suffer any inconvenience from the application of the foreign law. This courtesy or comity is established, not only from high motives of respect for the laws and institutions of the foreign countries, but from considerations of mutual utility and advantage." The case of Burton v. Burton, *40 N. Y. 359, is a striking illustration of the operation of a law of the United States in affixing a different *status* to a foreign subject, resident in a foreign country. In that case, after plaintiff's marriage to Burton in a foreign land, he himself being a foreign resident and subject at the time, he emigrated to the state of New York, was naturalized, and there died. Although an actual resident of England at all times, upon the death of her husband she came to New York, and claimed her right of dower upon the ground that she was a citizen of the United States, made so by virtue of the naturalization of her husband under a general act of congress to that effect, and her claim was upheld. In conclusion the court uses this language: "It is said, furthermore, that she did not, by residence or in any way, assume the allegiance of the United States, or give her assent to the citizenship conferred by the act. This, however, was not necessary to entitle her to claim its benefits." In Headman v. Rose, 63 Ga. 458, the same question was again presented, and that court said: "When the claim was first presented here as to whether Mrs. Rose could claim to be a citizen of the United States under the provisions of that act of congress, (having never been in the United States until after the death of her husband,) we were all inclined to the opinion that she could not; but, upon a more careful examination of that statute in the light of the interpretation which has been given to it by the supreme court of North Carolina in Kane v. McCarthy, 63 N.C. 299, and by the court of appeals of New York in Burton v. Burton, *40 N. Y. 371, and in Kelly v. Owen, 7 Wall. 496, in which the supreme court of the United States cites the case of Burton v. Burton approvingly, we hold and decide that, if Mary Rose was married to William Rose, intestate, and he was a naturalized citizen of the United States, then she, by the terms and provisions of the act of congress of 1855, was also a citizen of the United States." It will be noticed that these decisions are not based upon the principle that the domicile of the husband was the domicile of the wife, and that consequently she was deemed to be in this country at the date of his naturalization, and therefore came under the operation of the act, but they rest upon the broad principle that congress has not only the power to say what aliens shall become citizens of the United States, but what acts shall create such citizenship. The fact that these cases bear upon the political *status* of the party, rather than upon his civil *status*, does not weaken their force and authority here. In principle no distinction can be discerned in this regard. In both cases there is involved an exercise of the same sovereign power. This doctrine has been carried to still greater lengths in criminal cases, where a crime has been committed in a foreign jurisdiction. In the Warrender Case, 2 Clark & F. 539, Lord Brougham remarked: "But it may be said that, the offense being committed abroad, and not within the Scotch territory, prevents the application to it of the Scotch criminal law. To this it may, however, be answered that, where a person has his domicile in a given country, the laws of that country to which he owes allegiance may visit even criminal offenses committed by him out of its territory. Of that we have many instances in our own jurisprudence. Murder and treason committed by Englishmen abroad are triable in England, and punishable here. Nay, by the bill which I introduced in 1811, and which is constantly acted upon, British subjects are liable to be convicted of felony for slave trading in whatever part of the world committed by them."

Section 215 of the Civil Code is as follows: "A child born before wedlock becomes legitimate by the subsequent marriage of its parents." This section takes a wide range. Its operation is not confined within state lines. It is as general as language can make it. Oceans furnish no obstruction to the effect of its wise and beneficent provisions. It is manna to the bastards of the world. If Blythe, subsequent to the birth of plaintiff, had returned to England, and married Julia Perry, such marriage, under the provision of law just quoted, *ipso facto* would have resulted in the legitimation of Florence Blythe. Then, in answer to the interrogatory of appellants already noticed, we say that she was so domiciled that by the laws of California she could have been changed from bastardy to legitimacy. Our statute, conjoined with principles of international law, would have changed her bastardy to legitimacy in the world at large; and regardless of international law, and regardless of all law of foreign countries, our statute law alone would have made her legitimate in the world at large, whenever and however that question should present itself in the courts of California. And we also have here a most striking illustration of the extraterritorial operation of California law. We have the effect of a statute of this state attaching to a state of facts where the mother and child were never in California, but residing and domiciled in England, and the marriage taking place in England; and California law, as stated, has the effect upon that child to give it a different domicile, and completely change its *status*. Such would not only be the effect of this law upon the child viewed by California courts, but such would be its effect viewed by the courts of England, where the child was domiciled, and that, too, notwithstanding no provisions of law are there found for the legitimation of bastards. This assumption of Blythe's marriage to Julia Perry in its facts forms an exact photograph of the celebrated case of Munro v. Munro, found in 1 Rob. Scot. App. H. L. 492; a case crystalizing the judicial thought of the age upon the subject, and commanding the respect of all writers and judges upon the law of domicile. We shall make copious references and indulge in liberal quotations from that decision, for its legal soundness never has been questioned, and, as we view the subject, it casts a flood of light upon many matters involved in the investigation at hand.

Munro, a Scotch gentleman of fortune, domiciled in Scotland, while upon a visit to London, cohabited with an English woman, domiciled in England, and a child was the result of such cohabitation. He subsequently married the woman in England, and it was held under the law of Scotland, by the house of lords sitting as a court of appeal, (although, if it had been a case appealed from the English courts, the decision would undoubtedly have been the same,) that such child was thereby legitimated, Scottish laws providing for legitimation *per subsequens matrimonium*. It was there said: "It is maintained that the pursuer having been born in England of an English woman, not married at the time of the birth, she was born an illegitimate child; that that *status* of illegitimacy was indelible by the law of England; and that a subsequent marriage, even taking it to be a Scotch marriage, could not legitimate the child, or wipe off the indelible stain of illegitimacy. We cannot assent to this proposition, and, with all possible deference to any different opinions, we know of no authority for it in the law of Scotland, or among the jurists and writers on general law, in the application here attempted to be made of it. * * * To say again that because the child was born in England of an English mother her illegitimacy is indelible, if this means that it is indelible by the law of England, and under the law of England, is to say no more than that the law of England has not adopted the rule of legitimation *per subsequens matrimonium;* but if it be meant that because a child was born in England it cannot become legitimate in Scotland by a Scotch marrriage, is a question to be determined by the law of Scotland; it is a *petitio principii*, for which there is no authority whatever in that law. * * * We are here, in a Scotch question, and in a Scotch court, applying a plain rule of our law, and unless that law says that if a child be born in England it shall not have the benefit of the rule, we do not see how it is at all material that it could not enjoy it if the law of England were to be applied to the case; but we know of no exception in the law of Scotland, nor, as far as we are informed, is there any such exception recognized in the law of any country which holds the principle of legitimation *per subsequens matrimonium*. We are not here giving any opinion on a point about which it does not belong to us to form any judgment. We are not inquiring what the law of England might decide, if the pursuer, or any person similarly situated, were making a claim in an English court of law in respect of property within their jurisdiction. * * * We are aware that conflicts of law may take place, and there is no help for it when they do occur; but the question before us is a purely Scotch question, to be ruled by general principles, no doubt, but still with reference to the law of Scotland in that particular point, and we cannot, in consistency with the established principles of that law, hold that this pursuer could not become legitimated by the marriage of her parents, when or wheresoever she may have been born. It appears to us to be very clear that the circumstance of the mother being English adds nothing at all to the supposed difficulty in the place of the pursuer's birth. She was certainly illegitimate by the law of England, and by the law of Scotland also, at the time of her birth, and she would have been so equally though her mother had been a Scotch woman. Lord MACKENZIE said: 'I cannot help entertaining doubt whether the indelibility of English bastardy has any meaning beyond this: that an English bastard is not legitimated by an English marriage. * * * But, suppose it were true that English bastardy is indelible, not only against a marriage in England, but against a marriage all the world over,—I say, suppose there was produced a statute providing and declaring that an English bastard, born in England, should remain a bastard all the world over, notwithstanding anything that could be done in any country, —I ask, could we give it effect? Could we acknowledge the authority of such a statute? I think we will be bound to say that the English parliament might rule the fate of the bastards in England, but that its laws were not entitled to extend to other countries, and that there was no principle of the law of nations which would give effect to such a statute.'" In summing up his conclusions, the lord chancellor, after holding Munro to be domiciled in Scotland, said: "If that be a correct conclusion from the evidence, it follows that the appellant in Munro v. Munro, being the child of a domiciled Scotchman, had at the moment of her birth a capacity of being legitimatized by the subsequent marriage of her parents for all civil purposes in Scotland, and that she accordingly, by their subsequent marriage in 1801, became legitimated, and, as such, capable of succeeding to the property in question."

The foregoing views of learned judges are in direct conflict with the arguments of appellants' counsel in this case; and such views were declared to be the law after able arguments there made upon the same lines as here presented. Appellants insist that the domicile of the child irrevocably fixes that child's *status.* In this case, subsequent to the child's birth, Julia Perry married a domiciled Englishman; hence her domicile was permanently established in England, and for that reason the child's domicile, being the mother's domicile, was permanently established there. Under appellants' reasoning this state of facts would forever debar the child from legitimation, for even its presence in California would avail nothing as against its English domicile. If such be good law, section 226 of the Civil Code, expressly authorizing the adoption of minors of other states, is bad law, for it is squarely in conflict with those views.

We find in Story's work upon Conflict of Laws (section 105*a*) the following: "*Sixthly.* As to issue born before the marriage, if by the law of the country where they are born they would be legitimated by the subsequent marriage of their parents, they will, by such subsequent marriage, (perhaps in any country, but at all events in the same country,) become legitimate, so that this character of legitimacy will be recognized in every other country. If illegitimate there, the same character will belong to them in every other country." But Judge Story's citations in its support do not clearly bear him out, and legal authority to the effect that the place of birth forms no element in the case vastly preponderates. We have in Loring v. Thorndike, 5 Allen, 257, a case involving additional elements, and therefore additional complications, even to those found in the Munro Case. The man was domiciled in Massachusetts. The woman was domiciled in Mayence. The illegitimate children were born in Frankfort on the Main, and the marriage occurred at that city. The Massachusetts law required not only a subsequent marriage, but a subsequent acknowledgment of the child. Upon this state of facts, and this provision of law, the child was held legitimate by the Massachusetts court, even though the acts of acknowledgment occurred in a foreign country. In the case of In re Grove, 40 Ch. Div. 216, Lord Chief Justice COTTON said: 'What is really necessary, I think, is that the father should at the time of the birth of the child be domiciled in the country allowing legitimation, so as to give to the child the capacity of being made legitimate by subsequent marriage; but it is the subsequent marriage which gives legitimacy to the child, who has at its birth, in consequence of its father's domicile, the capacity of being made legitimate by subsequent marriage." In the same case Lord Justice FRY stated: "The appellant claims through Sarah Thomegay, who was born in 1744, in this country, [England,] and was an illegitimate child of Mark Thomegay and Margaret Powis. At birth that child took the domicile of its mother, and it took the *status* of illegitimacy according to the law of the domicile of its mother, and it took also the capacity to change that *status* of illegitimacy for one of legitimacy, provided that, according to the law of the domicile of the father, the subsequent marriage would work legitimation. The position of such a child, therefore, is curious, taking domicile and *status* from the mother, but taking the potentiality of changing its *status* from its putative father." In the case of Shedden v. Patrick, 1 Macq. 535, the father being domiciled in the state of New York at the date of the child's birth, and there being no law of legitimation in New York, the child was declared illegitimate by the English courts.

Appellants' counsel confidently insist that Ross v. Ross, 129 Mass. 243, is valuable as an authority to support their views. After a careful examination of the opinion in that case, we are unable to perceive its force as authority here. A child was legally adopted in Pennsylvania. The adoptive parent removed with the child to Massachusetts, where the father became domiciled, and there died, leaving real estate in that commonwealth. The litigation arose upon a question as to who was entitled to inherit, and the court said: "We are, therefore, of the opinion that the legal *status* of the child of intestate, once acquired by the demandant under a statute and by a judicial decree of the state of Pennsylvania, while the parties were domiciled there, continued after their removal into this commonwealth, and that by virtue thereof the demandant is entitled to maintain this action." Respondent's position in this case controverts no principle of law there declared, and it is difficult to see how the court could have arrived at a different conclusion. The judgment would have been the same if the father had never changed his domicile to Massachusetts, and probably the same if there had been no law of adoption whatever in that state. Miller v. Miller, 91 N. Y. 315, in principle seems to have been that character of case, and the same conclusions were there arrived at by the court. In the celebrated case of Birtwhistle v. Vardill, 7 Clark & F. 936, to which the learned chief justice refers in his opinion in the Ross Case, the decision would have undoubtedly been in line with Ross v. Ross, if, in lieu of the statute of Merton, England's law of descent had been similar to the Massachusetts provision. The case of Foster v. Waterman, 124 Mass. 592, involves nothing but a single question of statutory construction, and in no manner supports the proposition that a resident of one state cannot adopt a child under the adoption laws of another state where such child is domiciled; but the Appeal of Wolf, (Pa. Sup.) 13 Atl. Rep. 760, does hold directly to the contrary of such contention.

The doctrine of indelibility of bastardy in England is not correct in its broadest sense, for it is in the power of parliament to legitimate bastards at any time.

Neither is the rule universal that a child legitimate in one country is legitimate in all the world. This principle of different *status* in different countries finds a striking illustration in Lolley's Case, Russ. & R. 236, reviewed and dissented from by Lord BROUGHAM in Warrender v. Warrender, supra. In that case the facts disclose that Lolley was married in England, divorced in Scotland, and upon his return to England, and making a second marriage, he was then tried and convicted of bigamy. Here we have a state of facts where, under the respective laws of England and Scotland, Lolley, after his divorce, and prior to his second marriage, was a married man in England, and an unmarried man in Scotland, and after his second marriage he had a lawful wife in Scotland, and a different lawful wife in England; thus having two lawful wives at the same time. It can hardly be said that Lolley's *status* was the same in both countries. A similar principle is applied to the legitimacy of children by subsequent marriage. Section 215 applies to all bastards where the father is domiciled in California. Its provisions would operate upon and legitimate a child born of a father who at the time of its conception and birth was the husband of another woman, or would apply to an incestuous bastard. Such was expressly declared to be the law under a similar provision of a state statute in the case of Hawbecker v. Hawbecker, 43 Md. 516, the court saying: "No doubt the legislature, in thus making the civil rule of the common law, intended to hold out to the sinning parents an inducement to marry, and thus to put a stop to the mischiefs of further illicit intercourse between them; but, in our opinion, the main purpose and intent of the enactment we are now considering was to remove the taint and disabilities of bastardy from the unoffending children whenever their parents did marry, without regard to the deepness of guilt on the part of their parents in which they were conceived and born." Such a child, under the canon law, would be deemed an adulterine or incestuous bastard, incapable of legitimation, and in the courts of certain countries where that law controls would not be recognized as legitimate. Thus is presented a case—and by no means an anomalous one—where the child would be legitimate in California and illegitimate by the laws of various other countries.

We have quoted thus extensively from the authorities upon the subject of domicile as especially bearing upon the question of *legitimatio per subsequens matrimonium* for the reason that we are unable to perceive any difference in the general principles of law bearing upon that character of legitimation and in those principles bearing upon other forms of legitimation authorized by the same statute. The only distinction claimed by appellants is that legitimation founded upon subsequent marriage is based upon the fiction of law that a previous consent existed, and the marriage related back to that time. Upon this point it would seem all-sufficient to say that our statute does not recognize such a fiction, and its effective operation in no wise depends upon the assumption of its presence. Times are not what they once were, and we live in an age too practical to build our law upon the unstable foundation of fictions. In Birtwhistle v. Vardill, supra, Lord Chief Justice TYNDAL, in speaking upon this question, says: "Pothier, on the other hand, when he speaks of the effect of a subsequent marriage in legitimating children born before it, disclaims the authority of the canon law; nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the custom of Troyes, and then adds * * * that it is a common right received throughout the whole kingdom." Schouler, Dom. Rel. § 226, says: "The principle to which the law of legislation *per subsequens matrimonium* is to be referred has been a subject of controversy. The canonists base the law, not on general views of expediency and justice, but upon a fiction, which they adopted in order to reconcile the new law with established rules, for, assuming that as a general rule children are not legitimate unless born in lawful wedlock, they declared that by a fiction of law parents were married when the child was born. Such reasoning—by no means uncommon when the wise saw more clearly what was right than why it was so—has not stood the test of modern logic, and the Scotch courts have placed the rule once more where its imperial founders left it, namely, on the ground of general policy and justice."

Upon principle no distinction can be made between the rules of law applicable to these various forms of legitimation. Many of the states of this Union, in order to effect those ends, require, in addition to a subsequent marriage, that the father (in some states both father and mother) shall also acknowledge the child. This is the case of Loring v. Thorndike, supra, where the marriage not only took place in foreign territory, but, as is said in Miller v. Miller, supra, the facts of the acknowledgment occurred in a foreign jurisdiction. Thus, Massachusetts law required marriage and acknowledgment, and invoked the rule of domicile of the husband to establish the capacity of the child for legitimation. Section 2405 of the Revised Code of Alabama allows legitimation of a bastard child simply by acknowledgment of the father in writing, certified and recorded. No consent of the mother is required; no notice to or consent of the child is demanded. If such a statute were found within the lids of the Civil Code of this state, under the facts of this case as they appear upon the question of domicile, Blythe, by following the requirements of the provision of the law there laid down, could legitimate his illegitimate child. Civil Code, § 215, declares that marriage *ipso facto* results in legitimation; and section 230 declares that acknowledgment, accompanied by certain other acts, shall result in legitimation. If the principle of the domicile of the father is good law where marriage and acknowl edgment are both required to accomplish the result, that principle is no less good law when applied to marriage alone, under section 215, or when applied to acknowledgment alone, under the Alabama Code, or when applied to acknowledgment accompanied by other acts, under section 230 of the Civil Code of this state.

Dicey says, (page 192:) "Question. What is the effect, according to English law, of a person being made legitimate by the authority of a foreign sovereign? Suppose that a person born illegitimate is legitimated by a decree of the czar of Russia, will such a person be held legitimate here? There is no English authority on the subject. The most probable answer is (it is conceived) that the effect of such a decree would, like the effect of a subsequent marriage of the parents, depend on the domicile of such person's father at the time of the birth. Suppose, that is to say, that D., the child's father, were domiciled in Russia at the time of the child's birth, the decree would have the effect of making the child legitimate in England. A person, on the other hand, born of a father domiciled in England, could not be made legitimate here by the force of any foreign law."

Bar, in his International Law, has discussed this identical question at length, although it can scarcely be said to be even incidentally mentioned in the works of either Savigny, Foote, Phillimore, or Schaffner. He says, (section 198:) "In what we have said we have proceeded on the footing that legitimation, if the consent of the child be validly given, is dependent solely on the personal law of the father, and that, therefore, if this law allows legitimation by an act of the head of the state, it matters not to inquire whether some other legal system, in particular the personal law which the child has hitherto enjoyed, recognizes this legitimation, but that, on the contrary, legitimation *per rescriptum* is to be regarded in international law on exactly the same footing as legitimation *per subsequens matrimonium*. This opinion, which, as we think, is the prevailing opinion in German jurisprudence, and in which, too, Fiore, § 149; Phillimore, § 542; and Wharton, § 249,—concur, has, however, often been disputed. In the first place, it has been said that an act of that kind by a sovereign must necessarily have its operation confined to the dominions of that sovereign, for he has no authority beyond these limits; but if it be true generally that the personal law of the father is the rule, that law must be allowed to say that legitimation can take place by means of an act of that kind. The legitimation is to be recognized, not because the sovereign is to exercise sovereign rights in another country, but because the personal law is to have effect there. The opposite opinion, which is held by older writers, is no doubt explained, and to some extent justified, by the imperfect legal capacity which, in the middle ages, and in many territories down to later times, clung to the bastard, especially, too, as the sole result of legitimation, even in the territory of the sovereign who bestowed it, was in many cases merely to withdraw the estate of the person so legitimated upon his death from the grasp of his sovereign. * * * But, in the second place, the more modern French school, while they reject the view of the older writers as to the effect of the legitimation being necessarily confined to the territory of the sovereign who bestows it, refuse to recognize this kind of legitimation unless it is also recognized in the personal law which the child has hitherto enjoyed. In this way, one who has hitherto been a French child in respect that the Civil Code has never sanctioned legitimation *per rescriptum*, can never be legitimated by the act of a foreign sovereign. But Laurent, in arguing in support of this doctrine that legitimation touches the *status* of persons, and that this *status* must be determined everywhere of Frenchmen by the law of France, proves too much. This rule would have to hold also in the cases of legitimation by subsequent marriage, so that in this case also the personal law of the child would be the only rule." In this connection, and as bearing directly and emphatically upon the general principles involved in the solution of the important question presented by this branch of the case, we again quote from Bar, § 194: "If the personal law of the child requires more conditions to be observed before it will pronounce that a child has been legitimated, the reason of that is not any anxiety for the interest of the child, so much as for that of the father and his family, *e. g.* the other children, his collateral relations; but the state, to which the child has up to that moment belonged, has no interest in that matter, and, if that legal system which is charged with the protection of the family is willing to hold the child legitimated, there is in truth no conflict between the two systems. That system to which the child has hitherto belonged says: 'If the father belonged to me, I would not hold the child to be legitimated.' That involved no contradiction of the other system, which says: 'Since the father belongs to me, I do hold the child to be legitimated.' No doubt we must assume that assent of the child is given in due legal form, for legitimation can only take place against the child's wish if the personal law of the child forces that upon him or her, but in by far the greater number of cases it will be beyond all doubt that the legitimation is advantageous to the child, and the child or its guardian can subsequently signify its approval of and found upon it." Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this state authorize and encourage it, and there is no principle upon which California law and policy, when invoked in California courts, shall be made to surrender to the antagonistic law and policy of Great Britain. It was said in Munro v. Munro: "We are here in a Scotch question, and in a Scotch court applying a plain rule of our law, and unless that law says that, if a child be born in England, it shall not have the benefit of the rule, we do not see how that it is at all material that it could not enjoy it if the law of England were to be applied to the case;" and again: "We are not inquiring what the law of England might decide if the person were making a claim in an English court of law in respect of property within their jurisdiction." And we say here plaintiff was the child of Blythe, who was a domiciled citizen of the state of California. She founds her claim upon the statutes of this state, and is now here invoking the jurisdiction of the courts of this state. It is a question of California law, to be construed in California courts, and we see nothing in our constitution or statutory law, or in international law, to have prevented Blythe from making the plaintiff his daughter in every sense that the word implies. In conclusion, we hold that Blythe, being domiciled in the state of California both at the time of the birth of plaintiff and at the time he performed the acts which it is claimed resulted in the legitimation of plaintiff, and California law authorizing the legitimation of bastards by the doings of certain acts, it follows that Florence Blythe, the plaintiff, at all times was possessed of a capacity for legitimation under section 230 of the Civil Code of this state.

We pass to an examination of the second branch of the discussion involved in the consideration of section 230, namely, if plaintiff's situation endowed her with the capacity for legitimation, did the acts of Blythe bring her within the requirements of the statute? Those requirements are: (1) He shall publicly acknowledge the child as his own; (2) he shall receive it as his child, with the consent of his wife, if he is married, into his family; (3) he shall otherwise treat it as if it were a legitimate child. As to these matters, the trial court found in detail the facts to be that Blythe had fulfilled every requirement of the statute. These findings are strenuously attacked, as being unsupported by the evidence, and we are called upon to pass upon its sufficiency in this regard. This section of the Code is entitled to a liberal construction, because section 4 provides: "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and promote justice." By virtue of this provision, the court, in the case of In re Jessup, 81 Cal. 419, 21 Pac. Rep. 976, and 22 Pac. Rep. 742, 1028, has expressly declared that this section shall have a liberal construction; but, as there said: "Liberal construction does not mean enlargement or restriction of a plain provision of a written law. If a provision of the Code is plain and unambiguous, it is the duty of the court to enforce it as written. If it is ambiguous, or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction is to be indulged as, within the fair interpretation of its language, will effect its apparent object, and promote justice." Did Blythe acknowledge the plaintiff to be his own child? The word "acknowledge" has no technical meaning, and in its ordinary acceptation is defined by Webster "to own or admit the knowledge of." It is not necessary to dwell at great length upon this special element necessary to satisfy the statute. Under the evidence it can hardly be considered debatable. Blythe declared the plaintiff to be his child to all persons upon all occasions. He was garrulous upon the subject. Aside from his business occupations, his mind ever rested upon his relations to the child, and it was his common topic of conversation. If necessary to this decision, it could almost be held that he shouted it from the housetops. He acknowledged the child to its mother and to its grandmother before it was born, and subsequently in no single instance was he ever heard to deny its paternity. It was named and baptized Florence Blythe, at his request, and ever after has been known to the world as Florence Blythe. Authority is not necessary to be cited to support this branch of the case, but In re Jessup, supra, is not only in accord with this position, but conclusive in its favor. This acknowledgment was also public, for, as we have seen, the thought of concealment of the paternity of the child never entered his mind. Why should it, when it is entirely apparent from the evidence that he was proud of such paternity?

Did Blythe receive it as his child, with the consent of his wife, into his family? Blythe had no wife, and that element of the statute is eliminated from the case. No construction of the statute, however rigid, would hold the existence of a wife necessary before the benefits to be derived under this section could possibly attach to an illegitimate child. This question of the wife's consent can only be a material element when there is a wife to consent. In re Jessup fully recognizes and necessarily adopts this principle, for in that case, as here, the father of the child had no wife to consent, and such fact would thus have defeated plaintiff's claims at the very threshold of the litigation. It may be conceded for the purposes of this case that, if Blythe had a family, such child must have been received therein, or the statute would not have been satisfied; but, as we have seen, if Blythe had no wife to consent, that requirement has no standing here; so, if he had no family into which the child could have been received, that element is foreign to the case. Under the rule of liberal construction laid down in the case of In re Jessup, such must necessarily be the law. To give that meaning to the statute by which all men who have no families are debarred from legitimating their illegitimate offspring, would be to give the section a harsh and illiberal construction. Unless the provision is so plain and explicit as to amount to an express inhibition to that effect, upon every principle of right and justice we could not so hold. The rule of construction, as declared in the Jessup Case, is that, if the statute is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such construction is to be indulged as within the fair interpretation of its language will effect its apparent object and purpose. Section 1866 of the Code of Civil Procedure further provides: "When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right, and the other against it, the former is to be adopted." Applying these tests of statutory construction to this provision, but one result can flow therefrom, and that is, the existence of a family no more than the existence of a wife is an indispensable element to a complete and perfect adoption (or legitimation, more properly speaking) under this provision of law. This view is fully borne out by the decision in Re Jessup. It is said in the decision of the court in that case, referring to Jessup· "As he had no home and no family, in the strict sense of a collective body of persons who live in one house and under one head or manager,—a household including parents, children, and servants,—it would not be a fair or liberal construction to say that the child had not been adopted or acknowledged because he had not been received in such a home, or made a member of such family." It is needless to say that the Jessup Case was considered with the care that its importance demanded, for the record discloses that fact; and it may be suggested that upon this question alone the court stood together. Indeed, the learned counsel representing appellants in that case throughout their arguments conceded such to be the law. Blythe had no family. The court found that he was living with a mistress in San Francisco from the year 1880 to the time of his death. He appears to have lived in lodging houses during all these years. He had no relations, save of the collateral line, and they were at all times residing in a foreign country. He had not seen them or communicated with them for more than 10 years prior to his death, and at no time had he seen any of them or communicated with any of them since Florence Blythe, the plaintiff, was born. If he had a family, either this mistress or these collateral kindred constituted that family. Such cannot be the fact, and it would be a travesty upon the word to so hold. It was held in the Jessup Case that the father had a family in the sense of brothers and sisters, with whom he was brought into frequent contact, and from whom he concealed and to whom he denied the paternity of the child, and for these reasons and others the court held there was no adoption. There are no facts in this case in the slightest degree comparable to those there presented. In that case the language of the court as to this point bears directly upon the question of acknowledgment, and not as to the reception into the family; and we have already seen that a public acknowledgment was made by Blythe against which nothing can be said. If the term "receiving it into his family" does not necessarily mean an actual reception into an actual family, but may mean a constructive reception into a constructive family, then such measure of requirement is filled to the brim. Plaintiff was baptized in Blythe's name, at his request. Their correspondence indicates hearts filled with mutual affection. Her picture looked down upon him from its place upon the wall. At his rooms her name was a household word.

We pass to the examination of the remaining element of the statute, to wit: "He shall otherwise treat it as a legitimate child." If the father has publicly acknowledged the child to be his child, and has taken it into his family, it would seem but little remained to be done to wash away forever the stain of bastardy. The public acknowledgment of the child is the main fact. It is the important factor in the eyes of the statute. If the child was publicly acknowledged and received into the family, it would be a novel case where a court of equity would close its doors and refuse to declare a legitimation because the child was poorly clothed and illy fed. That case has not yet arisen, and it is hoped and believed it never will. The statute clearly means that the father must treat his illegitimate child as he would naturally treat his legitimate child, not as the majority of men in his financial circumstances would or should treat their children. Every man furnishes the rule by which he must be measured. No imaginary standard of excellence can be created, and then it be demanded that Blythe shall rise to that standard. If appellants' contention be true, a child whose father was an ignorant man, believing education an evil to be shunned, and who therefore denied an education to the child, could not be granted legitimation. Upon appellants' theory, an illegitimate child, whose father was a miser, would be compelled to bear forever the stain of bastardy. While Blythe was a man of large property interests, his estates were heavily involved. Money was required in many channels, and it is not probable that he had any surplus of cash on hand. Plaintiff was well clothed and well fed. It appears that at no time was she deprived of the necessaries of life. She resided at all times either with her mother or her grandfather. Blythe furnished something near $150 a year for her support. Certainly during her infancy this was entirely sufficient, and no complaints were made to him that more money was needed to meet her wants. At all these times he himself was either stopping in a log house in the mountains of Trinity, or living with his mistress in lodgings in San Francisco, surrounded by his dogs, birds, and cats, while his hens were located upon the roof. It may well be inferred from the simplicity of his own life, as indicated by the foregoing circumstances, that, if legitimate children had been born to him, they would have been treated, as far as pecuniary expenditures were concerned, upon the same lines as this illegitimate child was treated. He made a will, which was subsequently lost or destroyed, wherein he provided for her. He corresponded with her as a father would correspond with his little daughter. He had her christened in the name of Florence Blythe. Her health, her education, and her religion were matters in which he exercised the utmost concern. She occupied his thoughts, and her name was upon his lips in his dying hour. For these reasons, it may well be said that "he otherwise treated her as a legitimate child."

We pass to an examination of section 1387 of the Civil Code, upon which plaintiff relies to constitute herself an heir of Thomas H. Blythe, deceased. That section declares, *inter alia*, that "every illegitimate child is an heir of any person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." It is unnecessary to decide whether this provision effects the *status* of a child, or whether it is alone a statute of descent. If it either directly or indirectly touches upon her *status*, our views upon the question, as herein previously expressed, are applicable. If it is a statute of descent pure and simple,—and Estate of Magee, 63 Cal. 414, seems to so declare in explicit terms,—then the plaintiff is entitled to all the benefits of it, regardless of domicile, *status*, or extraterritorial operation of state laws. The rules of liberal construction applicable to section 230 are likewise to be invoked in the consideration of section 1387, and the obvious purpose and intent of the legislature in making this enactment was to entitle illegitimate children to inherit their father's estate the same as legitimate children. Did the intestate, Blythe, in writing, signed in the presence of a competent witness, acknowledge that he was the father of the claimant, Florence Blythe? Upon an inspection of the provision, we see that the word "acknowledge" must be viewed in the light of its ordinary acceptation, and it is therefore used in exactly the same sense as when found in section 230. The acts required to constitute the acknowledgment are not laid down in the statute. No stated form of acknowledgment is there found by which we may be guided. Again, we must take this statute as we find it. We are not here to construct a statute, but to construe a statute. We can neither interpolate nor eliminate, and we are bound to assume that the legislature enacted the law as it now stands with a due comprehension of the meaning of words, and of the rules of statutory construction, and that they incorporated into the act all that was intended, and that they intended that effect should be given to all that was found therein.

The writings relied upon in this case to bring plaintiff within the provisions of the statute are various letters, written at different times by Blythe to his daughter and her grandfather, which letters were signed by him in the presence of W. H. H. Hart, who was a competent witness. These letters, as to the question of acknowledgment of relationship, are of the same general character and import, and our investigation will be limited to the consideration of two of them,—one a letter to the grandfather, and the other a letter to the daughter,—either of which, to our minds, fully satisfies the statute. He writes a letter to the plaintiff, from which we quote: "My darling child: You have made your father very happy by writing to him your little letter. * * * But I feel sad to learn that my own dear child has been sick, and her papa not being near to help her. You say you wonder when you shall see your dear papa. Well, my dear child, it is about like this: Your papa * * *. After that your papa will leave San Francisco, * * * and have his dear Florence with him always. * * * I should like my dear daughter to write to her papa a letter once every month. * * * Grant is now laying at my feet, while his master is writing his first letter to his own darling child far away. * * * May God bless you, my dear child. From your loving father, THOMAS H. BLYTHE." The letter to the grandfather was read to said Hart, and signed in his presence. We quote: "I look at the proposed baptism of dear Flora as a matter of very deep importance. After full deliberation, I think it best to have Flora brought up in the Episcopal Church,—Church of England. You will therefore please have my daughter christened at once, and have her named after her father, Florence Blythe." There can be but one construction placed upon these letters, and that is they mean that Florence was the daughter of Thomas H. Blythe,—"his own dear child." These letters acknowledge the relationship of father and daughter, not hesitatingly and grudgingly, but willingly, gladly, and entirely. When a father says, "You are my own darling child;" "I am your father; you shall be baptized in my name, and loved, cherished and protected always,"—the subject is exhausted, the cup of acknowledgment is filled to overflowing. If letters are entitled to be used as writings to prove the fact of acknowledgment, these letters prove that fact. It was decided in Bailey v. Boyd, 59 Ind. 297, under a statute requiring the father to acknowledge his illegitimate child subsequent to marriage, before such child should be held legitimate, that "it was not necessary that this acknowledgment should have been expressed in words, but it may fairly be inferred from the acts and conduct of the elder Bazil." But it is now insisted that the writing must be a writing specially prepared for the sole object of making the illegitimate child an heir of the father. The adjudications of courts are not favorable to this view. In the case of Rice v. Efford, 3 Hen. & M. 227, it was held that the recognition of the illegitimate child in a will as the testator's child, the will being void as a will, was sufficient to entitle him to inherit; Chief Justice TUCKER, in this connection, saying in Stones v. Keeling, reported in the same volume, upon the following page: "The act of 1785, it should be remembered, relates to the disposition of property only, and proceeds to show who shall be admitted to share the property of a person dying intestate, notwithstanding any former legal bar to a succession thereto; and in that light the law ought to receive the most liberal construction, it being evidently the design of the legislature to establish the most liberal and extensive rules of succession to estates in favor of all in whose favor the intestate himself, had he made a will, might have been supposed to be influenced; and here there can be no doubt, had he died testate, that these daughters would have been the first object of his care." Reading the present case in the light of the evidence furnished by the record, there can be no doubt but, if Blythe had died testate, Florence would have been the first object of his care. In Succession of Fletcher, 11 La. Ann. 60, Henry Fletcher, in an act of manumission, made before a notary and witnesses, described the party enfranchised by his act as his "natural daughter slave," and such was held to be a sufficient acknowledgment of paternity, under a statute which declared that "the acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses." In that case the court, citing French authorities, held: "It is said that the words 'natural daughter slave' were terms of description foreign to the purpose of the act, used to manumit a slave, and not to acknowledge her paternity, but no form is prescribed for such an acknowledgment save only that the declaration be made before a notary public, in presence of two witnesses. If the declaration be thus made, it seems to be immaterial whether it be the main object of the act or not." In Remy v. Municipality, 11 La. Ann. 159, the court, in referring to the acknowledgment of paternity made in a will, said: "This document, it is true, was intended to be a will, and has never been admitted to probate as such, but, though not binding as a will, it is certainly good as acknowledgment of paternity, made in due form." Section 1387 is essentially a statute of inheritance, and there is no more fitting place for the father to recognize the moral duty enjoined upon him towards his illegitimate offspring than by acknowledging that child in his last will and testament, in accordance with the provisions of that section; and the fact that the acknowledgment was subsidiary to the main object and purpose of the testator in making the document would not thereby weaken the effect of the writing as an acknowledgment.

Under the statute of Indiana, marriage and subsequent acknowledgment of the paternity of the child by the father constituted a legitimation of the child, and in the case of Brock v. State, 85 Ind. 397, where the father married the woman and acknowledged the child for the sole purpose of escaping a prosecution for bastardy, and with the intention, at the time of the marriage, to immediately abandon the mother and child, it was held that such intentions were entirely immaterial, and that his acts created a legitimation. In Crane v. Crane, 31 Iowa, 296, the question here involved squarely presented itself. The statute of Iowa provided for legitimation by a recognition in writing of the illegitimate child by the father. Two propositions upon which appellants insist are directly decided against them in that case. It was held that a formal writing of recognition was not necessary, but that letters to a friend would suffice; and it was further held that the references to the child in the letters were sufficient to constitute recognition. The references by the father in those letters to the child as his child, while quite clear, are weak, vague, and unconvincing when compared to the references upon the same subject found in the letters of Blythe. A majority of the states of this Union, and also various countries of Europe, require the illegitimate child to be recognized or acknowledged by the father before legitimation takes place, yet no authority has been cited from any state or country, (and we therefore confidently assume there is none,) except the case of Pina v Peck, 31 Cal. 359, to which our attention shall be presently directed, which holds that a formal recognition or formal acknowledgment is necessary in order to constitute a legitimation.

It is insisted that the witness Hart should have subscribed his name to the writing as a witness thereto, but "competent witness" and "subscribing" or "attesting" witness are in no sense synonymous terms. In Re Noble, 124 Ill 270, 15 N. E. Rep. 850, the court says: "'Credible witnesses,' as used in the statute relating to wills, has been construed, both in England and this country, to mean 'competent witnesses;' that is, such persons as are not legally disqualified from testifying in courts of justice by reason of mental incapacity, interest, or the commission of crime, or other cause excluding them from testifying generally, or rendering them incompetent in respect of the particular subject-matter, or in the particular suit." As before remarked, it is not the duty of the court to add to or subtract from the words of the statute. We must construe it as it stands enacted. If the legislature had intended such witness to be a "subscribing" or "attesting" witness, it was easy for it to have said so. Not having so declared, it would be judicial legislation for this court to so hold the statute to be. Section 1940 of the Code of Civil Procedure provides that a writing may be proved by any one who saw it executed, and we cannot say but that such proof was contemplated by the legislature when it framed this provision of the statute. Our Codes contain many instances where the term "attesting witness" or "subscribing witness" is used, when the signature of the witness is required to give life to a written instrument, and we must presume that the legislature did not intend that the writing should be signed when it did not so declare. In all the statutes of the various states, wherever the signature of a witness to any document is required we find the statute either using the words "attesting witness" or "subscribing witness." Under the liberal rules of construction by which this court must be guided, and under the principle laid down by Chief Justice TUCKER in Stones v. Keeling, we are not called upon to defeat this plaintiff's claims by holding that the words "competent witness," as used in the statute, should be construed to mean "attesting" or "subscribing" witness. The law of Pennsylvania requires that the will of a married woman shall be executed in the presence of two witnesses; and the court said in Combs' Appeal, 105 Pa. St. 159: "Such witnesses were not required to subscribe their names thereto." If more need be said on this behalf, we would suggest that this statute was originally copied from a statute of the state of Maine, which also used the words "competent witness," but subsequently the legislature of that state amended the statute by causing it to read "and attested by a competent witness;" that legislature thus recognizing, not only the fact that legislation was necessary in order that the witness should be required to sign the writing, but also that it was a matter with which the legislature should deal, and with which the courts had no concern. It is a familiar principle of statutory construction that a statute taken and enacted from the laws of another state carries with it the construction given to it by the laws of that state. The amendment made to the statute of Maine clearly indicates what construction was there given this provision of section 1387. In speaking as to the construction of statutes relating to the form and manner of making wills, the court said in Re Simpson, 56 How. Pr. 126: "The restrictions which from motives of prudence are thrown around the right should be construed liberally in favor of the testament, and forms should not be required which the legislature has not plainly prescribed." The question as to the wisdom and policy of this provision is not a matter for our consideration. This court is not the forum to administer relief for evil in this law, if evil there be. If the law is not what it should be, let the legislature follow the course adopted by the state from which it took the law, and amend the statute in this regard, as that state has done. As the law is now written, compliance has been had with it, and, having determined that matter, the investigation is concluded, as far as this court is concerned.

It is further insisted that the letters, when placed in the crucible by which they are to be tested, are found wanting, because it is said that the writing must be complete in itself; that is, it must show upon its face that the child is an illegitimate child, and that it was signed in the presence of a competent witness. We find nothing in the law subjecting the writing to any such test. The statute does not require it. Such recitals would not add one jot to the weight and credit to be given to the writing by the court, if they were there found stated. They would have no more weight and be of no more avail in arriving at a final determination of the merits of the cause than if Blythe had said in the writing: "I made this writing, and the facts therein stated are true." A statement in the writing that it was signed in the presence of a competent witness could not be evidence of that fact; no more would a reference in the writing to the child as an illegitimate child establish such illegitimacy. In Grant v. Mitchell, 83 Me. 26, 21 Atl. Rep. 178, the court, in speaking to this question, said: "In either case it must first appear that the child is illegitimate. The statute does not, nor does it purport to, act upon any other; nor does the subsequent marriage, adoption, or acknowledgment have any tendency to prove this fact. Whatever may be the effect of the acknowledgment in showing the paternity of one proved to be illegitimate, it cannot be determinative as proof of the illegitimacy." Blythe, in writing, acknowledged himself to be the father of Florence Blythe; Florence Blythe is an illegitimate child; therefore, Blythe acknowledged himself to be the father of an illegitimate child. This logic is unassailable, and no sound reason can be adduced why the acknowledgment should contain a declaration of bastardy.

Bearing upon both branches of this case, as to the policy of the law and the true principle of construction to be invoked, we quote the apt language of Beatty, C. J., in the Jessup Case, page 435, 81 Cal., and page 750, 22 Pac. Rep., and the views there expressed in no wise conflict with the principles declared in the main opinion of the court. He says: "The only argument that can be made against his claim to inherit his father's estate rests upon a strict construction of the statutes remedial in their nature, designed to secure to innocent unfortunates in his situation a just measure of the rights to which they are by nature as fully entitled as are legitimate offspring. No doubt a strong argument can be built on this basis of strict construction against the decision of the superior court. But I adhere to the view so strongly put and so satisfactorily maintained by Justice Works in his opinion: that in cases of this kind the only strictness required is in proof of paternity. That being satisfactorily established by plenary proof, I think courts should lean strongly in favor of a finding that the father of an illegitimate child has done what every honest and humane man should be not only willing, but eager, to do, and what a just law would compel the unwilling to do. I also think it a wholly unauthorized construction of the statute that the acts of recognition, acknowledgment, etc., necessary to legitimize a natural child, should be performed with the express intention on the part of the father of accomplishing that object. If the acts are in themselves such as the statute prescribes, I think they confer legitimacy without any reference to the intent with which they are performed. There is no danger to morality in recognizing the natural rights of illegitimate children, as against their fathers, or other claimants of their estates; and there is no danger of encouraging the fabrication of spurious claims, so long as strict proof of paternity is insisted upon." The foregoing views are not in harmony with the principles declared in the elaborate opinion of Mr. Justice Rhodes, in the case of Pina v. Peck, 31 Cal. 359, and upon which decision appellants, in the main, rest this branch of their case. It is not our intention to analyze the soundness of the legal principles laid down in that opinion, otherwise than may have been incidentally done in what we have already said. Still, we might be allowed to say no authority of courts or men learned in the law is presented in that opinion to support the views there declared, although, as we have seen, authority is not wanting to the contrary. Pina v. Peck is not authority in this case, for two sufficient reasons: *First.* But four justices participated in the decision, (Justice Sanderson not taking part,) and two of these justices concurred alone in the judgment. This fact entirely destroys the effect of the decision as an authority upon any and all matters therein discussed. *Secondly*. Justice RHODES says at the very inception of his opinion: "It is contended by the defendants that this provision of the statute is in derogation of the common law, and must, therefore, be strictly construed. That doctrine was announced and applied by the court in Estate of Sanford, 4 Cal. 12, and we are of the opinion that the ruling is correct beyond a doubt. As a consequence resulting from the operation of this rule, the acknowledgment must conform to the statute, and be complete in itself; that is to say, it must not require the aid of extrinsic evidence. When the parties are identified, and the instrument in writing is produced and proven, the court must be able to say from the instrument that the person who signed it thereby acknowledged himself to be the father of the illegitimate child therein named." Thus this decision was expressly based upon strict and rigid rules of statutory construction, and, as we have seen, those rules of construction have now been entirely displaced as to the Codes by rules liberal and humane in their character. That decision being expressly based upon strict rules of construction, and strict rules of construction now being abolished, it cannot be said to be binding authority in a case which we are called upon to decide by an application of statutory rules of liberal construction. It is insisted that the following rule of construction, as declared by Judge Cooley in his Constitutional Limitations, (page 66,) must be invoked in this case, to wit: "It has ever properly been held that the legislature, by enacting without material alteration a statute which has been judicially expounded by the highest court of the state, must be presumed to have intended that the same words should be received in the new statute in the sense which had been attributed to them in the old." There can be no question but that, if the rules of statutory construction were the same now as when Pina v. Peck was decided, and the views there expressed had been adopted by a majority of the court, this principle of the construction of statutes would have controlling effect in this case; but it is equally true that, if the rules of construction have been changed, such principle, in the very nature of things, could not maintain. For the foregoing reasons let the judgment be affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.

Chief Justice BEATTY and Justice HARRISON, being disqualified, do not participate in the foregoing decision.

MCFARLAND, J. I concur in the judgment of affirmance upon the ground that the plaintiff is the heir of the deceased under section 1387 of the Civil Code. But I dissent from the proposition that plaintiff was adopted by deceased under section 230. Section 230 provides that "the father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he be married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it." There can be a compliance with this section only by doing the three things which it requires to be done, viz.: The father must publicly acknowledge the child; he must receive it into his family; and he must otherwise treat it "as if it were a legitimate child." Assuming that the deceased, in the case at bar, did the first of these three things, he certainly, in my opinion, did not do either of the other two. It is clear that he did not receive the plaintiff into his family; in fact, there is no pretense that he did so. He had no family, and therefore, of course, did not receive her into his family. It is said that, as he had no family, he could not have received her into it; nevertheless the fact remains that he did not do so, and therefore did not comply with the said section of the Code. How can there be compliance with a statute in the absence of conditions contemplated by the statute, and absolutely necessary to give it effect? The provision of the Code in question assumes the existence of a family; and it assumes that there may be a family in which there is no wife, because it provides that, if there be a wife, she must consent to receive the illegitimate child into the family. Either a widow or a bachelor, as we all know, may have a family, viz. "a collective body of persons living together under one head or manager." In order to make the statute applicable it is not necessary that there should be a living wife in the family. It might have provided that the child should be received into a family in which there was a wife; and, in that event, no reception into any other kind of a family would have been sufficient. But it does *not* so provide. The provision is that the child must be received into the father's family; and that, if there be a wife, she must consent. There must, however, be a family into which the child can be received; and, when that condition is not present, the provision of the Code under discussion can have no operation. There is no question here of strict or liberal construction. If it were true that there ought to be a strained construction in favor of illegitimate as against legitimate children, (and the law would be just the same if legitimate children were contestants,) still the statute would not bear the tension by which plaintiff seeks to stretch it. The language of the Code seems to me plain. It provides that under certain conditions an illegitimate child may be adopted by certain acts, but when those conditions do not exist it cannot by such acts be adopted. And if it be necessary to look beneath the plain language of the section of the Code in question to discover the intent of the legislature when enacting it, there is no difficulty in seeing it. It was clearly the intent that, in the absence of documentary evidence, the claims of asserted illegitimate children should not succeed upon loose oral statements about disjointed and uncertain acts and declarations of deceased persons, but that there should be such continuous and unequivocal acts as reception into the family, and treatment there as legitimate children in the face of the world. One having no family can adopt the other mode, and can, by a written acknowledgment in the presence of a competent witness, make his illegitimate child his heir, as provided in section 1387 of the Civil Code, or may provide for it by will.

I am aware that in the opinion of the court delivered in Re Jessup, 81 Cal. 408, 21 Pac. Rep. 976, and 22 Pac. Rep. 742, 1028, views were expressed different from those above stated, but they were not necessary to the decision of that case, and mere *dicta*, and, I think, incorrect. I concurred in that opinion, but as I was thoroughly convinced that the facts in that case did not bring it within the Code, under that construction of it, I must have failed to consider as thoroughly as I should have done the views above referred to. Upon mature reflection, I am satisfied that they are wrong. Neither do I think that the deceased in the case at bar complied with the third requirement of said section 230, —he did not "otherwise treat plaintiff as if she were a legitimate child." To treat a child "as if it were a legitimate child" is to treat it as ordinary people usually treat their legitimate children, considering their circumstances in life. Did the deceased do this? Can any one think that if plaintiff had been his legitimate child, born in lawful wedlock, he would not have treated her differently? Without reviewing the evidence here, I venture to say that, considering all the circumstances, no instance can be found in modern civilized life where a father treated a legitimate child in the manner in which the deceased treated the plaintiff. The case of the plaintiff here appeals, no doubt, strongly to human sympathies. The deceased was a millionaire, and had no legitimate children, and, so far as yet discovered, the plaintiff is his only illegitimate child. But the law would have to be applied just the same to a case where half a dozen legitimate children had been left a small estate, and a brood of asserted bastards were clamoring for half the patrimony. No doubt illicit sexual relations sometimes impose hardships on innocent persons, but such is the result of all violations of law. The legislature could abolish all distinctions between legitimate and illegitimate children; but if it should do so it would practically abolish marriage, and dethrone chastity as the queen of womanly virtues.

Upon the second branch of the case I have come to the conclusion, after a good deal of doubt, that the letters written by the deceased, and testified to by one of the witnesses as having been written and signed in his presence, constituted a written acknowledgment by him that plaintiff was his illegitimate child, within the meaning of section 1387, and that such acknowledgment makes her his heir. There was some evidence to establish these facts, and therefore the findings of the court below must be taken as true. The argument is very strong that the section contemplates a formal written instrument, made for the express, deliberate purpose of complying with the law, and not a writing made without such present and deliberate intent. But as the language of the section is very broad, and does not, upon its face, present the condition contended for by appellants, I am disposed to consider their construction too narrow. Upon this ground I concur in the judgment. The judgment of the court below proceeds upon the theory that plaintiff was adopted under section 230, but, as the purpose of the action is to determine her heirship, and as the facts which make her an heir under section 1387 are found by the lower court, and as the result is practically the same under either section, I see no objection to affirming the judgment.

De Haven, J. I concur in the foregoing opinion of Mr. Justice McFarland.

97 Cal. 147

Peckham et al. v. Stewart. (No. 14,291)

(Supreme Court of California. Jan. 10, 1893.)

Tender—Sufficiency—Vendor and Purchaser—Sufficiency of Title — Deed — Mistake in Grantee's Name.

1. In an action for damages for failure to deliver a deed in accordance with a contract, it appeared that defendant agreed to make a conveyance of some lands to plaintiffs on or before a certain time, provided that plaintiffs should pay the unpaid price, and that plaintiffs, before the expiration of the time, offered, in writing, to pay the balance, and demanded the deed. *Held*, under Civil Code, § 1496, providing that "the thing to be delivered need not be actually produced upon an offer of performance," that this offer was sufficient to impose upon defendant the obligation to tender the deed.

2. In an action for damages for failure to deliver a deed that would vest in plaintiffs "a good and perfect title," it appeared that the land was formerly owned by one C., who conveyed to K. F. Redmond; that thereafter one K. F. Redman conveyed the land to defendant; and that subsequently, and before the tender by defendant of a deed to plaintiffs, K. F. Redman executed another conveyance of the same property to defendant, in which he recited that he derived his title under the name "Redmond," that his name was erroneously spelled "Redmond" in the conveyance by which he acquired his title, and that he is the identical person to whom such conveyance was in fact made under the name "Redmond." *Held*, that defendant's title is not "a good and perfect title," such as he was bound to give by his agreement with plaintiffs.

3. St. 1873-74, p. 345, § 1, providing that "any person in whom the title of real estate is vested, who shall afterwards, from any cause, have his or her name changed, shall, in any conveyances of real estate so held, set forth the name in which he or she derives title to said real estate," applies to a married woman who conveys land to which she acquired title before her marriage, or to a man whose name has been changed by law, and who conveys property, the title to which was vested in him before his change of name, and not to a case where the name is erroneously written in the first deed.

Department 2. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Action by one Peckham and others against one Stewart for damages for failure to deliver a deed in accordance with agreement. From a judgment for plaintiffs, defendant appeals. Affirmed.

Julius Lee and *L. D. Holbrook*, for appellant. *James A. Hall* and *Cross & Hall*, for respondents.

De Haven, J. The defendant entered into a written agreement with plaintiffs by which he agreed to execute to them on or before December 1, 1888, a conveyance of certain described lots which would vest in plaintiffs “a good and perfect title” thereto, provided that plaintiffs should on or before that date pay the sum of $8,675, the balance of the purchase price agreed to be paid for such lots. The plaintiffs paid $1,000 on account of the purchase price at the date of the agreement. This action is to recover damages from defendant for an alleged failure on his part to make to plaintiffs a deed in accordance with the agreement. The plaintiffs recovered judgment for the sum of $1,000, and the defendant appeals. The grounds upon which the defendant relies for a reversal of the judgment are—*First*, that the complaint does not state a cause of action; and, *second*, that the evidence shows that he did tender to plaintiffs a deed conveying a perfect title to the lots sold.

1. The plaintiffs were not, under the contract set out in the complaint, entitled to a conveyance of the lots described in the agreement until they first paid, or offered to pay, defendant the balance of the purchase price agreed upon; and, unless the complaint alleges a full performance or offer to perform their part of the contract in this respect, they are not entitled to maintain this action. Englander v. Rogers, 41 Cal. 421, Easton v. Montgomery, 90 Cal. 307, 27 Pac. Rep. 280; Dennis v. Strassburger, 89 Cal. 583, 26 Pac. Rep. 1070; Hill v. Grigsby, 35 Cal. 656. The law applicable to this branch of the case is stated by Mr. Justice Rhodes, with his usual clearness and accuracy, in delivering the opinion of the court in Hill v. Grigsby, supra, in this language: “In a contract for the sale of real estate, where the purchaser covenants to pay the purchase money, and the vendor covenants to convey the premises at the time of payment, or upon the time of payment of the money, or as soon as it is paid,—and they all mean the same thing,—the covenants are mutual and dependent; and neither can sue without showing a performance, or an offer to perform, on his part, and the performance, or the offer to perform, on the one part is a condition precedent to the right to insist upon a performance on the other part.” The allegation of the complaint upon this point is that plaintiffs did, on August 31, 1888, offer, in writing, to pay the defendant the full purchase price of the lots mentioned in the agreement. The offer is addressed to the defendant, and signed by plaintiffs, and, so far as necessary to be here stated, is as follows: “Please take notice that we, * * * the obligees in a certain bond for a deed * * * made to you by us on the first day of June, 1888, * * * do hereby, in writing, offer to pay to you, the said obligor therein, the sum of $8,675. And we do hereby demand of you that you do forthwith make * * * to us a good and sufficient conveyance of the property mentioned and described in said bond, with the usual covenants, and that you shall give to us a perfect title to said lands, all in accordance with said bond.” It is urged by defendant that this offer was not sufficient to impose upon him the obligation to tender the conveyance, and that it was incumbent upon plaintiffs to actually produce and tender to him the balance of the purchase money, as a condition precedent to their right to maintain this action, and that the complaint is defective because it fails to allege an actual tender of the money to be paid under the contract. In support of this position the case of Englander v Rogers, 41 Cal. 421, is cited. It was held in that case that a simple offer to pay, without an actual tender of the money, was insufficient to put the vendee in a contract of sale in default. The court there said: “To constitute a valid tender in such a case, the party must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but produce and offer, to pay it to the other party, or on the performance by him of the requested condition.” This was the rule of the common law as to what was required in order to make an effectual tender of money, when its production was not dispensed with by some act or declaration of the party entitled to receive it. 2 Greenl. Ev. (15th Ed.) § 602; Bakeman v. Pooler, 15 Wend. 637. And as there was no statute of this state relating to the subject of tender when Englander v. Rogers, supra, was decided, the common law, furnished the rule of law for the decision of that case. 1 Hitt. Gen. Laws, par. 599. But section 1496 of the Civil Code, since enacted, has changed the common-law rule, which required its actual production in making a tender of money. That section declares: “The thing is to be delivered, if any, need not, in any case, be actually produced upon an offer of performance, unless the offer is accepted.” The written offer of plaintiffs in this case complied with the requirements of this section. They had a right, at the time of making the offer, to demand that defendant perform his part of the contract by delivering the conveyance required by the contract; and until defendant signified his acceptance of their offer to pay, by a tender of such conveyance, plaintiffs were under no obligation to actually produce before him the money mentioned in their written offer. It follows from these views that the demurrer to the complaint was properly overruled.

2. The court found that the defendant’s title to the land which he agreed to convey was defective, and that he did not at the date when he tendered a conveyance thereof to plaintiffs, “or at any time thereafter, or at the time of the trial of this case,” have a perfect title thereto. It is claimed that this finding is against the evidence. It is shown by the statement on motion for a new trial that on October 20, 1876, one Jane Coolidge held the legal title to about two thirds of said land, and that on that day she conveyed the

portion thereof owned by her, the name of the grantee in the deed then made by her being given as "K. F. Redmond." On November 17, 1876, one Callahan, who was the owner of the remainder of the land, conveyed the portion owned by him, the name of the grantee in his deed being also given as "K. F. Redmond." So it would seem that on this last-named day the apparent legal title to all the land was in a person bearing the name of "K. F. Redmond." Thereafter one K. F. Redman executed a deed of all the land to defendant, and after this, and before defendant tendered a deed thereof to plaintiffs, said Redman executed another deed of the same land to defendant, in which he recited that he derived title thereto under the name of "K. F. Redmond," that his name was erroneously written "Redmond" in the conveyances which he received from Callahan and Jane Coolidge, and that he is the identical person to whom such conveyances were in fact made under the name of "K. F. Redmond." This is all the evidence on the point, and upon these facts we are of opinion that defendant did not show such a title to the land in question as plaintiffs were bound to accept under their agreement. The apparent legal title was in K F. Redmond, and a deed executed by K. F. Redman was not apparently sufficient to transfer such title. The names were not *idem sonans;* and, as the purpose of a name is to identify the person to whom it is given, the presumption would be that the names of "Redmond" and "Redman" refer to different persons. McNally v. Mott, 3 Cal. 235. The second deed from Redman, in which he recites that he is the identical person named as "Redmond" in the prior conveyances does not help the matter. These recitals may be true, in point of fact, and upon being established by proof, in a proper action, the defendant could doubtless be able to obtain a judgment reforming the deeds under which his grantor, Redman, claimed, and which judgment would, in effect, give him a "good and perfect title" to the land, within the meaning of the law and the agreement which he made with the plaintiffs. But a good and perfect title is one which is not only good in point of fact, but it must also be apparently perfect when exhibited; that is, free from any reasonable objection. It is not sufficient that it can be shown to be good as the result of an action instituted for the purpose of reforming defects existing in any deed which is necessary to make the chain of title complete. This was so substantially held by this court in the late cases of Turner v. McDonald, 76 Cal. 177, 18 Pac. Rep. 262, and Sheehy v. Miles, 93 Cal. 292, 28 Pac. Rep. 1046; and the same rule is declared, also, in Richmond v. Gray, 3 Allen, 25, and Tillotson v. Gesner, 33 N. J. Eq. 327. In holding that the last deed executed to defendant by Redman did not, of itself, cure the apparent defect in defendant's title growing out of the fact that the land was formerly conveyed to Redmond, and not Redman, we have not overlooked the act concerning conveyances, cited by appellant, (St. 1873-74, p. 345,) the first section of which is as follows: "Section 1. Any person in whom the title of real estate is vested, who shall afterwards, from any cause, have his or her name changed, shall, in any conveyances of real estate so held, set forth the name in which he or she derives title to said real estate." This statute evidently was intended for such cases as that of a married woman conveying land to which she acquired title before her marriage, or where a man whose name has been changed by law conveys property, the title to which was vested in him prior to such change of name; but it has no application to a case like this, and cannot, without a very wide departure from its language, be construed as authorizing one who has in fact received a conveyance, but in which his name has been erroneously stated, to correct such mistake by reciting the fact in a subsequent deed. The statute applies only to the cases expressly named in it, and provides for them the same rule for conveyancing always followed before its enactment by those who understood the proper method of transacting such business.

Judgment and order affirmed.

We concur: McFarland, J.; Harrison, J.

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3 Cal. Unrep. 734

WOODWARD et al. v. RAUM et al. (No. 14,779.)

(Supreme Court of California. Jan. 11, 1893.

Partition—Real and Personal Property—Decree.

In an action for partition of real estate, with the buildings and personal property thereon, it is proper to order partition of the real property separate and apart from the personal property, where it does not appear that such course will greatly prejudice the owners.

In bank. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

Action for partition by one Woodward and others against one Raum and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

John B. Harmon, for appellants. *Estee, Wilson & McCutcheon* and *W. W. Cope*, for respondents.

Per Curiam. Appellants commenced this action for partition of the property known as "Woodward's Gardens," consisting of three parcels of land, with the buildings, structures, improvements, art gallery, museums, menagerie of wild animals, and other personal property. The contention of appellants in the court below was, and their contention here is, that the entire property, real and personal, constitutes one piece of property, of which a partition cannot be made without great prejudice to the owners, and therefore a sale of both the real and personal property should be made together. The court, however, found that a partition of said real property, separate and apart from said personal property, might be made without great prejudice to the owners, and decreed accordingly. Is that finding justified by the evidence? We think it is.

There is some conflict in the evidence upon this question, *i. e.* witnesses differed in opinion as to whether the real estate would bring more if sold without the wild animals and other personal property or not. After a careful reading of the evidence on this question, we are not prepared to say that the evidence even preponderates against the finding of the court below. If it had appeared to that court that a partition could not be made without great prejudice to the owners, a sale might have been ordered. Section 752, Code Civil Proc. But it did not appear to the court below, and does not appear to us, that a partition cannot be made without great prejudice to the owners; and the owners themselves appear to be equally divided upon this question.

Judgment and order affirmed.

(97 Cal. xvii)

HUTCHINSON et al. v. WOODWARD et al.

(No. 14,780.)

(Supreme Court of California. Jan. 11, 1893.)

In bank. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

Action by one Hutchinson and others against one Woodward and others. From a judgment for plaintiffs, and order denying a new trial, defendants appeal. Affirmed.

John B. Harmon, for appellants. *Estee, Wilson & McCutcheon* and *W. W. Cope*, for respondents.

PER CURIAM. This is an action for the sale, and partition of the proceeds thereof, of the personal property on the premises known as "Woodward's Gardens." The court decreed a sale and partition as prayed. Appellants moved for a new trial, which was denied, and this appeal is from the judgment and order. The contention of appellants is that the personal property and real estate constituting "Woodward's Gardens" should all be sold together as one piece of property, and the proceeds of such sale be partitioned among the owners. We held in Woodward v. Raum, 31 Pac. Rep. 930, that the real estate might be partitioned among the owners without prejudice to them, and affirmed the judgment of the court below, ordering such a partition to be made.

Judgment and order affirmed.

(3 Cal. Unrep. 735)

DIXON v. PLUNS. (No. 14,429.)[1]

(Supreme Court of California. Jan. 11, 1893.)

VERDICT—NEGLIGENCE—NONSUIT.

1. A verdict arrived at by adding together the amounts thought by each juror to be a just verdict, and dividing the sum by 12, will be set aside.

2. While plaintiff was walking on the sidewalk of a public street, an employe of defendant, who was repairing a building overhead, let fall a chisel, which struck plaintiff on the head, inflicting a serious injury. *Held*, that this established a prima facie case of negligence on the part of defendant, and a nonsuit was properly denied. Harrison, J., dissenting.

Department 1. Appeal from superior court, city and county of San Francisco; EUGENE R. GARBER, Judge.

Action by Katie E. Dixon against William J. F. W. Pluns to recover damages for personal injuries inflicted through the alleged negligence of an employe of defendant. From a judgment for plaintiff, defendant appeals. Reversed.

H. C. Firebaugh, for appellant. *Nagle & Nagle*, for respondent.

GAROUTTE, J. Respondent, while walking upon the sidewalk of Larkin street, in the city of San Francisco, was struck upon the head, and quite seriously injured, by a chisel which fell from a scaffolding above, upon which one of the appellant's employes was standing while engaged in affixing a cornice to the building. Damages were recovered in the lower court, and this appeal is from the judgment and order denying a new trial.

Appellant moved for a new trial upon the ground of misconduct of the jury, in this: that they arrived at their verdict by a resort to the determination of chance. The Code expressly provides that such misconduct may be shown by the affidavits of jurors, (section 657, Code Civil Proc.;) and, in support of the motion, appellant presented the affidavit of one Koster, a juror, wherein he stated "that, upon retiring to the jury room, the twelve jurors first agreed by a vote that the average sense of the jurors should control in arriving at what the verdict should be, and then the twelve jurors agreed to be controlled by their vote, and voted that the said average sense of the jurors should be arrived at in the manner following, namely, by each individual juror writing on a piece of paper what he would fix the verdict at, and that the sums so written should then be added together, and the aggregate divided by twelve, and that the amount resulting should be taken as the average sense of the jurors, and be put in the verdict accordingly; and thereupon said plan was carried out," etc. Courts have not been astute in perceiving sufficient error to set aside verdicts upon the grounds here relied upon, and evidence sustaining the verdict has been generally favored; but upon this motion no opposing affidavits were offered, and the merits of the contention rest alone upon the sufficiency of the statement of facts above recited. Reduced to its lowest terms, the affidavit plainly discloses that the verdict was the result of a previous agreement, and was arrived at upon the basis that the amount of the verdict should be the quotient resulting from a division wherein 12 was the divisor, and the sum of the various amounts thought to be a just verdict by the respective jurors the dividend. The calculation was made in pursuance of a prior agreement that the result should be the verdict; and that result was adopted as the verdict, not upon further consideration of the jury, and upon the determination that such amount formed a just and proper verdict, but it was adopted in pursuance of the prior "agreement." The decisions of our courts clearly indicate that they do not countenance such procedure, and the verdict must be set aside. This question is reviewed, and the authorities collated, in the recent case of Improvement Co. v. Adams, (Colo. App.) 28 Pac. Rep. 662, where it is said: "As well put in one case, 'it substitutes the fluctuation and uncertain hazards of the lottery for the deliberative conclusions of their reflections and interchange of views.'" It was said by this court, in Turner v. Water Co., 25 Cal. 397: "To ascertain this average, the jury may properly adopt the method which was used in the present case, but they ought not to agree to be bound by the result, whatever it may be. If they do so agree, and such result is made the verdict without further consideration or assent, such verdict is vicious and irregular, and must be set aside whenever the fact is made to appear by proper and competent evidence." This language is quoted with approval in the recent case of Hunt v. Elliott, 77 Cal. 591, 20 Pac. Rep. 132. In that case it was held that the affidavit of the juror was insufficient in its statement of facts to defeat the verdict. The court failed to specifically indicate wherein the defects existed, and we now are unable to perceive them; but the judgment sustaining the verdict was clearly right upon the second ground stated, and might well have been supported upon that ground alone. As to the affidavit now under consideration, as already suggested, we are satisfied it presents a state of facts that demands a retrial of the case. As the cause must be returned to the lower court for further proceedings, we pass to an examination of some additional matters.

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[1] Reversed in banc see 33 P. 268, 98 Cal. 384.

The motion for a nonsuit was properly denied. Upon the evidence we cannot say that the respondent was guilty of contributory negligence in walking upon the sidewalk at the time the injury was inflicted. She had a right to be there, and had no sufficient reason to anticipate danger from overhead. Respondent's evidence also established a *prima facie* case of negligence upon the part of appellant. Conceding the rules of evidence as between master and servant to be as intimated in Madden v. Steamship Co., 86 Cal. 448, 25 Pac. Rep. 5, still that case is not this case. Respondent was walking upon a public thoroughfare. An employe of appellant, while engaged in repairing a building overhead, let fall a chisel, which inflicted the injury. Those facts constitute a *prima facie* case, for the presumption of negligence upon the part of the employe flows therefrom, and authorities are ample to support this principle of law. As to common carriers this doctrine is fully discussed and adopted in the case of Boyce v. Stage Co., 25 Cal. 460, where Chief Justice Sanderson said: "The argument places the burden of explanation upon the shoulders of the plaintiff, but, unfortunately for the argument, the law places it upon the shoulders of the defendant." This case was approved in Treadwell v. Whittier, 80 Cal. 583, 22 Pac. Rep. 266, a case of injury by the falling of an elevator; the court holding that the rule applied to common carriers was equally applicable to the owner of an elevator. It is there said: "In this case the plaintiff was only called on to show that he was hurt by the breaking of the machinery of the elevator, by which he was injured. When this is done, he has made out a case on which, there being no other evidence introduced, he has a right to recover." The application of the principle of presumption of negligence from the facts and circumstances of the accident apply to the present case as entirely and fully as to the preceding citations. No sound reason can be advanced to the contrary. Upon principle there is no distinction. This question is carefully considered, and the authorities reviewed, in Mullen v. St. John, 57 N. Y. 567. In that case the wall of a building fell upon a traveler in the street. The court held that a presumption of negligence arose from the fact of the building falling. In Lyons v. Rosenthal, 11 Hun, 46, the injury arose from the falling of a box of goods from the story above, and it was held that negligence would be presumed. In support of this doctrine the court cited various English authorities, which upon their facts stand upon common ground with the case at bar. See Kearney v. Railroad Co., L. R. 5 Q. B. 411; Byrne v. Boadle, 2 Hurl. & C. 722; Scott v. Dock Co., 3 Hurl. & C. 596. The true rule recognized by the authorities as pertaining to this class of accidents is: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Shear. & R. Neg. § 60. Let the judgment and order be reversed, and the cause remanded for a new trial.

I concur: Paterson, J.

Harrison, J. I concur in the judgment of reversal upon the first point discussed in the opinion of Mr. Justice Garoutte. I also concur in holding that the court properly refused a nonsuit. But I do not concur in that portion of the opinion which holds that the liability of the defendant is to be determined by the same rules which determine the liability of common carriers of passengers. Their relation to a passenger is such that, upon the proof of an injury sustained by him while being carried, negligence is presumed, and the burden of exonerating itself from liability is thrown upon the carrier. Bush v. Barnett, (Cal.) 31 Pac. Rep. 2. In the present case, however, there was no contractual relation between the plaintiff and the defendant, and as the liability of the defendant is predicated solely upon his negligence, it was essential for the plaintiff to present some evidence tending to establish such negligence before she was entitled to recover. Whart. Neg. § 421. "It is believed that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to the plaintiff, without more, will amount to evidence of negligence on the part of the defendant." Thomp. Neg. p. 1227. See, also, Cosulich v. Oil Co., 122 N. Y. 123, 25 N. E. Rep. 259; Huff v. Austin, 46 Ohio St. 386, 21 N. E. Rep. 864.

When the plaintiff rested her case she had, however, presented sufficient evidence to establish a *prima facie* case of negligence on the part of the defendant. She was, at the time of receiving the injury, traveling upon the public highway,—a place in which she had the right to be,—and the defendant was engaged in the lawful occupation of constructing a building fronting upon the street. While thus engaged, he was compelled, more or less, to obstruct the free use of the street; but as this obstruction was for his own convenience, and was an interference with the rights of others, it imposed upon him the duty of exercising such care and caution in the performance of his work as would not interfere with the safety of those who had the right to use the street; and any omission on his part to observe this duty was such negligence as would render him liable for any injury resulting therefrom. Inasmuch, therefore, as there was evidence presented by the plaintiff tending to show that the accident to her was caused by the falling of a chisel from the scaffolding of the building, and that the chisel was that of one of the employes of the defendant, who had the control of the construction of the building, there were circumstances before the court which would authorize an inference of negligence on the part of the defendant, and which threw upon him the burden of disproving the same, (Shear. & R. Neg. § 58;) and the court was not authorized to withdraw the determination of this question from the jury.

(97 Cal. 171)

PEOPLE v. AH LEE DOON. (No. 20,912.)

(Supreme Court of California. Jan. 12, 1893.)

CRIMINAL LAW—RECORD ON APPEAL — DISQUALIFICATION OF JUDGE—DRAWING JURY—CONTINUANCE—EXAMINATION OF JUROR—CHARACTER OF DEFENDANT.

1. A copy of the judge's charge, made from the official reporter's notes, and certified by the county clerk, and which is materially different from the copy in the printed record, is no part of such record, and cannot be used to correct the charge as contained in the bill of exceptions, which has been indorsed and authenticated by the judge.

2. Papers filed as proposed amendments to the record must be disregarded when not embodied in the bill of exceptions.

3. A judge who is disqualified, under Code Civil Proc. § 170, from sitting or acting as such in an action in which he has been attorney, may order and superintend the drawing of the panel of jurors for the term of court by which such action is to be tried, since this is not sitting in the action within the meaning of the statute.

4. Any objection because of such judge ordering the drawing of the panel should be raised by challenging the panel from which the jury was drawn, so that, if the objection had been sustained, a new venire could have issued, and could not be raised for the first time after verdict.

5. Though the order of the governor authorizing a judge to preside over a cause in another county than his own is not issued until two days after he received defendant's plea while acting in such cause, it will be presumed, in the absence of any question raised at the time of entering the plea, that he was then acting under an invitation from the judge of that county, which, under Code Civil Proc. § 71, would give him the same authority as an order from the governor.

6. Defendant, on trial for murder, moved for a continuance on the ground that his chief witness, a Chinaman, was absent in China, and alleged that such witness was the only one who saw the assault on defendant by deceased, in consequence of which defendant afterwards shot deceased, and that such witness' testimony on the trial would be substantially the same as defendant's. It appeared that defendant was informed of the intended departure of the witness, and made no effort to induce him to remain, or to secure his testimony by deposition. Defendant claimed in his affidavit that the witness intended to return, and that he was provided with return papers, but of this he offered no proof. *Held*, that a refusal to grant a continuance on account of the absence of such witness was not an abuse of discretion.

7. Such refusal could not be based on the ground that the evidence of the witness was merely cumulative.

8. On the examination of a juror on his voir dire it is in the discretion of the court to ask him leading questions, and allow counsel to do so, which discretion, however, must not be abused.

9. It is not error to exclude evidence of the good disposition of defendant, other than his good reputation.

10. On the cross-examination of witnesses testifying to defendant's good disposition it was proper to ask them if they had heard of defendant's prior conviction of murder, and of his having drawn his pistol on different persons.

11. The law taking away the challenge for implied bias on the ground that the juror has formed or expressed an unqualified opinion as to the guilt of the accused is not unconstitutional as taking away one of the essential constituents of the right of jury trial secured by the constitution.

In bank. Appeal from superior court, Marin county; D. J. MURPHY, Judge.

Ah Lee Doon was convicted of murder, and appeals. Affirmed.

Chas. B. Darwin and *Edgar B. Haymond*, for appellant. *W. H. H. Hart*, Atty. Gen., *James W. Cochrane*, Dist. Atty., and *J. N. E. Wilson*, for the People.

BEATTY, C. J. The defendant, on the 2d day of December, 1890, shot and killed William N. Shenton, at the town of San Rafael, in Marin county. On the 29th of December, 1890, F. M. Angellotti, then district attorney of said county, filed in the superior court an information charging the defendant with the crime of murder, and also charging him with a prior conviction of murder in the first degree, which it was alleged had never been reversed, annulled, or set aside. On the same day the defendant was arraigned before E. B. MAHON, then judge of the superior court of Marin, and was given time to plead until January 5, 1891. On that day F. M. Angellotti, who, as district attorney, had taken the dying declaration of Shenton conducted the preliminary examination of defendant, and filed the information against him, having succeeded E. B. MAHON as judge of the superior court, and, being disqualified to sit or act in the case, (Code Civil Proc. § 170, subd. 3,) extended the defendant's time to plead until January 10th, at which time D. J. MURPHY, one of the judges of the superior court of San Francisco, being president and presiding, the defendant appeared with his counsel, and entered his plea of not guilty. The case was thereupon set for trial on the 19th of January, but was subsequently continued until February 2d, at which date the trial commenced before Judge MURPHY. Between the date of defendant's plea and the commencement of his trial one or more orders continuing the cause from day to day were made by Judge ANGELLOTTI. On January 10th—the date of defendant's plea—Judge ANGELLOTTI made an order directing the clerk to draw 50 jurors, and the sheriff to summon them for January 19th, the day for which defendant's trial was set. Judge ANGELLOTTI presided at the drawing of said 50 jurors, and from the panel so obtained the jury which tried the defendant was selected, no challenge or objection to the panel having been at any time interposed by or on behalf of the defendant. When the cause was called for trial on February 2d the defendant moved for a continuance on the ground of the absence of a material witness. His motion was overruled, and the trial proceeded, resulting in his conviction of murder in the first degree, and sentence of death. Before sentence he moved for a new trial, which was denied, from which order and the judgment he prosecutes this appeal.

The errors assigned in support of the appeal are numerous, and only partly indicated by the foregoing statement, which, however, is sufficient to exhibit the case in its general outlines. Other material facts will be stated in connection with the points to which they more particularly relate.

It is proper at the outset to say that the attempted amendments or additions to the record, filed by the people and by the defendant respectively, must be wholly disregarded. The paper filed by the attorney general on the part of the people consists of a copy of the judge's charge to the jury, certified by the county clerk, which, it is said, differs materially from that contained in the printed record. But the copy contained in the printed record, or one of them, (for it appears in two places,) is embraced in the bill of exceptions settled and allowed by the judge who presided at the trial, while the copy certified by the clerk seems to be a longhand transcript of the official reporter's notes of the charge, filed with the clerk, but never indorsed or authenticated by the judge. Such a document is no part of the record, (People v. January, 77 Cal. 179, 19 Pac. Rep. 258,) and cannot, of course, be used to correct the bill of exceptions, which is a part of the record. The paper filed by the defendant consists of copies, certified by the private secretary of the governor, of certain correspondence between Judge ANGELLOTTI and the clerk of Marin county on one side, and the governor on the other, relating to the designation of Judge MURPHY to preside in the superior court of Marin county for the trial of defendant and others whose prosecution for criminal offenses had been commenced by Judge ANGELLOTTI while district attorney. The facts shown by this proposed amendment appear to be wholly immaterial, but if they were otherwise they could not be considered. To make them part of the record they should have been embodied in the bill of exceptions. Looking, then, exclusively to the duly certified record of the case contained in the printed transcript, I proceed to consider the matters assigned as error.

1. It is contended that Judge ANGELLOTTI, being disqualified to sit or act in the case, had no power or jurisdiction to order the drawing of the panel of jurors for the session of the court at which the defendant was to be tried, and especially that he was incompetent to preside at the drawing of such jurors. Section 170 of the Code of Civil Procedure reads as follows: "No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding (1) to which he is a party, or in which he is interested; (2) when he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law; (3) when he has been attorney or counsel for either party in the action or proceeding. But the provisions of this section shall not apply to the arrangement of the calendar, or the regulation of the order of business, nor in the power of transferring the action or proceeding to some other court." It is perfectly clear from the terms of this section, without reference to the numerous cases in which its provisions have been applied and enforced, that Judge ANGELLOTTI was disqualified by the third subdivision from sitting or acting in this cause, except for the purpose of making the merely formal orders enumerated in the last clause of the section, and it is well settled that so far as he may have done so his acts were void. The question, therefore, is whether, in ordering and superintending the drawing of the panel of jurors, he did sit or act in this cause. It does not appear that the jury was drawn specially for this case, and presumably it was the regular jury for the ensuing term or session of the court which it is made the duty of the presiding judge to have drawn and summoned. Code Civil Proc. § 214. To draw such jury was not a proceeding in this cause, or in any cause, and could not possibly have been a void act merely because this cause, and possibly others in which Judge ANGELLOTTI was disqualified, was coming on for trial. The fault, if fault there was, consisted in selecting the jury which tried this cause from the panel so drawn. But if the jurors drawn and summoned in pursuance of Judge ANGELLOTTI's order were incompetent to try this cause, the objection should have been taken by a challenge to the panel, and if, for the purposes of this cause, the act of the judge in ordering the jurors drawn was void, as counsel contend, then certainly the statute (Pen. Code, § 1059) is broad enough to have given the defendant good grounds of challenge to the panel; and that was the regular and only way to raise the objection. If it had been made at that time, and sustained, a special *venire* could at once have been issued. Raised for the first time after verdict, it comes too late.

2. It is objected that Judge MURPHY had no authority to act in the cause on January 10th when he received the defendant's plea. It is certainly true that the order of the governor, issued on January 12th, conferred no authority to act on the 10th. But Judge MURPHY may have been, and probably was, presiding on the 10th by invitation of Judge ANGELLOTTI. Such invitation would have conferred the req-

uisite authority. Const. art. 6, § 8; Code Civil Proc. § 71.[1] No question as to Judge MURPHY'S authority was raised at the time of entering the plea, and it must be presumed that he was lawfully exercising jurisdiction. Code Civil Proc. § 1963, subds. 14-16.

3. It is claimed that the court erred in denying defendant's application for a postponement of the trial. The evidence adduced at the trial showed that while Shenton was driving slowly along the street defendant approached him from behind, ad fired several shots at him. The first shot missed, the second took effect, the bullet striking Shenton in the back, inflicting a mortal wound, and bringing him helpless to the ground. A third and fourth shot were fired after Shenton fell, but whether directed at him or not is perhaps not clear. It was, at all events, however, highly material to the defense to show what provocation led to the shooting. According to the testimony of the defendant, he had been wantonly assaulted, beaten, and kicked by Shenton a few minutes before the shooting. According to the dying declaration of Shenton, a quarrel had taken place, in which blows had been exchanged, but the quarrel was provoked by the abusive, insulting, and aggressive conduct of the defendant. The only witness present when this quarrel took place was a Chinaman, named Lee Ching. The affidavit filed by defendant in support of his motion for a continuance showed that Lee Ching would testify to the same version of this quarrel and assault that the defendant gave. It is not denied that his evidence would have been material, but the attorney general contends that, as it would have been merely cumulative to that of the defendant, the absence of the witness was not a ground for a continuance. It is true that a trial will not be postponed ordinarily for the purpose of obtaining cumulative evidence, but this rule, which is by no means absolute, has no application to a case in which the only evidence at hand is that of an interested party, especially when he is defendant under an indictment for murder. The ruling of the court against a continuance cannot be sustained on the ground that the evidence was cumulative. But thre was another ground upon which the ruling may have been made, and which is sufficient to sustain it. According to the defendant's affidavit, Lee Ching had sailed for China on December 6th, promising to return in September or October following, and provided with papers which secured him the right to return. But upon this point—the right of Lee Ching to return and re-enter the United States—it was clear that the defendant could have no direct knowledge of the facts, and he neither stated the facts nor the sources or means of his information. The court may well have found that there was no probability that Lee Ching would ever return within its jurisdiction. No effort appeared to have been made to induce him to remain, although the defendant was informed of his intended departure, and knew that his trial was impending, and no steps were ever taken to secure his testimony by deposition. Under the circumstances, the court may have been satisfied that his testimony was not really desired, and that his absence was used as a pretext for delay. In passing upon the motion for a new trial the court was probably influenced with respect to this matter, and largely justified by the fact that Shenton's dying declaration was directly opposed to the defendant's testimony, not only as to the circumstances of the shooting, but as to the previous quarrel and assault, and that several disinterested witnesses of the shooting fully corroborated the dying statement, and as clearly contradicted the defendant's testimony. The fact that the defendant was proved to have given an untruthful account of the shooting and the circumstances attending it, while the dying declaration was corroborated in those particulars by a number of disinterested witnesses, may have satisfied the judge that the defendant had no real desire to call a disinterested witness of the preceding quarrel. At all events, we cannot say that the refusal of the continuance was, in view of all the circumstances, an abuse of discretion.

4. Two jurors were challenged for actual bias,—one because he had formed and expressed an opinion that the defendant was guilty, (an opinion based upon newspaper reports and common rumor;) the other, apparently, because he had a low opinion of the value of Chinese testimony. In the course of the examination of these jurors upon their *voir dire* a number of questions were asked them by counsel for the prosecution and by the court, which were objected to as leading. The questions certainly were leading, but such a course of examination is in the discretion of the court, and we cannot see that it was abused in this instance.

5. The information contained a charge of prior conviction of murder, and alleged that it had not been reversed, annulled, or set aside. It is contended that this was error, but how it was error is not stated, and does not occur to us. It was an error on the part of the district attorney to allege that the conviction was in force, for it appeared by the evidence at the trial that the offense had been pardoned, but the court committed no error in any ruling concerning this matter. The only thing done by the court was to permit the prosecution, with the consent of the defendant, to withdraw that part of the charge.

6. It would not have been error if the court had excluded evidence of the good disposition of the defendant other than evidence of his good reputation; but, as matter of fact, the record shows that the objection of the prosecution to this evidence was withdrawn, and it was thereupon admitted.

7. On cross-examination of the witnesses

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[1] Code Civil Proc. § 71, provides: "A judge of any superior court may hold the superior court in any county, at the request of the judge or judges of the superior court thereof, and, upon the request of the governor, it shall be his duty to do so; and in either case the judge holding the court shall have the same power as a judge thereof."

who testified to the good disposition of the defendant, the court permitted them to be asked if they had heard of his prior conviction of murder, and of his having drawn his pistol on different persons. In the cross-examination of witnesses testifying to reputation or character, such questions are permissible.

8. The charge of the court was very long, and a large number of special instructions were asked by the defendant, many of which were refused. It is contended that the court erred in refusing each one of eleven different instructions asked by the defendant, and that many parts of the charge of the court were erroneous. After a careful examination of the charge and the instructions refused, I find that the instructions refused are all embraced in the charge, and I find no error in the charge of which the defendant can complain. If it is erroneous at all, it is in stating the law more favorably to the defendant on one or two points than he had a right to ask.

9. In addition to the foregoing points, counsel for defendant have called in question the constitutionality of the law taking away the challenge for implied bias, on the ground that the juror has formed or expressed an unqualified opinion as to the guilt of the accused. Their contention is that one of the essential constituents of the right of trial by jury, secured by the constitution, is the right of a person accused of a crime to be tried by jurors who have never formed or expressed an unqualified opinion of his guilt, whether founded on newspaper reports, or common rumor, or upon grounds more reliable. After carefully considering the argument of counsel and the cases cited, I am satisfied that the weight of authority is against their contention, and that there is nothing to warrant us in pronouncing unconstitutional a statute which has been in unquestioned operation nearly 18 years. The judgment and order of the superior court are affirmed.

We concur: De Haven, J.; McFarland, J.; Paterson, J.; Harrison, J.; Garoutte, J.

(3 Cal. Unrep. 741)

ROBINSON v. THORNTON et al. (No. 14,819.)[1]

(Supreme Court of California. Jan. 12, 1893.)

Execution—Sheriff's Deed—Limitation of Actions—Outstanding Title in Ejectment.

1. Where land is sold under execution in an attachment suit, the sheriff's deed takes effect as of the date of the levy of the attachment, and a conveyance by the attachment debtor after the attachment was levied, and before judgment, vests no title in his grantee.

2. The statute of limitations does not begin to run against the purchaser of land at a sheriff's sale, or his grantees, until delivery of the sheriff's deed. Leonard v. Flynn, 26 Pac. Rep. 1097, 89 Cal. 536, followed.

3. Where the defense of outstanding title in a third person is made to an action of ejectment, it is essential to show that the title was outstanding at the time of trial.

Department 1. Appeal from superior court, San Mateo county, John Reynolds, Judge.

Ejectment by C. P. Robinson against R. S. Thornton and others. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant Thornton appeals. Affirmed.

Edwd. F. Fitzpatrick, for appellant. *T. M. Osmont* and *D. M. Delmas*, for respondent.

Garoutte, J. This is an appeal by defendant Thornton from a judgment and order denying a motion for a new trial in an action of ejectment. Plaintiff founds his title upon an attachment, judgment, and sale on execution thereunder, in an action entitled McCombe v. Benjamin S. Green and Hannah Green, his wife, commenced April 1, 1872, the attachment being levied upon the realty the following day. Judgment was rendered for McCombe November 5, 1880, and the lands were sold under execution thereon December 10, 1881, to one Forbes, and certificate of sale issued to him upon the same day. Upon the 4th day of June, 1887, the ex-sheriff of San Mateo county, who made the sale, executed a deed of the premises to respondent, who held the certificate as an assignee thereof. This action was commenced June 8, 1887. Appellant, as appears by his evidence, relies upon three defenses to defeat respondent's cause of action: (1) Title under a deed from said Green, dated August 17, 1872; (2) title by adverse possession, based upon an entry made under the aforesaid deed; and, (3) outstanding title in a stranger.

1. A sheriff's deed takes effect from the date of the levy of the attachment, if the levy is such as to create a lien. Porter v. Pico, 55 Cal. 165. Upon an examination of the evidence we are satisfied that a valid levy was made; and it follows that respondent's title, under his deed of June 4, 1887, took effect as of the date of the attachment, to wit, April 2, 1872, and that appellant's deed from Green, dated August 17, 1872, carried no title.

2. Appellant failed to acquire title, as against Robinson, by adverse possession. Robinson had no right of entry, and therefore no cause of action, until he received the sheriff's deed, and his complaint was filed within a short time subsequent to that event. The statute of limitations did not begin to run against him until his right of entry accrued. In Jefferson v. Wendt, 51 Cal. 573, this doctrine was declared; and, upon the ground that it had established a rule of property, it was followed in Leonard v. Flynn, 89 Cal. 536, 26 Pac. Rep. 1097. The adjudications of the courts of Illinois declare the statute of limitations in this character of action to begin to run from the date when the purchaser at the execution sale is entitled to his deed, and not, as in this state, from the date of the actual delivery thereof. This view was taken in Pratt v. Pratt, 96 U. S. 704, and seems to have sound reason in its support, but the rule is to the contrary in this state. It must be remembered that this appellant did not enter upon the land with bow and spear, defying the

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[1] Judgment vacated, and rehearing granted.

world. He entered under a deed from Green, the judgment debtor, and, in effect, respondent's grantor, and is now claiming color of title under such deed. Respondent had no right of entry during these years that appellant was in possession; neither did Green, respondent's grantor, for whatever interest he possessed he conveyed by deed to appellant. Hence there was no right of entry in any one, and therefore there was no person entitled to oust appellant. It would be a novel principle to declare a title by adverse possession against the respondent, holding a perfect legal title, when neither he, his predecessors nor grantors, were entitled to bring an action to recover possession of the realty during the period of incubation of this new title. The principle upon which the statute of limitations is founded is the laches of the true owner in sleeping upon his rights, but there can be no laches when there are no rights to be protected. It was said by Mr. Justice Miller in Pratt v. Pratt, 96 U. S. 707: "The defendant, having purchased the land of the person who had the legal title, does undoubtedly hold adversely to everybody else. He admits no better right in any one. He is no man's tenant. The right by which he holds possession is superior to the rights of all others. He asserts this, and he acts on it. His possession is, in this sense, adverse to the whole world. But it is not inconsistent with all this that there exists a lien on the land, —a lien which does not interfere with his possession, which cannot disturb it, but which may ripen into a title superior to that under which he holds, but which is yet in privity with it. In the just sense of the term his possession is not adverse to this lien. There can be no adversary rights in regard to the possession under the lien, and under the defendant's purchase from the judgment debtor, until the lien is converted into a title conferring the right of possession. The defendant's possession after this is adverse to the title of plaintiff; and then, with the right of entry in plaintiff, the bar of the statute begins to run."

3. For the purpose of showing outstanding title, appellant proved that the common grantor, Green, had mortgaged the premises to certain parties, who had foreclosed the mortgage, and sold the realty under such foreclosure, prior to the date of the McCombe attachment, and that one Ford was the owner of such title at the inception of this action. In rebuttal, respondent introduced a deed showing that whatever title Ford may have had at the commencement of the action was then vested in him. The admission of this evidence was clearly correct. It was not offered for the purpose of showing title in respondent, but to rebut the fact that any outstanding title then vested in Ford. The appellant in no manner connected himself with Ford's title, and under such circumstances the defense of outstanding title is overcome by proof that since the beginning of the action such title has ceased to exist. An outstanding title sufficient to defeat plaintiff in ejectment must be outstanding at the time of the trial of the action. Sedg. & W. Tr. Title Land, § 831. Appellant insists that he connected himself with Ford's title "by acquiring it by adverse possession." Adverse possession for the statutory period creates a title, but does not operate to transfer the title of the disseisee to the disseisor. Williams v. Sutton, 43 Cal. 65; Water Co. v. Richardson, 72 Cal. 608, 14 Pac. Rep. 379. If respondent had received a deed of this realty from Green at the date of the levy of the McCombe attachment,—except as to the statute of limitations,—he would have been in a position to have successfully prosecuted this action to final judgment, upon the facts as they appear by the record. The final result of the attachment proceedings was a deed to respondent, vesting in him all the title to this realty that Green had at the date of the levy. Such being the fact, respondent must prevail, for the defense of the statute of limitations cannot be maintained.

Respondent's deed from the ex-sheriff, taken in connection with the proceedings in the action of McCombe v Green et al., upon which the deed was based, made a *prima facie* case of title in his favor; and as we have already seen, that *prima facie* case is too strong to be repelled to any attack that can be launched against it by the defenses which are used by appellant for that purpose. Let the judgment and order be affirmed.

We concur: Harrison, J.; Paterson, J.

(97 Cal. 196)

In re ARGUELLO'S ESTATE. (No. 19,116.)

(Supreme Court of California. Jan. 14, 1892.)

ADMINISTRATORS—DEPOSITS IN BANK — PERSONAL LIABILITY.

1. Where an administrator deposits to his own credit, in a bank, funds of the estate, without any designation of his representative capacity, and afterwards the bank fails, he is personally liable for the loss, regardless of care or prudence, even though he has no other money in such bank.

2. Such liability is not affected by Civil Code, § 2236, which provides that "a trustee who willfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events."

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Proceeding for an order to compel the administrator of the estate of Luis Antonio Arguello, deceased, to pay over to creditors funds in his hands belonging to the estate. So ordered. The administrator appeals. Affirmed.

Hendrick & Younkin, for appellant. *Hunsaker, Britt & Goodrich*, for respondent.

Belcher, C. This is an appeal by the administrator of the estate of the decedent from an order of the superior court of San Diego county, requiring him to pay to the creditors of the estate, whose claims had been duly presented and allowed, certain sums of money. The sum of money in controversy was $4,846.80, which was received by the administrator, for and on account of the estate, between July 5, 1891, and October 15, 1891, and deposited by him in the California Savings Bank in the city of San Diego in his own name. The court below found the facts to be as follows: "That, at the time said funds were deposited by said administrator in said California Savings Bank, said bank was reputed to be, and was considered, a safe and solvent bank and place of deposit, and was of good credit and standing, and was believed by said administrator to be solvent and safe; that said deposit was made in the individual name" of the administrator, "without any designation or indication of his representative capacity, but said administrator had no other funds or account with said bank, and deposited such with that particular bank for the express purpose of keeping the same separate from, and so that it would not be unnecessarily mingled with, his own property or individual funds; that in depositing said funds in said California Savings Bank, as aforesaid, said administrator acted in good faith; that on the 12th day of November, 1891, said California Savings Bank became suddenly, unexpectedly, and wholly insolvent, suspended business, and has not been able to pay the amount so deposited by said administrator with it, or any part thereof; * * * that said administrator has been guilty of no negligence or want of care in the administration of said estate, except that he deposited such funds in the California Savings Bank in his individual name instead of in his representative capacity or in the name of the estate." And as conclusions of law the court found that the administrator was responsible for the money so deposited by him, and that he must pay it over to the creditors of the estate.

The appellant contends that an administrator is only required to act in good faith, and to exercise such skill, prudence, and diligence in managing the affairs of the estate as men ordinarily bestow upon their own affairs; and that when he has in good faith, and with reasonable care, deposited funds of the estate in bank, which have been subsequently lost by the failure of the bank, he will not be held liable for the loss, unless he has willfully and unnecessarily mingled the trust property with his own, so as to constitute himself in appearance its absolute owner; and hence that, under the facts found in this case, the order of the court was erroneous, and should be reversed. The question presented has many times been before the courts of England and of this country, and the decisions upon it have been practically unanimous, and to the same effect as the decision of the court below in this case. The law upon the subject is stated in Perry on Trusts, (section 443:) "A trustee may deposit money temporarily in some responsible bank or banking house; and if he acted in good faith and with discretion, and deposited the money to a trust account, he will not be liable for its loss; * * * but he will be liable for the money in case of a failure of the bank, or for its depreciation, if he deposits it to his own credit, and not to the separate account of the trust estate." And again, in section 463: "So, if the trustee pays the money into a bank in his own name, and not in the name of the trust, he will be responsible for the money in case of the failure of the bank." A reference to a few of the numerous cases cited will be sufficient. In Com. v. McAlister, 28 Pa. St. 480, an administrator had deposited in his own name funds of the estate in a savings bank, and they had been partly lost by a failure of the bank. The court, after stating the facts and reviewing the authorities, said: "But it is sufficient, for the present case, to say that where an administrator or trustee, with trust funds in his hands, deposits them in his own name in a bank or other institution which fails, the loss shall fall upon him; and his liability will not depend upon the good faith, prudence, or judgment with which, apparently, he may have acted, nor upon the fact that he may have disposed of his own funds in the same way." In Williams v. Williams, 55 Wis. 300, 12 N. W. Rep. 465, and 13 N. W. Rep. 274, the plaintiff had in his possession as administrator a sum of money, and for safe-keeping, and greater security and convenience, deposited the same in a bank, taking a certificate of deposit in his own name for the amount. The bank was at the time in good credit and repute as safe, solvent, and in all respects trustworthy; and in making the deposit the administrator informed the teller, who received the money and gave the certificate, that the moneys were trust funds, and did not belong to him individually, but did not inform him to whom the money did in fact belong, nor give any directions as to the deposit being made or the certificate issued in any other than his individual name. Subsequently the bank failed, and the certificate became worthless and the amount wholly lost, except a small dividend was made from the assets in the hands of a receiver. It was held, after a quite lengthy review of the authorities, that the administrator must bear the loss. The court said: "To hold the administrator answerable in this case is undoubtedly a great hardship; but to exonerate him from liability is to encourage the mismanagement of trust funds, and to open the doors to frauds innumerable against those whose age and weakness entitle them to the most rigid protection of the law. The rule, therefore, should not be slackened, even if the question were a new one, much less in view of the authorities cited." In Naltner v. Dolan, 108 Ind. 500, 8 N. E. Rep. 289, attorneys had collected money for a client, and deposited it in a bank which was then in good standing, in their own name, but not mingled with their own money. The bank afterwards failed, and the money was mostly lost. It was held that the attorneys must bear the loss. The court said: "In case it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape the risk only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank as to indicate in some way that it is the principal's money. If he deposit in his own name he will not, in case of loss, be permitted to throw such loss on his principal, [citing cases.] In such case the good faith or intention of the trustee is in no way involved. Having for his personal convenience, or from whatever motive, deposited the money in his own name, thereby vesting himself with a legal title, it follows as a necessary consequence, when a loss occurs, he will not be permitted to say, as against the *cestui que trust*, that the fact is not as he voluntarily made it appear. * * * Whatever diversity of opinion may be found in respect to the rights of the bank or other creditors of the depositor, the authorities agree that a trustee who either invests or deposits trust money in his own name, without in some way designating it as trust property, will be responsible for any loss that may occur to the fund while so invested or deposited." But, whatever may be the rule elsewhere, appellant insists that the rule in this state is declared in section 2236 of the Civil Code, and that that does not make him liable. The section referred to reads as follows: "A trustee who willfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events." We do not think this section was intended to change the rule generally prevailing, or to limit liability under it; on the contrary, the section seems to be in entire accord with the general rule, and in effect to declare it in unmistakable terms. In our opinion the order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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97 Cal. 181

SPENCE v. SCOTT. (No. 14,774.)

(Supreme Court of California. Jan. 12, 1893.)

BILL OF EXCEPTIONS—WHEN NECESSARY.

Where the only question on appeal is whether the court below erred in striking out certain portions of the answer filed, a bill of exceptions is necessary. 31 Pac. Rep. 52, affirmed.

In Bank.

On rehearing. For former report, see 31 Pac. Rep. 52.

PER CURIAM. Upon further consideration of this cause, after hearing in bank, we are satisfied with the conclusion which was reached by department 1 in its opinion filed September 2, 1892, (31 Pac. Rep. 52,) and, for the reasons stated in said opinion, the judgment and order appealed from are affirmed.

97 Cal. 235

KING et al. v. SHEWARD. (No. 19,042.)

(Supreme Court of California. Jan. 19, 1893.)

SALE OF GOODS—RETURN OF PORTION—CONDITIONS.

In an action to recover a balance due on account of goods sold, it appeared that a correspondence relating to the right of defendant to return a portion of the goods purchased by him was concluded by a letter from plaintiffs stating that "you may return the goods with the long pants, and we will handle them the best we can for you, and will credit you with whatever we can get for them;" and that defendant immediately returned the goods, with a letter stating that "we send you to-day, per freight, 151 suits, bill inclosed, as per letter of instructions." *Held*, that a judgment for plaintiff for the amount of the loss on a resale of the goods was proper, though the letter accompanying the bill of the goods returned was written by a clerk without authority.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by Henry W. King and others against J. T. Sheward to recover a balance due on an account for goods sold and delivered. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jas. Burdett, for appellant. *J. L. Murphey*, for respondents.

GAROUTTE, J. In this cause the learned judge of the trial court rendered the following opinion:

"The plaintiffs are a clothing house in Chicago, and the action is for a balance due on a claim for goods sold and delivered to the defendant. The main item of difference about which the contention in this suit is, arises from a loss on the return of some of the goods. The defendant ordered the goods by a letter to a Mr. Cook, who was acting for the plaintiffs, the Chicago house, asking him to send not to exceed $2,000 worth of boys' and children's clothing, and adds: 'I want the privilege of returning anything I want to, but if you take proper care I will not return anything, in all probability.' Mr. Cook turned this letter over to the plaintiffs, the Chicago house, and they shipped the lot of goods to fill the order, and on January 5, 1889, Mr. Cook sent the defendant a letter in which he says: 'I am sending you a little over $2,000, so you can return anything you think will not suit your market.' The evidence shows that the plaintiffs sent goods to the value of $476.62 more than Mr. Sheward's letter called for, and the bill accompanying the goods contained the following statement: 'We will allow no goods to be returned after ten days from their receipt.'

"Mr. Cook testifies that the first time they were notified that Mr. Sheward found fault with the goods was his letter of May 8, 1889, in which he states that Mr. Fitzackerly had discovered, in going through the stock, that they did not need the long-pant suits, and asked the privilege of returning them, he paying the freight charges and getting other goods in place thereof, and asking Cook to wire him if he would consent. Cook turned this letter over to the house, and the plaintiffs at once telegraphed Mr. Sheward, on the same day, the 15th of May, and wrote Mr. Sheward, refusing to permit him to return the goods. May 15th, after receiving the telegram from the plaintiffs, Mr. Sheward writes another letter, in which he says he had not handled boys' clothing enough to find out he had made a mistake, 'and I ask you to help me out.' On May 22, 1889, plaintiffs wrote another letter to the defendant in answer to his letter of May 15th to Cook, in which they again refused to receive the goods, and used the following language: 'If you had on receipt of the goods, within a reasonable time thereafter, advised us, we should willingly have received them from you;' and adding: 'We will, however, say this to you: You may return the goods with the long pants, and we will handle them the best we can for you, and will credit you with whatever we can get for them.' Immediately upon the receipt of this letter by the defendant, and on the 29th of May, 1889, he packed up 151 suits and shipped them to the plaintiffs, the Chicago house, and sends the bill with a letter as follows: 'We send you to-day per freight 151 suits, bill inclosed, as per letter of instruction May 22d. Yours, truly, J. T. SHEWARD. Per L.'

"The bill shows that sixteen lots were returned, giving the numbers of each lot, which corresponded with the same numbers in the plaintiffs' first bill to said Sheward, but the return bill shows that ten of these lots were broken by forty-one suits. The defendant, it is true, says that his bookkeeper who signs this letter accompanying the return bill had no authority for writing it, still he was in the employ of the defendant, instructed to make out the bill and send the same, and it was in the line of his business to accompany it with a letter; and, from the fact that the goods were sent after the letter received from the plaintiffs, they would be sent in pursuance to their instruction, whether it said so in the letter or not. In other words, as I view the case, this letter of instruction, as it is called, or letter by the plaintiffs giving the conditions on which they would receive the goods returned, disposes of this case. The defendant had his option whether to return them according to the terms proposed in that letter, or to retain them, and recoup for damages if they were not the kind of goods ordered. He saw proper, however, to accept the terms proposed by the plaintiffs, and returned the goods. The plaintiffs accordingly received the goods so returned, and sold them, as they said they would do, at the best prices. The goods were billed at the price of $882 when returned, and they were sold by the plaintiffs for $600, making a difference of $282. This, with the item of freight and a small error, makes the amount for which the suit is brought. There was much testimony in the case, and much of the argument of counsel in their briefs, which, under the view I take of the matter, cuts no figure. It was in the nature of a new contract or proposition on the part of the plaintiffs to receive back the goods on certain conditions, and the defendant accepted that proposition, and that is the end of the matter, whether it is a hardship or not. Judgment must go for the plaintiffs."

For the foregoing reasons let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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3 Cal. Unrep. 748

BOYD v. BOYD. (No. 19,046.)

(Supreme Court of California. Jan. 14, 1893.)

DIVORCE—DIVISION OF COMMUNITY PROPERTY.

In an action for a divorce it is not an abuse of discretion for the trial court to set off to plaintiff the homestead and a small amount of personalty from the community property, leaving to defendant all other community property; section 146, subd. 1, Civil Code, providing: "* * * The community property shall be assigned to the respective parties in such proportion as the court, from all the facts of the case and the condition of the parties, may deem just."

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

(Not to be published in California Reports.)

Action for divorce by S. J. Boyd against E. H. Boyd. Judgment for plaintiff. Defendant appeals. Affirmed.

Jones & Carlton, for appellant. *Holloway & Kendrick*, for respondent.

FOOTE, C. This appeal was taken from a judgment in favor of the plaintiff, and from an order refusing a new trial. The appeal from the order has been dismissed by the appellate tribunal, and the matter now stands on an appeal from the judgment alone. This appeal was not taken within 60 days from the rendition of the judgment, so that no exception to the decision on the ground that it is not supported by the evidence can be considered. The findings must therefore be held to be supported by the evidence. The appellant contends, however, that the findings are insufficient. The findings are general, viz.: That all the allegations of the plaintiff's complaint are true; that all the allegations of the answer of the defendant, and of the averments thereto, are untrue and false, except the admissions contained in allegations 1 and 2, viz. that the parties were married as alleged in the complaint, and are husband and wife; and that the issue of said marriage was correctly stated in that pleading. Such findings have often been held to be sufficient. Richards v. Shear, 70 Cal. 186, 11 Pac. Rep. 607.

It is further claimed by the defendant and appellant that the court abused its discretion in awarding property to the plaintiff. The decree, which follows the findings and conclusions of law, does not show such to be the fact, and we have nothing to do with the evidence in the case. The court seems, by the decree, to have set aside to the plaintiff, "the innocent party," the homestead taken from the community property, which is subject to a mortgage of $5,000, and a small amount of personal property, leaving to the defendant all other property heretofore owned by the parties as community. This is in accordance with the legal power of the trial court in a proper case, under section 146 of the Civil Code, subds. 1 and 2.[1]

As to the other questions discussed by the appellant, it is sufficient to say that by the dismissal of the appeal from the order denying a new trial they are not before the appellate court for consideration. We perceive no prejudicial error in the record, and advise that the judgment be affirmed.

I concur: VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed; and, it appearing to the court that this appeal is without any merit whatever, and has been prosecuted for delay, it is ordered that to the judgment against defendant be added the sum of $100 costs.

97 Cal. 194

PEOPLE v. DAVIS. (No. 20,947.)

(Supreme Court of California. Jan. 14, 1893.)

LARCENY—PRESUMPTION AS TO OWNERSHIP—INDICTMENT.

1. On a trial for larceny from the person, the presumption of law is that the property belonged to him from whose possession it was taken.

2. The owner of the article stolen need not be produced as a witness for the state, if the felonious taking can be established by other competent evidence.

3. Under Pen. Code, § 484, which defines "larceny" as "the felonious stealing, taking, carrying, leading, or driving away the personal property of another," the indictment or information need not allege the taking to be against the will of the owner.

Department 1. Appeal from superior court, Los Angeles county; B. N. SMITH, Judge.

Charles D. Davis was convicted of larceny, and appealed. Affirmed.

W. W. Holcomb, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

GAROUTTE, J. Appellant was convicted of grand larceny, and appeals from the judgment and order denying his motion for a new trial.

Upon a careful examination of the instructions of the court, given to the jury, we have no fault to find with them.

It is insisted that the evidence is insufficient to support the verdict. Davis was charged with stealing a pocketbook and one five-dollar gold piece, all of said property being of the value of six dollars; and it was further charged to be the property of Jane Doe, and taken from her person. Doe was not present at the trial, neither was her testimony before the jury, in any form. It is now claimed that no evidence was introduced showing that the property alleged to have been stolen was her property, or that it was taken against her will. The evidence of eyewitnesses showed that the pocketbook was taken from the woman by appellant while she was standing up in a crowded street car, and the manner of the taking strongly indicates the act of a professional pickpocket. The fact that the property was in the possession of Jane Doe at the time of the taking is sufficient evidence of the ownership in her. It was said in People v. Nelson, 56 Cal. 82: "The money was in the possession of Ah Chung, and was taken from his person by the defendants. Therefore, it was presumptively his property, and that was sufficient proof of ownership." Under the Penal Code[1] of this state, it is not necessary to allege in the indictment or information that the property was taken against the will of the owner. There is nothing found in the definition of "larceny" to that effect. Bish. Crim. Proc. § 752*a*, says: "But such consent is, at the common law, matter simply of defense, and the absence of it does not enter into a *prima facie* case. Hence nonconsent is not averred in the indictment, and it need not be proved." In the state of Texas, nonconsent is made by statute a material element in the definition of "larceny," yet in that state the courts hold that such fact may be proven by circumstantial evidence; and there can be no question but that in many cases the mere act of taking is of such character that nonconsent would follow as an irresistible conclusion.

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[1] Section 146, subd. 1, Civil Code, provides: "* * * The community property shall be assigned to the respective parties in such proportion as the court, from the facts of the case and the conditions of the parties, may deem just."

[1] Pen. Code, § 484, defines "larceny" as "the felonious stealing, taking, carrying, leading, or driving away the personal property of another."

The affidavits offered of newly-discovered evidence are wholly insufficient to justify the granting of the motion for a new trial. Let the judgment and order be affirmed.

We concur: Paterson, J.; Harrison, J.

97 Cal. 21

CHRISTY v. SPRING VALLEY WATERWORKS. (No. 14,388.)

(Supreme Court of California. Dec. 13, 1892.)

Partition—Res Judicata—Adverse Possession—Statute of Limitations.

1. A judgment in partition is conclusive of the rights of the parties in the land sought to be partitioned, and a defendant who failed to assert a claim at the trial will be precluded from afterwards asserting it.

2. A deed executed to a defendant in partition, by his codefendants, to certain land sought to be partitioned, while the proceeding is pending, cannot avail such defendant in acquiring a prescriptive title to the land so conveyed against a plaintiff in the partition proceedings.

3. Nor can the payment of taxes by defendant on land while it is held in cotenancy with plaintiff operate to strengthen a title by adverse possession against plaintiff.

4. Code Civil Proc. § 322, provides that when it appears that the occupant entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, and that there has been a continued occupation and possession of the property included in such instrument, or of some part of the property, under such claim for five years, the property so included is deemed to have been held adversely. *Held*, that the mere fact that defendant had deeds to some of the land sought to be partitioned would not establish an adverse holding by it; it being essential for defendant to show that it entered into possession under such deeds.

5. If there was error in the exclusion of tax receipts offered in evidence by defendant to prove that it had paid taxes on certain land, such error was cured by the testimony of a witness that defendant had paid the taxes.

6. Code Civil Proc. § 765, provides that referees in a partition suit must report their proceedings to the court, describing the property divided and the shares allotted to each party, with a particular description of each share. Section 766 provides that the judgment of the court confirming such report shall be final and conclusive on all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided or any part thereof. *Held* that, until the final judgment confirming the referee's report was rendered, it could not be known to which of the parties any particular parcel of the land would fall, and until such segregation had been made there could be no adverse holding of any portion of the land by either party to the action against any of the other parties thereto; and while a suit in partition was pending, the statute of limitations could not run against or in favor of either of them.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Ejectment by Christy against the Spring Valley Waterworks. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Fox, Kellogg & King, for appellant. *I. N. Thorne* and *Oliver P. Evans*, for respondent.

Harrison, J. This cause has been before the court on two former occasions. 68 Cal. 73, 8 Pac. Rep. 849; 84 Cal. 541, 24 Pac. Rep. 307. The action is ejectment, and the plaintiff's title is derived from one Randall, to whom the land in question was allotted in an action of partition entitled Randall vs. Winter, brought by him against his cotenants in the late twelfth district court, and in which the appellant herein was one of the defendants. The interlocutory decree in that action was rendered October 13, 1871, and the referee who was appointed under its provisions to make partition of the land involved in the action made his report to the court August 2, 1875, and a final decree, affirming this report and awarding the lands in controversy herein to Randall, was rendered December 23, 1875. The plaintiff herein succeeded to the rights of Randall in the land so allotted to him August 23, 1880, and on the 5th of October, 1880, commenced the present action. The defendant in its answer denied the title of the plaintiff, pleaded the statute of limitations, and also alleged ownership in itself. Judgment was rendered in favor of the plaintiff, and from that, and also from an order denying its motion for a new trial, the defendant has appealed.

The interlocutory decree in the partition suit of Randall vs. Winter established the relative rights of the parties thereto in the tract of land sought to be partitioned, and the final judgment therein confirming the report of the referee in partition was a conclusive determination that, as against all of the defendants in that action, Randall was the owner in fee of the tract of land described in the complaint herein. If the defendant herein had any right or claim to this land, it was incumbent on it to assert such right or claim in that action, and a failure to do so would preclude it from subsequently asserting such claim. As was said upon the former appeal in this action, (68 Cal. 73, 8 Pac. Rep. 849:) "In one way or the other it was bound to disclose its adverse claims to the land so that the court might ascertain and determine them. If they were not disclosed, the judgment of the court established the title as it was found to exist in the tenants in common at the date of its rendition, and it was conclusive upon all the parties as to whatever title or claims to the land they had then in hand." The judgment in that action was also a conclusive determination that the parties thereto were tenants in common of the land in controversy according to their respective rights, and that until that time there had existed between them a unity of possession of said land. If, prior to the commencement of that action, the defendant herein had acquired any title as against Randall by virtue of any adverse possession, it should have been set up by it in that action as a defense to his right to have it partitioned in that suit; but, whether alleged or not, the judgment in partition confirming the land to Randall was conclusive that the defendant had not acquired any such title. If at the commencement of that action the defendant was holding the land in adverse possession, but had not held it long enough to ripen into a title, the bringing of the suit suspended the running of the time, and prevented the acquisition by it of a title by prescription. While the suit was pending, the running of the statute of limitations was suspended, and neither party to the action could acquire any rights in the land by virtue of an adverse holding thereof which would impair the judgment that was finally rendered. As the plaintiff herein has succeeded to all the rights of Randall in the land in question, his right to the land must be held superior to that of the defendant, unless the defendant has in some mode acquired an interest therein subsequent to the rendition of that judgment. For this purpose the defendant in its answer set up the statute of limitations, and in its cross complaint alleged that it had acquired a title to the land by prescription. The court found in favor of the plaintiff upon these issues; but it is now urged by the appellant that the refusal of the court to admit certain evidence offered by it for the purpose of sustaining these allegations was error. If, however, the evidence offered was incompetent or manifestly insufficient to establish its averments, the exclusion by the court of such evidence would not constitute a reversible error.

The evidence offered consisted of a conveyance of the land in question from certain parties who were defendants in the partition suit, executed to the defendant February 17, 1870; also a deed from George Turner, dated August 28, 1871; certain tax receipts, and a judgment of condemnation rendered in 1862 by the county court of San Francisco. The record does not show the date at which the action of Randall vs. Winter was commenced, but it is shown that the answer therein of the present defendant was filed more than six months after the execution to it of the deed from the defendants in that action; so that whether this deed was executed prior to the commencement of that action, or subsequent thereto, it could not avail to impair the judgment rendered therein. If it was executed before the action was begun, the title conveyed thereby was adjudicated in that action, and the defendant could not acquire from its codefendants, *pendente lite*, any title that would not be bound by the judgment. It was held upon the first appeal herein, (68 Cal. 73, 8 Pac. Rep. 849,) that by the judgment in the partition suit the defendant was estopped from claiming any title by virtue of the Turner deed; and it needs no argument to show that, while that suit was pending, the execution to it of a deed could not aid the defendant in acquiring a prescriptive title any more than would any other act of adverse possession; nor would the payment by the defendant of the taxes upon the land, while it was held in cotenancy with the plaintiff in that suit, operate to strengthen its title, or give to it any new title. The deeds offered in evidence would not of themselves establish any adverse holding, and would be of avail to the defendant under its averments only upon its being shown by it that it entered into possession under them. Section 322, Code Civil Proc., provides: "When it appears that the occupant entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument as being a conveyance of the property in question, and that there has been a continued occupation and possession of the property included in such instrument, or of some part of the property, under such claim for five years, the property so included is deemed to have been held adversely." The effect of this section is not to make the instrument any evidence of adverse possession, but to extend the adverse possession which may have been held of any portion of the land included in the instrument to the whole of such land. It is still incumbent upon the party offering the deed to give competent evidence of an adverse possession of some part of the land included within the instrument, and, when evidence of such adverse possession has been given, the whole of the land embraced within the instrument is deemed to have been held adversely. It was admitted by the defendant herein that it had been in possession of the land since 1863, and Eliott testified on its behalf: "The defendant is in possession thereof, that is to say, of the lands in dispute in this action, since July 1, 1862, continuously down to the present time,—all the time. That possession has been exclusive in defendant. No one else has been in possession during that period. The defendant has been in the actual occupation of all the property in dispute in this action, exclusive of any other persons, and claiming it adversely to all the world, since July 1, 1862, down to the present time."

The error, if any, in excluding the tax receipts, was cured by the testimony of Eliott, who testified that the defendant had paid the taxes continuously to his knowledge since the year 1866 down to the present time upon the property in dispute in this action. "I know that because I have paid them myself for the company."

The record of the judgment of condemnation is not set forth in the transcript, and we cannot say that the court committed any error in excluding it. As before stated, the judgment roll in Randall vs. Winter, which was before the court, was conclusive evidence that the defendant herein had not prior to that time held any adverse possession of the land thereby partitioned to Randall; and as the evidence offered on behalf of the appellant, and excluded by the court, was insufficient to countervail the effect of this judgment, its admission would not have tended to change the finding of the court, and consequently its exclusion will not authorize a reversal of its action.

The contention of the appellant that the effect of the judgment in partition operates only from the date of the interlocutory decree, and that in support of its plea of a prescriptive title it can avail itself of any adverse possession subsequent to that date, cannot be maintained. The effect of the interlocutory decree was merely to determine the relative rights of the respective parties to the action in the entire tract of land, but did not accomplish any severance of the possession. It was still necessary that a partition of the entire tract, according to these respective rights, should be made, "and the share allotted to each party, with a particular description of each share," reported to the court, (Code Civil Proc. § 765,) and that such report should be confirmed by the judgment of the court; and it is provided in section 766, Code Civil Proc., that this judgment of confirmation "is binding and conclusive on all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof." Until the final judgment confirming the referee's report in partition was entered, it could not be known to which of the parties any particular parcel of the land would fall, and until such segregation had been made there could be no adverse holding of any portion of the land by either party to the action against any of the other parties thereto. The suit in partition was pending until the judgment of confirmation was rendered in December, 1875, and between the parties to an action the statute of limitations never runs against or in favor of either while the action is pending.

The judgment and order are affirmed.

We concur: Garoutte, J.; Paterson, J.

(97 Cal. 1)

GORMAN v. SOUTHERN PAC. CO. (No. 14,620.)

(Supreme Court of California. Dec. 8, 1892.)

Carriers—Ejecting Passenger—Damages.

1. Where a passenger is wrongfully ejected from a railroad car, in a forcible and violent manner, but without physical injury, the jury, in assessing his damages, may consider his injured feelings, the indignity endured, his mental suffering, and wounded pride.

2. An action for forcible ejection from a railway car sounds in tort, under Civil Code, § 3294, providing that "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury * * * may give damages for the sake of example, and by way of punishment."

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Jos. P. Jones, Judge.

Action by J. T. Gorman against the Southern Pacific Company to recover for personal injuries sustained by him while a passenger on defendant's road. Judgment for plaintiff. Defendant appealed. Affirmed.

Jas. C. Martin and *A. A. Moore*, for appellant. *Chase & Miller*, for respondent.

Belcher, C. The plaintiff brought this action to recover damages resulting from his wrongful expulsion from a railroad train owned and operated by the defendant. It is alleged in the complaint that on the 21st day of May, 1890, plaintiff was desirous of being conveyed from Antioch, in Contra Costa county, to Bethany, in San Joaquin county, upon defendant's railroad train, and that he paid to defendant's agent at Antioch the usual fare for that purpose, and received in return a ticket entitling him to such conveyance on the regular passenger train running between the two places named; that he got aboard the train, and soon after leaving Antioch the conductor thereof took up his ticket, and thereafter, and before reaching Bethany, to which place the ticket entitled him to ride upon the train, forcibly, and with violence, expelled and ejected him from the train, and refused him the privilege of riding thereon the balance of the distance to Bethany, about 20 miles; that he sustained damages in consequence of his forcible and violent ejectment from the train, as aforesaid, in the sum of $10,000, for which he asked judgment. The answer of the defendant denied that plaintiff had any ticket, or was forcibly or violently ejected from the train; admitted that he boarded the train at the place charged; and alleged that he never exhibited or showed a ticket, but, to the contrary, paid his fare to the next station from Antioch, and thereafter, before reaching Bethany, upon his refusal to pay further fare, he was given the usual and necessary time to present his ticket or pay, and, doing neither, was requested by the conductor to vacate the train at a station, and near to divers dwelling houses, and that he did so vacate while the train was standing still. The case was tried before a jury, and a verdict returned in favor of the plaintiff for $500, on which judgment was entered. The defendant appeals from the judgment and an order denying its motion for a new trial.

The principal contention on the part of the appellant is that the case was not one in which exemplary damages could be allowed, and that the damages awarded by the jury were excessive. At the trial the plaintiff testified that he bought a ticket, and got on the train, at Antioch, as stated in the complaint, and his testimony in this regard was confirmed by the station agent. He then proceeded as follows: "Soon after the train left, the conductor, Mr. Nightingill, asked for my ticket, and I gave it to him. We ran to the next station, and, just after we left, the conductor came to me again,—the same one,—and asked for my ticket. I said, 'I gave it to you just after leaving Antioch.' He said I did not, and that I must pay my fare, or show a ticket, or get off the train. I repeated that I had paid my fare once by buying a ticket, which I gave to him. This he denied, and immediately seized the bell rope over his head with one arm, and took me by the collar of the coat with the other, just as you would grab a dog. He threw me up in this way against the door, and pulled me out to the platform, and shoved me so violently down that when I got about two steps down I says: 'For God's sake, don't break my neck.' He said, 'Get off.' * * * When I finally left the train, it had not fully stopped. * * * When the conductor took my ticket, he put it in his pocket. When he asked me the second time for a ticket, after leaving Brentwood, I wanted him to look in his pocket, and he would find it, as proof; but he would not give time to consider that matter at all, but took me violently, and all of a sudden he grabbed me by the coat collar, and lifted me up off my feet, and shoved me before him out of the door. * * * When the conductor took me by the collar, it did not hurt me; that is, it did not hurt me physically. I was not hurt, except that it hurt my feelings to be put off, in the presence of other people, as if I hadn't paid my fare." The conductor was called as a witness by the defendant, and testified that he did not take up or receive any ticket from the plaintiff, and did not use any violence towards him, or seize him by the collar, or put his hands upon him at all; that, when he first called for the ticket, plaintiff said he wanted to go to Brentwood, the next station, and paid his fare thereto, 35 cents, by giving to witness a dollar and receiving back the change; that on leaving Brentwood witness again asked plaintiff for his fare, and told him he must pay his fare, show a ticket, or get off the train, and plaintiff said: "Stop your train, then, and I will get off;" and that he stopped the train in the immediate vicinity of the station, and plaintiff stepped off, without any violence, and without being touched. In rebuttal the plaintiff testified: "I did not say to the conductor, after leaving Brentwood, as he testified, to stop the train and I would get off, nor nothing purporting to convey that idea. I did not get off voluntarily from the train. There would be no object in my getting off. I did not give him a dollar for my fare from Antioch to Brentwood, and he did not give me any change back. We never had one word from the time he took my ticket until we passed Brentwood."

It clearly appears from the verdict that the jurors believed the plaintiff, and not the conductor; and it must, therefore, be assumed that the plaintiff was ejected from the train in the manner and under the circumstances stated by him. But, assuming this to be so, it is still claimed for appellant that plaintiff was entitled to recover only his actual damage, and that the amount allowed was entirely excessive. If a passenger refuses to pay his fare, or to exhibit or surrender his ticket, when reasonably requested so to do, the conductor may put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, on stopping the train. Civil Code, § 487. But, if a passenger has once paid his fare, he cannot be ejected because he refuses to pay a second time; and if he is so ejected the company will be liable to him in damages. Beach, Ry. Law, § 881. And it will be no defense to an action against the company for a wrongful expulsion that its conductor was honestly mistaken. Quigley v. Railroad Co., 11 Nev. 350; Hamilton v. Railroad Co., 53 N. Y. 25. The measures of damages in an ordinary case of wrongful expulsion, without unnecessary violence or insult, and from which no bodily injury results, is the cost of a ticket from the point of expulsion to the passenger's destination, together with an allowance for such damages as actually result from loss of time. But when the expulsion is accompanied by undue violence, or by insult and abuse, the jury is authorized to consider the injured feelings of the plaintiff, the indignity endured, his mental suffering, the humiliation and wounded pride which one in his condition in life and standing in the community would experience, and to award him compensatory damages therefor. Beach, Ry. Law, §§ 890, 891, and cases cited.

When a passenger is wrongfully expelled from a train, it is a breach of duty on the part of the carrier, and an action in tort will lie to recover damages. Redf. Carr. § 422; Beach, Ry. Law, § 887; Head v. Railway Co., 79 Ga. 358, 7 S. E. Rep. 217. In the case last cited it was held that, (we quote from the syllabus:) "An action on the case by a passenger against a railway company, for wrongfully expelling him from a train with force and violence, though the declaration allege a contract for carriage, is not for breach of the contract, but for a tort by breach of duty; and punitive as well as actual damages are recoverable, if the circumstances of the particular case warrant such recovery." The Civil Code, § 3294, provides: "In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." Here the action was clearly in tort for breach of duty; and under the section of the Code quoted the jury was authorized to give exemplary damages, if, in expelling the plaintiff, the defendant was guilty of oppression, fraud, or violence, actual or presumed.

The question, then, is, can it be said, in view of the facts proved, and the well-settled rules of law above stated, that the damages were so excessive as to justify the court in disturbing the verdict on that ground? "The rule is well settled that where a trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the measure and amount of damages are matters for the jury alone. In such cases courts will not disturb the verdict on the ground that the damages are excessive, unless the amount of damages is so disproportionate to the injury proved as to make it clear that the jury, in rendering the verdict, must have acted under the influence of passion or prejudice."

Russell v. Dennison, 45 Cal. 337. We see nothing in this case to indicate that the jury acted under the influence of passion or prejudice, and in our opinion the verdict cannot be disturbed on the ground that the damages were excessive.

It is also contended for appellant that the court erred in giving certain instructions, and in refusing to give other instructions, to the jury. The instructions given stated the law of the case fully and fairly, and we think correctly. The instructions refused were asked upon the theory that the plaintiff could in no event recover more than his actual damages, and that such damages could not exceed the cost of a ticket from the point where he was expelled to the point of his destination, together with a reasonable allowance for his loss of time. We see no prejudicial error in the action of the court upon the instructions given and refused, and in our opinion the judgment and order appealed from should be affirmed.

We concur: Vanclief, C.; Temple, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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3 Cal. Unrep. 749

YBARRA v. SYLVANY. (No. 19,102.)

(Supreme Court of California. Jan. 14, 1893.)

Action to Quiet Title—Findings—Sufficiency—Pleading.

1. In an action to quiet title, a finding that plaintiff is the owner in fee and entitled to the possession of the described parcel of land is a finding of an ultimate fact, and not a conclusion of law.

2. Where defendant pleads that the action is barred by certain specified sections of the Code of Civil Procedure, a finding that plaintiff, at the time of commencing the action, was under the age of 23 years, and his cause of action is not barred by either of the sections pleaded, is sufficiently specific.

3. Where defendant does not raise the objection that plaintiff has not legal capacity to sue, a finding that plaintiff was under 23 years of age at the time of commencing the action is not objectionable on the ground that he may have been under 21 years of age, and is sufficient.

4. Where defendant claims under a void guardian's deed, and sets up no claim for repayment of money paid, and it does not appear that he paid any for the land, a judgment quieting the title in plaintiff is not erroneous, though no tender of repayment is made.

Commissioner's decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

(Not to be published in California Reports.)

Action by Candelario Ybarra against Stephen Sylvany to quiet the title to a certain parcel of land. From a judgment for plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

Dameron & Van Schrever, for appellant, *Moye Wicks*, for respondent.

Belcher, C. This is an action to quiet the plaintiff's title to a parcel of land in the city of Los Angeles, and the complaint is in the usual form. The defendant, by his answer, denied all the averments of the complaint; denied that he had no right, title, or interest in or to the land; and alleged that he was the owner thereof in fee simple, and was such owner and entitled to the possession of the land when the action was commenced; alleged that he had been in the quiet and peaceable possession of the premises described, holding and claiming the same adversely to the plaintiff and all other persons, for more than five years before the commencement of the action, and that the plaintiff's cause of action was barred by the provisions of sections 1806 and 318 and 319 of the Code of Civil Procedure. He then set out the facts in a cross complaint and asked that his title be quieted as against the plaintiff. After trial the court below found that the plaintiff "is now, and for a long time hitherto has been, the owner in fee and entitled to the possession of" the parcel of land described in the complaint; that the defendant claims an interest in and to the said land, but his claim is without right, and he has no right, title, or interest therein, or in any part thereof; that the defendant was in the quiet and peaceable possession of the premises described, and claiming the same adversely to the plaintiff and all other persons, for more than five years before the commencement of the suit, but during all that time the plaintiff was the owner and entitled to the possession thereof; that, at the time defendant entered upon said premises, plaintiff was a minor, and defendant entered thereon "under a pretended purchase thereof at an irregular and erroneous and insufficient and void guardianship sale, made in the matter of the estate and guardianship of this plaintiff, and this defendant has never had any title to the said premises or any part thereof, save such title as he claimed to have under the said worthless and void guardianship deed of conveyance;" that plaintiff at the time of commencing the action was under the age of 23 years; and that his cause of action was not barred by either of the sections of the Code pleaded in bar thereof. Judgment was accordingly entered quieting the plaintiff's title, in accordance with the prayer of his complaint. Defendant moved for a new trial, which was denied, and then appealed from the judgment and order. No bill of exceptions or statement of the case is brought up in the transcript, and therefore only such questions can be considered as arise upon the judgment roll.

In support of the appeal it is claimed that the findings as to the plaintiff's ownership and right to the possession of the premises in controversy were mere conclusions of law, and therefore insufficient to justify the judgment. This claim cannot be sustained. Finding No. 1 was to the effect that the plaintiff is the owner in fee and entitled to the possession of the described parcel of land. This was a finding of the ultimate fact, and not of a conclusion of law, and was sufficient. Murphy v. Bennett, 68 Cal. 528, 9 Pac. Rep. 738; Daly v. Sorocco, 80 Cal. 367, 22 Pac. Rep. 211.

It is further claimed that the findings upon the issues raised by the plea of the statute of limitations were simply conclusions of law, and insufficient. The defendant pleaded the statute by alleging that the cause of action was barred by certain sections of the Code of Civil Procedure, and the court found that the action was not barred by either of the sections named. The finding was as broad and specific as the plea, and was sufficient. Gaslight Co. v. Dameron, 67 Cal. 663, 8 Pac. Rep. 595; Luco v. De Toro, 91 Cal. 407, 27 Pac. Rep. 1082.

It is also claimed that the finding that plaintiff was under the age of 23 years when the action was commenced was insufficient, because he might have been under the age of 21 years, and so incapacitated to commence the action. A sufficient answer to this claim is that defendant failed to raise the objection that plaintiff had not legal capacity to sue, by demurrer or answer, and it was therefore waived.

Finally, the point is made that the plaintiff had no right, legal or equitable, to have his title quieted as against the defendant, without first paying back to the defendant the money which the latter paid for the land at the guardian's sale. We do not think the judgment can be reversed on this ground. No claim for repayment of any sum of money is set up in the answer or cross complaint, and it nowhere appears in the record that any sum was ever paid by the defendant for the land. If he in fact paid for the land, and considered himself entitled to repayment, as a condition precedent to the quieting of the plaintiff's title, the facts showing his equities should have been set up, and appropriate relief asked. On the whole, we see no merit in the appeal, and therefore advise that the judgment and order be affirmed.

We concur: Haynes, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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96 Cal. 480

WHITTON v. SULLIVAN. (No. 14,090.)

(Supreme Court of California. Nov. 28, 1892.)

Action on Contract—Pleading—Evidence.

1. In an action by a stenographer to recover for services rendered, the complaint alleged a special contract to take testimony in a contested election case at a certain rate. Defendant admitted the contract, but contended that it was conditional on his success, and, as he was unsuccessful, the contract was void for failure of condition. *Held*, that the complaint need not state that defendant had agreed to pay the contract price. Pavisich v. Bean, 48 Cal. 364, followed.

2. Where the contract was made by defendant's attorney, on the authority of his client, with plaintiff, and there was no conflict between them as to its terms, but defendant claimed that his attorney had contracted to pay a greater price than he was authorized, it was proper to refuse proof of the market price for similar work to show what the contract was, as this was a matter between the defendant and his attorney.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by A. K. Whitton against Frank J. Sullivan for the recovery of money. From a judgment for plaintiff, defendant appeals. Affirmed.

E. P. Cole and *Frank J. Sullivan*, for appellant. *H. C. Platt*, for respondent.

Garoutte, J. Action brought by respondent, as a stenographer and notary, to recover for services rendered appellant in taking testimony, etc., in a contested election case. A special contract at the rate of 30 cents a folio for the original, and 5 cents a folio for copies, is relied upon as the basis of the action. Appellant admits that such was the contract, but insists that it was conditional upon his final success in securing a seat in congress, and that, if such event did not occur, then the contract price was an amount much less than is now claimed by respondent. Appellant was unsuccessful in his endeavors to oust his opponent, and hence asserts that the contract here relied upon was rendered nugatory by the failure of the condition upon which it was based. Under the authority of Pavisich v. Bean, 48 Cal. 364, and cases there cited, the complaint is unobjectionable.

It is insisted that the court erred in not permitting the appellant to prove the market price for work of a similar character, as tending to show what the contract in this regard really was. It is a well-recognized principle of law that, where a conflict of testimony arises between the parties as to the amount to be paid for services rendered under a contract, proof of reasonable value or market price is admissible as tending to show to some extent what price was agreed to be paid; and this principle is stated and approved in Ellis v. Woodburn, 89 Cal. 129, 26 Pac. Rep. 963. But we do not think the question arises in this case. If the conflict of testimony arose between the respondent and Bowden, and not, as it does, between appellant and Bowden, then this principle of law could be successfully invoked. Bowden and respondent agree in all respects as to the terms of the contract; and Bowden, as the agent of appellant, made the contract. Appellant testified: "I do not recollect ever having had any interview with Mr. Whitton. All the business that I did was with Mr. Bowden. I relied upon him as my attorney and confidential adviser. * * * I made arrangements with Mr. Whitton through Mr. Bowden, my attorney." It will thus be seen that Bowden was authorized by appellant to make a contract with respondent to perform this work, and under such authorization he made a contract with respondent, who performed the work thereunder. Appellant's cause of complaint is simply that his agent, Bowden, exceeded the limitations placed upon his powers, by contracting to pay respondent a greater price for the work than was included in his authority of agency; but this is a matter between the principal and his agent, and with which the party doing the work has no concern.

This principle is clearly declared in Cosgrove v. Ogden, 49 N. Y. 257, where the court said: "The defendants were responsible for this act of Brown. It was an act done by him in the prosecution of their business, and they are not relieved from responsibility therefor by his departure from their instructions in the manner of doing it. The test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do." For these reasons, conceding appellant's evidence to be entirely true, the conflict of testimony did not arise as to the amount agreed to be paid to respondent for the labor performed, but arose as to the nature of the authorization given by appellant to Bowden; and hence the evidence offered upon the question as to the market value of that character of work was immaterial, and the principle of law relied upon to sustain the offer entirely inapplicable. Upon a careful examination of the record we find nothing additional demanding our attention.

Let the judgment and order be affirmed.

We concur: Paterson, J.; Harrison, J.

(3 Cal. Unrep. 643)

PEOPLE v. CURRAN. (No. 20,927.)

(Supreme Court of California. Nov. 28, 1892.)

LARCENY—EVIDENCE.

Defendant and one F. were jointly indicted for grand larceny. On the trial there was evidence that wheat stolen by F. was stored in an outbuilding of defendant, but there was nothing to connect him with F., nor was it shown that defendant was acquainted with him. *Held*, that the verdict against defendant was not sustained by the evidence.

Department 1. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

One Curran was jointly indicted with one Fitzpatrick for grand larceny. Curran demanded a separate trial, and was convicted. From the judgment, and from an order denying his motion for a new trial, he appeals. Reversed.

L. J. Maddux, and *Eastin & Griffin*, (*W. E. Turner*, of counsel,) for appellant. *Atty. Gen. Hart*, for the People.

Paterson, J. The defendant, Curran, and one Fitzpatrick were charged jointly with the crime of grand larceny. Separate trials were demanded. The defendant, Curran, was tried and convicted, and from the judgment, and an order denying his motion for a new trial, he has appealed. We have carefully examined the evidence set forth in the bill of exceptions, and find nothing therein which sustains the verdict. It is not a case of conflict of evidence. The testimony tends to show that Fitzpatrick and another stole 29 sacks of wheat, and stored it in a cabin belonging to the defendant, Curran. There is not a *scintilla* of evidence which connects the defendant with Fitzpatrick, or the person who assisted him in stealing the wheat. It is not shown even that he had any acquaintance with either one of them. The wheat was stolen on the evening of the 18th of July, 1891, and placed in the cabin of the defendant. The following is a summary of all the evidence in the case: Watson testified that on July the 19th he missed 29 sacks from the pile of grain, and discovered the tracks of a spring wagon which had been drawn by two mules from Fitzpatrick's place to the stone cabin; that Curran was hauling wheat on the 19th with a four-horse wagon from the Wilson tract adjoining the tract on which the cabin was situated, and that he had been hauling wheat in the same way every day for some time prior to that time. Waterhouse, a deputy sheriff, testified that Curran told him on the 19th, at Salida, that some one had been putting wheat in his cabin, and wanted him to go over and investigate the matter, as there was likely to be trouble. This statement was made before anything was said to Curran by the officer. McGinn, the warehouseman, testified that Curran had brought wheat to his warehouse every morning, and deposited the same in the name of Mary A. Wilson; that on the morning of the 19th he deposited 40 sacks in the name of Mrs. Wilson, and that these 40 sacks of wheat were afterwards sold, and the money paid to Mrs. Wilson; that Curran never brought any wheat of his own there, and that, as soon as he arrived on the morning of the 19th, he told the witness about his discovery of the wheat in the cabin. Jeffries testified that he saw a wagon on the morning of the 19th standing at the door of the cabin, with some wheat on it; that he did not see any one load any wheat on the wagon at the cabin, but did see the defendant picking up wheat in the field near the same. McGinnes testified that he was a deputy constable; that he was told by Curran on the morning of the 19th that a lot of wheat had been placed in his cabin, but he did not known how it got there; that the defendant said to him he noticed wagon tracks leading into the cabin, and there was something wrong, and had driven in there to see what it was, and had discovered the wheat in the cabin. Grider testified that on the night of the 19th he saw two men hauling wheat from the pile to the cabin. He believed these men to be Will Ducker and Sylvester Fitzpatrick. The only testimony in the record which in any way tends to connect the defendant with the commission of any offense is that of Grider, the owner of the threshing outfit which was working in an adjoining field. He stated that early on the morning of the 19th he saw the defendant loading wheat from the cabin upon his wagon. Inasmuch as there is nothing whatever in the evidence tending to show that the defendant ever had any relations with the parties who stole the wheat, or that he even was acquainted with them, the most that can be claimed for this evidence is that it tended to show the defendant had received the wheat knowing it to have been stolen; but that is not the offense charged here. If it should be conceded, however, that the testimony of

Grider of itself tended to connect the defendant with the commission of the crime of grand larceny, with which he was charged, we think that the evidence, taken as a whole, is entirely consistent with the innocence of the defendant, and that the verdict cannot stand. It is the duty of the prosecution to make out a case against the defendant. All the circumstances of the case, when taken together, show very clearly that Grider was mistaken in saying that the defendant had taken wheat from the cabin on the morning of the 19th. He was at least half a mile distant from the cabin at the time he claims to have watched the operations of the defendant. He was contradicted in two material respects by two witnesses, Jeffries and Watson. The latter testified that he saw the defendant drive up to the cabin and stop, but that he did not take any wheat therefrom; that he was working on the Grider machine; that Grider was lying in his bed at the time the defendant was at the cabin; and that he was too far away from the cabin any way to see what was going on there at that hour in the morning. It is in evidence, uncontradicted, that the defendant had for some time been hauling wheat daily from land surrounding the cabin, and that on the morning of the 19th a portion of his load had been taken from the ground very near the place where the cabin was situated. Several representative citizens of the county of Stanislaus testified that they had known the defendant for several years, and that his reputation for honesty and integrity in the neighborhood where he lived was good,—had never before been questioned. A conviction—especially a conviction of felony—ought not to be permitted to stand on mere conjecture. The prosecution is bound to make out a case. It is difficult to see how the jury, under the instructions of the court, could say that they were satisfied beyond a reasonable doubt of the guilt of the defendant, unless there was evidence before them which is not contained in the record before us. "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict." Judgment and order reversed.

We concur: GAROUTTE, J.; HARRISON, J.

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97 Cal. 10

BARKER et al. v. DOHERTY et al.

(No. 14,144.)

(Supreme Court of California. Dec. 10, 1892.)

MECHANIC'S LIEN — TIME OF BEGINNING ACTION.

In an action to foreclose a mechanic's lien, where the plans and specifications were made a part of the building contract, and were not filed as required by section 1183, Code Civil Proc., and were therefore "wholly void, and no recovery shall be had thereon," though the contract was void, it might be used as evidence to show the character of the building to be erected, and thereby furnish the test by which it could be known when the building was completed, and the time when lien proceedings should be begun.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by C. A. Barker and others against John P. Doherty and others to foreclose mechanic's lien. Judgment for defendants. Plaintiffs appeal. Affirmed.

William N. Jordan, for appellants. *Charles F. Hanlon*, for respondents.

GAROUTTE, J. Action brought to foreclose certain mechanics' liens. The court found that they were prematurely filed, and rendered judgment for respondents. The plans and specifications were made a part of the contract, and were not filed in the recorder's office; hence the contract was void. Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. Rep. 629; Yancy v. Morton, 94 Cal. 558, 29 Pac. Rep. 1111.

Appellants were material men, and the only question involved in this appeal is, were the liens filed prematurely? And that question is answered by a determination as to the time when the building was completed. The court found that the building was completed by the owner (the contractor having decamped) November 30, 1886, according to the plans and specifications contained in the contract. There is evidence showing that a tenant of the owner had some possession of a portion of the building in the preceding month of September, but, as these liens were filed and actions brought prior to the amendment of the Code declaring occupation by the owner to be conclusive evidence of completion, that fact is only material as a circumstance tending to show the true date of completion. In referring to the finding of fact made by the court as to the date of completion of the building, appellants in their opening brief say: "It is evident from the language of this finding that the court had in mind as a standard of completion the requirements of the contract, and, had there been a valid contract between the parties, this finding would undoubtedly have been correct. In the absence of such contract, however, no such standard can be used, and it was the duty of the court to determine the fact of completion without reference to the requirements of any contract. Was it substantially done? Had a structure reasonably well adapted to the use for which it was designed been erected?" Appellants have placed before us no authority supporting the rule upon which they insist; neither can it be supported upon principle.

Section 1183 of the Code of Civil Procedure provides *inter alia*, that if the contract is not filed in the office of the county recorder of the county where the property is situated it "shall be wholly void, and no recovery shall be had thereon." Under this provision of the law, the contract in this case being void by reason of failure of recordation, appellants insist that the test of completion must be determined otherwise than by an inspection of the contract, and that the character of building erected by the contractor is not required in any sense to fill the measure called for by the terms of the contract. In Kellogg v. Howes, 81 Cal. 170, 22 Pac. Rep. 509, and in Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. Rep. 629, this provision of the Code was a subject of review; and those cases decided that the contract was void as forming the basis of a recovery, and no legal liability could be created by any of its provisions. This would seem to be apparent from a cursory reading of the provision itself. It was never intended to hold in those cases that the writing could not be used as evidence to determine the character of the building to be erected, and thereby to furnish the test by which it could be known when the building was completed. Such is evident from the fact that in those cases the test of completion of the buildings was furnished by an inspection of the very contracts which were held to be "wholly void." Any other interpretation of this provision of the statute would lead to inextricable confusion, and practically nullify the entire section. It is sufficiently difficult at the present time for lien claimants to determine the true date at which they should file their notice of liens; but if the contract is not to furnish a test of completion, then no test is known to the law, and the difficulties in their way would be absolutely insurmountable. Appellants' rule of construction would compel an owner to pay for the erection of a stone or brick building when the contract called for a wooden building, or require him to pay for a building consisting of two stories and a basement when his contract called for three stories without a basement. In other words, the contractor would be practically free to erect such a building as his fancy might dictate, and thus mulct the owner undeservedly out of large sums of money. This cannot be the law. Let the order denying a new trial be affirmed.

We concur: PATERSON, J.; HARRISON, J.

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96 Cal. 661

REBUT et al. v. LEGION OF THE WEST.

(No. 14,740.)

(Supreme Court of California. Dec. 9, 1892.)

BENEVOLENT ASSOCIATIONS—RECOVERY ON ENDOWMENT COUPON.

A complaint alleged that defendant was an association for the payment of endowments of $600 till each member had received $6,000, payable out of a special benefit fund composed of assessments and fines levied on its members; that defendant delivered to plaintiff a special benefit coupon reciting that "it was not to exceed $600, and should not mature before June, 1891, and was to be void if detached from the annexed certificate;" that in June, 1891, plaintiff, who was a member in good standing, presented the coupon to defendant, which refused to pay the same, though there were sufficient funds in the special benefit fund to pay it. *Held*, that the complaint is defective, since the coupon is only a part of the contract, the terms of which are not set forth, and since there is nothing to show how much, if anything, in endowments has been paid plaintiff, or that plaintiff is entitled to any portion of the fund on hand.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. SANDERSON, Judge.

Action by one Rebut and others against the Legion of the West on a special benefit coupon. From a judgment for plaintiffs, defendant appeals. Reversed.

F. Wm. Reade, for appellant. *Eugene N. Deuprey* and *Rogers & Chilstrom*, for respondents.

PATERSON, J. It is alleged in the complaint that the defendant is a voluntary, unincorporated association of a large number of persons, having for its object "the payments of endowments in the sum of $600 at certain periods, until the aggregated payments to each member amount to the sum of $6,000," said endowments to be paid out of a fund designated the "Special Benefit Fund," which is composed of the "proceeds from assessments levied upon the members to meet the payment of said endowment of $600 as the same becomes due, and is also composed of fines levied for nonpayment of said assessments, and the accumulation of interests derived from investments of said assessments when collected; that said assessments and fines are levied by said defendant upon its members;" that the plaintiff Josephine was admitted to membership in the association June 4, 1888, and has ever since been a member thereof in good standing. It is further alleged in the complaint that on the day the plaintiff became a member of the association the defendant executed and delivered to plaintiff Josephine an instrument, of which the following is a copy: "No. 1879. Special Benefit Coupon. $600. This first coupon, issued by authority of the Grand Lodge, Legion of the West, shall not exceed six hundred dollars, and shall not mature before the month of June in the year 1891. Void if detached from annexed certificate. E. D. FEUSIER, Grand Sec'y. WILLIAM C. FLINT, Grand Commander." It is alleged that plaintiff Josephine was a member of the association in good standing on the 4th day of June, 1891, and on that day presented said coupon to the secretary of the association, and demanded payment thereof; that the defendant "then and there refused to make payment of said sum of $600, provided for in said coupon; that at the time of said presentation of said demand there were ample funds and money in said 'Special Benefit Fund' to fully pay said sum of $600, provided for in said coupon." The complaint concludes with a prayer for judgment against the defendant for the sum of $600, with interest thereon and costs of suit.

It is clear that the complaint does not state facts sufficient to constitute a cause of action, and that the judgment must be reversed. It shows that the association consists of a very large number of persons, who are to be paid $600 each at certain periods until the sum paid to each amounts to $6,000. There is nothing to show how much, if anything, the plaintiff has been paid by the defendant in endowments. It is alleged that there is money enough in the fund to pay the sum of $600, but there is nothing to show that the plaintiff is entitled to draw any amount from that fund. It is not shown that any assessment has ever been made to meet this particular demand. The amount of funds on hand may be necessary for the payment of superior obligations to other members. There is not even an allegation that the amount claimed has not been paid; the only attempt to allege the same being the statement that the defendant refused to make payment at the time the demand was made. The written instrument set forth in the complaint does not show that the plaintiff is entitled to receive anything from the defendant. It is apparent that it is only a part of a contract, the terms of which are not set forth, and is "void if detached from annexed certificate." It shows that in any event the obligation shall not mature before the "month of June in the year 1891," and shall not exceed $600. Whether the obligation therein referred to has matured at all, and how much, if anything, is due under the contract, is not alleged. In addition to the appeal from the judgment, there is an appeal from an order of the court refusing to vacate and set aside the judgment entered against the defendant after default. In view of the fact that the judgment itself must be reversed, it is unnecessary to consider the merits of the appeal from the order referred to, as a reversal carries with it all the relief sought by the defendant on his motion to vacate. Judgment reversed, with directions to the court below to allow the plaintiffs to amend their complaint.

We concur: HARRISON, J.; GAROUTTE, J.

(3 Cal. Unrep. 688)

In re BULLARD'S ESTATE. (No. 14,902.)

(Supreme Court of California. Dec. 8, 1892.)

PROBATE PRACTICE—FILING ADDITIONAL FINDINGS—REVIEW ON APPEAL.

1. Code Civil Proc. § 1704, provides that all orders and decrees of the court, or the judge thereof, in probate proceedings, "must be entered at length in the minute book of the court." *Held*, that after an order was entered from which an appeal was taken, and while it was pending, the trial court had no power to make any new or further findings or decree in regard to the matters involved.

2. Findings of facts will not be set aside because they are intermixed with statements of evidence, argument, and conclusions of law.

3. The sufficiency of a bill of contest in a probate proceeding will not be considered by the supreme court when it is raised for the first time on appeal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; E. R. GARBER, Judge.

Proceeding to contest the will of James H. Bullard, deceased. From an order in favor of contestants, the beneficiary appeals. Affirmed.

George D. Collins, for appellant. *Eugene N. Deuprey*, for respondents.

BELCHER, C. This is an appeal from an order refusing to admit a proposed will to probate. The testator, James H. Bullard, died at the age of about 76 years, leaving, surviving him, three grown-up sons. His estate consisted of real property in the city and county of San Francisco of the alleged value of $6,000. Eight days before his death he executed the will in question, and by it devised all of his estate to his eldest son, except a nominal legacy of five dollars to each of the other two. The eldest son presented the will for probate, and his brothers contested it upon the grounds—*First*, that the alleged will offered for probate is not and was not the last will, or any will, of James H. Bullard, deceased; *second*, "that said James H. Bullard, at the alleged time of the pretended making and execution of said pretended will, was not of sound and disposing mind;" *third*, that the testator, if he made the pretended will at all, was induced by the proponent and his wife to sign it by and through fraud and undue influence. The proponent answered, denying "that, at the time of the making or execution of said will, said James H. Bullard was not of sound or disposing mind," and also denying specifically each of the other grounds of contest. The case was tried by the court without a jury, and on August 19, 1891, a paper was filed by the clerk, which, as appears from the transcript, was signed by the judge, and had at its head the title of the court and cause, and the word "Findings," and was indorsed, "Opinion and findings denying probate of will." In this paper, after a somewhat lengthy statement of the evidence, the facts, and the law bearing upon the question of the testator's mental capacity to make a will, is found the following: "The case made by the contestants upon this issue has not been met or overcome by the defendant. It is probable that the testator was sometimes able to recognize those about him, both before and after the execution of the will, and it may have been that at times he was able to converse and to make known his wants; but it does not necessarily follow that, because of his ability to do these things, that he was of sound and disposing mind. If such a presumption arises, it is overthrown by the facts developed here. It is the case of a very old man whose vital forces were fast ebbing away, brought down to his deathbed by old age, with body and mind alike upon the eve of dissolution, and while sore with sickness, and weak with infirmities, without strength or energy, the hopeless victim of death, called upon in this condition to dispose of his property by a will prepared without his knowledge, and presented in the persuading presence of those to whom obedience, in his helpless illness, had become a habit. I find that he was not of sound and disposing mind." Then, after speaking briefly of the question of undue influence, it is said: "The other grounds of contest do not require special consideration here. I find against them. But it follows from the finding of the mental incapacity of the testator that the proposed will must be denied probate, and it is so ordered." On the day this paper was filed, a minute order was entered by the clerk "that the proposed will herein be, and the same is hereby, denied probate, from the finding of the mental incapacity of the testator herein." From this order an appeal was duly taken by the proponent of the will on October 5, 1891, and the transcript was filed in this court on December 23d following. On March 8, 1892, an order in the case was made by the trial court, reading as follows: "The application on behalf of contestants to alleged will of James H. Bullard, deceased, to have findings and decree regularly submitted to this court by counsel for contestant signed as the proper and only finding and decree herein, coming on to be heard on the 8th day of March, 1892, after due notice, etc.: Now the court signs and makes the findings and decree signed this 8th day of March, 1892, the only proper or any findings and decree in the above-entitled matter; and this court now orders, adjudges, and decrees hereby that the paper filed herein August 19, 1891, and indorsed in the handwriting of the court herein 'Opinion,' is not, and at no time was, in any respect, findings, and such paper was not intended in any wise to be used or construed as findings herein, and that the words, 'and findings denying probate of will,' indorsed thereon, was the act of the clerk in the county clerk's office of this court, and without right or authority, and in no wise was the act of this court; and it is hereby ordered that said paper, filed August 19, 1891, is not, and at no time was, a part of the judgment roll herein, and that the order made upon said paper filed August 19, 1891, and all proceedings thereon, be, and the same are hereby, vacated and set aside." The order thus made, and the findings and decree signed and filed, have been brought here on suggestion of the diminution of the record.

The respondents contend that "the appeal taken herein is void, being based upon false findings, and a false and bogus minute order, and that there is not any appeal taken from the findings and decree of the court, namely, the findings and decree of March 8, 1892," and, therefore, that "the so-called 'appeal' taken by the appellant herein should be forthwith dismissed." The appellant, on the other hand, contends that the order of August 19th—it having been entered at length in the minute book of the court as required by section 1704 of the Code of Civil Procedure—would have become final and conclusive against him if no appeal had been taken therefrom within 60 days after it was entered, and that after the appeal was taken, and while it was pending, the trial court had no power to make any new or further findings or decree in regard to the matters involved. This contention seems to be well supported by the authorities, and in our opinion it must be sustained. Livermore v. Campbell, 52 Cal. 77; Baggs v. Smith, 53 Cal. 88; People v. Center, 54 Cal. 236; Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. Rep. 480; Savings Union v. Myers, 72 Cal. 161, 13 Pac. Rep. 403. It follows that the findings and decree of March 8th were made without authority, and must therefore be disregarded. The appeal cannot be dismissed.

The question, then, is, can the order of August 19th be sustained? Appellant contends that it should be reversed, upon the grounds (1) that there were no sufficient findings to support it; and (2) that the bill of contest did not state facts sufficient to support the ground of contest on which the order was made, to wit, that of mental incapacity.

The first ground is based upon the statement that the paper found in the record, and designated "Findings," contains a heterogeneous mass of argument, opinion, probative facts, and conclusions of law, but no findings of the ultimate facts; and it is said that "apparently the statement, 'I find that he was not of sound and disposing mind,' is the finding of an ultimate fact, but, when taken in connection with the other portions of the findings, it will at once be perceived that it is but the court's conclusion from the application of the law, as understood by it, to the other facts found, and therefore must be considered a conclusion of law." In support of this position, McClory v. McClory, 38 Cal. 575, and Walker v. Buffandeau, 63 Cal. 316, are cited. In the first case cited it was held that "a document filed by the judge, in which he states the case, the testimony, and the reasons for his decision, and not the ultimate facts established by the evidence, is an opinion, and not a finding, within the meaning of the Code." And in the second case the court, after referring to Jones v. Clark, 42 Cal. 180, said: "But unless the previous findings, in some degree, tend to prove the ultimate fact, it is manifest that the conclusion [as in this case] 'from the foregoing facts' must be treated as what it purports to be,—a conclusion of law from the facts previously recited." In Jones v. Clark the question was as to ratification of a promissory note purporting to have been executed for and on behalf of a mining partnership, and signed by the superintendent as such, and on page 192 it is said: "The court finds several facts which, in the opinion of the court, tend to establish the fact of ratification, and then finds, as a conclusion from them, that the note has been fully ratified and confirmed by the company. This was the ultimate fact to be ascertained, and it is none the less a finding of fact because it is stated as a conclusion from other stated facts." We fail to see how these cases support the contention of appellant. It is true, as stated in Hidden v. Jordan, 28 Cal. 306, that findings "should consist of a concise, distinct, pointed, and separate statement of each specific, essential fact established by the evidence, in its proper order, without any of the testimony by which the facts are proved, followed by a similar statement of the conclusions of law drawn from the facts thus found." But, if the ultimate facts are found, they will not be set aside or disregarded because they are intermixed with statements of the evidence, findings or probative facts, argument, and conclusions of law. Here one of the ultimate facts to be determined was as to the mental capacity of the testator to make a will; and in our opinion the finding "that he was not of sound and disposing mind" must be treated as a finding of the ultimate fact, and not as a conclusion of law. This seems clear, for the reason, in the first place, that it purports to be such a finding, and, in the second place, that the previous findings tend, at least in some degree, to establish the fact that he was not of sound and disposing mind.

But, conceding the finding in question to be a finding of fact, it is next claimed that "it is clearly insufficient, because too general and indefinite, as it is not confined, or at all directed, to the mental capacity of the decedent at the very time when the will was executed." We do not think this point can be sustained. Looking at all the findings, it seems clear that the finding objected to was intended to refer, and must be understood to refer, to the time when the will was executed.

The second ground relied upon by the appellant for a reversal of the order relates to the bill of contest, and it is claimed that it is wholly insufficient, because it charges only that the testator was not of sound and disposing mind "at the alleged time of the pretended making and execution of said pretended will." It is urged that the "alleged time" of the execution might not be the true time, and that the time of the "pretended" execution of a will is absolutely irrelevant, and that a "pretended will" is one that is offered as something false or unreal; and it is said the Code provides that "any person interested may appear and contest the will," but says nothing about contesting a pretended will. It is therefore claimed that the bill of contest was insufficient to support the order, and hence it should be reversed. The part of the bill of contest here objected to was not happily written, and, if the proponent had demurred to it on the ground that it was ambiguous or uncertain, very likely his demurrer would have been sustained. No demurrer, however, was interposed, and the question is raised here for the first time. We think it should have been raised in the court below by special demurrer, and, not having been, that it cannot be raised here. It results, in our opinion, that the order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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3 Cal. Unrep. 694

POTTKAMP v. BUSS et al. (No. 14,448.)

(Supreme Court of California. Dec. 8, 1892.)

DEED—PROPERTY CONVEYED—"STORE."

The recital in an instrument of sale that there was conveyed "that certain store, and all the stock and goods therein, and the bakery attached thereto, and the tools and fixtures of said bakery," will be construed as conveying the land on which the store and the bakery attachment stand, and so much as may be necessary for their ordinary use.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

(Not to be published in California Reports.)

Action by Adolph Pottkamp against John G. Buss and others to quiet title to land. From a judgment for defendants, and from an order denying his motion for a new trial, plaintiff appeals. Reversed.

A. B. Hunt and *A. D. Lemon*, for appellant. *F. J. Castlehun*, *John F. Burris*, and *M. G. Cobb*, for respondents.

VANCLIEF, C. Action to quiet title to a lot of land 50x100 feet, and a house thereon, used and occupied as a store and bakery, situate in the city of San Francisco. The defendants answered the complaint, denying plaintiff's alleged title, and averring that Buss is the absolute owner of the house and lot, and that the defendants Pfeiffer & Ludemann (sued as Doe and Roe) are in possession under a lease from him. Defendants also filed what purports to be their cross complaint against the plaintiff, praying that their title may be quieted, and that plaintiff "be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the defendants." Judgment passed for defendants, according to the prayer of their cross complaint. The plaintiff brings this appeal from an order denying his motion for a new trial.

The plaintiff claims title from the defendant Buss by the following written instrument: "John G. Buss to Adolph Pottkamp. Know all men by these presents, that I, John G. Buss, of the city and county of San Francisco, for and in consideration of $2,500, the receipt whereof is hereby acknowledged, do hereby sell, convey, and transfer to Adolph Pottkamp that certain store, and all the stock and goods therein, and the bakery attached thereto, and the tools and fixtures of said bakery, situate at the southeast corner of Seventeenth and Dorlores streets, in the city and county of San Francisco, state of California; also 8 horses, 3 wagons, and 1 buggy, with the harness belonging to all and each of said wagons and buggy. In witness whereof, I have hereunto set my hand and seal this 31st day of March, 1887. [L. S.] JOHN G. BUSS. Witness: JOHN R. KELLY." On July 8, 1887, Buss filed in the superior court his petition under the insolvent act, and was then adjudged to be an insolvent debtor. On July 20, 1887, he applied to the court in the insolvency proceedings to have set apart to him the house and lot in question here as a homestead, and his application was granted. A certified copy of the order setting apart the homestead was recorded on July 23, 1887. The assignee in the insolvency proceeding, however, claimed all the property described in the instrument dated March 31, 1887, above set out. But a compromise was effected between the plaintiff and said assignee by which the latter released to the former the house and lot in question, and the plaintiff released to the assignee all his right to the personal property described in said instrument. The court construed the instrument of March 31, 1887, to be a mere bill of sale of the personal property therein described, and as not intended to convey the premises described in the complaint. I think this was error. There is nothing in the circumstances under which the instrument was executed tending to justify this construction; and it seems to have been given solely upon the ground that the word "store," as used in the instrument, does not mean the house and lot, but only the personal property stored therein. The language of the instrument is: "That certain store, and all the stock and goods therein, and the bakery attached thereto, and the tools and fixtures of said bakery." This very clearly expresses the intention to convey the building in which the goods were stored, and the attachment thereto, in which the business of baking was carried on. See Webster's definition of the word "store;" also Barth v. State, 18 Conn. 440, and State v. Canney, 19 N. H. 137. The conveyance of the storehouse and the bakery attachment thereto included the land on which they stand, and so much as may be necessary for their ordinary use. Dev. Deeds, § 863, and authorities there cited. The evidence tended to prove that the instrument was intended as security for a debt due from Buss to plaintiff; but, had the court so found, the finding would not have justified the judgment, even though the debt secured had been subject to a plea of the statute of limitations. Booth v. Hoskins, 75 Cal. 271, 17 Pac. Rep. 225; De Cazara v. Orena, 80 Cal. 132, 22 Pac. Rep. 74. If the instrument is an unsatisfied mortgage, that fact, with an offer to redeem from it, might perhaps have constituted sufficient ground for defendant's cross complaint praying that his title be quieted against the plaintiff. But the record does not present this question, and it need not be decided. The judgment rendered was based on the ground that the instrument, whether a mortgage or an absolute deed, affected only the personal property; and, there being no issue as to the personal property, there was no occasion to consider whether the instrument was a mortgage of the personal property or not. I think the order should be reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings.

We concur: Haynes, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the order is reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings.

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3 Cal. Unrep. 697

KENNEDY & SHAW LUMBER CO. v. TAYLOR et al. (No. 14,182.)

(Supreme Court of California. Dec. 8, 1892.)

Partnership—Assuming Antecedent Debts of Members.

1. Civil Code, § 2395, provides that "a partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them." *Held*, that a partnership was formed where a contractor, on assigning his contract to others, made a written agreement with them, which agreement provided that the contractor was to do the work, that the parties taking the contract were to furnish the money to carry it on, and receive the payments made as the work progressed, but that the profits were to be equally divided between them.

2. Material was sold and delivered to the contractor before the agreement of partnership was made, and was afterwards used in the work. *Held*, that a finding that the partnership assumed payment thereof was justified.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; E. R. Garber, Judge.

(Not to be published in California Reports.)

Action by the Kennedy & Shaw Lumber Company against Joseph W. Taylor, W. S. Somervell, and E. Lund, as copartners, for the recovery of money. From a judgment for plaintiff, and from an order denying their motion for a new trial, defendants Taylor and Somervell appeal. Affirmed.

J. C. Bates, for appellants. *Langhorne & Miller*, for respondent.

Vanclief, C. This is an action to recover from the defendants, as copartners, the sum of $1,815.59 for lumber sold and delivered to them by plaintiff. The defendant Lund failed to answer, and his default was entered. The other defendants answered, denying all material allegations of the complaint. The cause was tried by the court, and a joint judgment was rendered against all the defendants. The defendants Taylor and Somervell appeal from the judgment, and from an order denying their motion for a new trial.

The principal point made by appellants is that the finding by the court that the defendants were copartners is not justified by the evidence. On June 18, 1889, the defendant Lund entered into a written agreement with Antonelle and Doe, whereby he agreed to do certain work on section 8 of the sea wall along the water front of San Francisco, and to furnish all materials therefor, and to purchase the lumber needed for the performance of the agreement on his part from the plaintiff. The defendants Taylor and Somervell executed to Antonelle and Doe their bond, guarantying that Lund would perform his contract. On June 20, 1889, Lund assigned his agreement with Antonelle and Doe to Taylor and Somervell, and at the same time the following written agreement was executed between Lund, Taylor, and Somervell: "This agreement, made and entered into by and between Jos. W. Taylor and W. S. Somervell, parties of the first part, and E Lund, party of the second part, all of the city and county of San Francisco, state of California, witnesseth: The parties of the first part agree to furnish, as required, all moneys necessary to fulfill and carry out all the conditions of that certain contract and agreement made and entered into by and between Antonelle and Doe and E. Lund, (party of the second part therein,) dated June 18, 1889. For such moneys so advanced and paid, the party of the second part, E. Lund, is to give his whole time and energy to the successfully carrying on and completing of the aforesaid contract in every particular. The parties of the first part, J. W.

Taylor and W. S. Somervell, shall collect all moneys due and owing, or to become due and owing, on account of such contract, pay all bills as presented, and keep or have kept a faithful book of records showing receipts and disbursements, where any and all parties to this agreement shall have free access to review the same at all reasonable times, and make such notes as he may desire therefrom; and, after all just and equitable bills are fully paid and satisfied, the remainder of any moneys remaining as a profit on such contract is to be and shall be divided between the parties hereto equally, share and share alike. Witness our hands and seals this 21st day of June, A. D. 1889. J. W. TAYLOR. W. S. SOMERVELL. E. LUND." Though this agreement is dated June 21st, the court found that it was executed on June 20th, and the evidence justifies this finding. The evidence shows without conflict that this agreement was executed at the same time that Lund assigned his contract with Antonelle and Doe to Taylor and Somervell, which assignment was acknowledged before a notary public, whose certificate is dated June 20th. The evidence further shows that Taylor and Somervell received the installments paid on the contract as the work progressed, and paid the laborers and many other expenses, but failed to pay plaintiff for the lumber delivered mostly on the orders of Lund, but a part of it on their orders.

I think the agreement above set out, and the acts of the parties under it, sufficiently evince a partnership to justify the finding in question. Civil Code, § 2395.[1] The only evidence claimed to be opposed to the finding is that plaintiff, having no knowledge of the partnership while the lumber was being delivered, charged to Lund all that part of the lumber ordered by him. But in cases of secret partnerships and dormant partners a creditor is entitled to recover from all the partners when discovered. Story, Partn. § 138; Crawford v. Stovepipe Works, 83 Cal. 629, 24 Pac. Rep. 836. By the agreement assigned to Taylor and Somervell, under which the work was to be done, they were bound to purchase the lumber from plaintiff; and, by their partnership agreement with Lund, Taylor and Somervell were to pay for the lumber and all other materials required for the work. A small part of the lumber, the price of which was $192.28, had been delivered to Lund, but not used, before the written agreement of partnership was executed, and was afterwards used in the work. Counsel for appellants contends that Taylor and Somervell are not responsible for this in any event. I think, however, that the partnership agreement, and the fact that the lumber was used by the firm in the work, justified the court in finding that the partnership assumed the debt. Randall v. Hunter, 66 Cal. 512, 6 Pac. Rep. 331. Other points are made on the admission and exclusion of evidence, but in view of the existence of the partnership they are immaterial, and the rulings excepted to harmless. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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3 Cal. Unrep. 745

LIGHT v. RICHARDSON. (No. 19,072.)

(Supreme Court of California. Jan. 13, 1893.)

CONTINUANCE—ABSENCE OF PARTIES.

1. Defendant and his witnesses were present at the time fixed for trial, but his attorney was absent from sickness. The court stated that the case would be continued on that account, and the defendant and his witnesses left without instructions as to future attendance. The next day the attorney was still sick, and the defendant and his witnesses did not appear. A motion for continuance was denied. *Held*, that the absence of defendant and his witnesses was excusable, and the continuance should have been granted.

2. Code Civil Proc. § 595, which provides that "the court may require the moving party, where application is made on account of the absence of a material witness, to state on affidavit the evidence which he expects to obtain," is not imperative, and should not be required of counsel when he cannot be aided in making the affidavit by his client, who is excusably absent.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

(Not to be published in California Reports.)

Action by W. R. Light against E. W. Richardson. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Willis & Appel and *Walter F. Haas*, for appellant. *H. L. Valentine* and *Del Valle & Munday*, for respondent.

HAYNES, C. The defendant appeals from a judgment rendered against him, and from an order denying a new trial. The facts are presented in several bills of exceptions.

The cause was set for March 3, 1892, in the superior court, and was on the calendar for trial. The defendant's attorneys were Messrs. Willis & Appel, and on that day Mr. Willis was absent from the county on business, and Mr. Appel was unable to be present on account of sickness. The defendant was present with his witnesses, and ready for trial but for the absence of his attorney. Another cause was then on trial, and, in answer to an inquiry made by plaintiff's attorney, the court stated "that the case would not be reached, and, if reached, it would have to be continued on account of the sickness of Mr. Appel." The defendant and his witnesses soon after left the court room, and, owing to the illness of one of his attorneys and the absence of the other, received no instructions in regard to their future attendance. On the morning of March 4th, Mr. Appel being sick still, Mr. Willis moved the court for a continuance of the cause upon his own affidavit. The affidavit, in addition to the facts above mentioned, alleged that the case had been in Mr. Appel's charge; that it was understood and agreed between the firm of Willis & Appel and the defendant that Mr. Appel should try the case; that Mr. Appel had prepared it, and in consequence he (Mr. Willis) had given only a casual attention to it, either as to the law or the facts; that he had no opportunity of communicating with the defendant or his witnesses; that defendant was not notified to be in court on that day, and that he did not know where he was. The continuance was denied, and defendant excepted.

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[1] Civil Code, § 2395, provides that "a partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them."

Without deciding the question whether the absence of Mr. Appel, who had charge of the case, and who, as appeared from the affidavit above mentioned, by agreement with the client was to try the case, would have entitled the defendant to a continuance, we think the absence of the defendant and his witnesses under the circumstances was excusable, and that the continuance should have been granted. The defendant was informed by the statement of the court that his attorney upon whom he relied was sick; that if the case should be reached that it would have to be continued for that reason; and, in the absence of the other member of the firm, we do not think it strange that he inferred that it would not be tried until Mr. Appel should recover from his sickness, and that he would be notified by his counsel of the time of trial. But, on the contrary, his presence with his witnesses at the time fixed for trial was sufficient evidence that his absence on the next day was attributable to some other cause; and that cause, we think, should have been attributed to the defendant's mistake of what was implied by the statement of the court in reference to a continuance of the case. It is clearly the intention of the Code, while protecting the court from imposition and unnecessary delays, to secure a reasonable opportunity to litigants to try their causes on the merits, to the end that justice may be done; and while no definite rule can be laid down, embracing all the different circumstances under which continuances should be granted, this spirit and intention of the Code, which is especially manifested in section 473, Code Civil Proc.,[1] should always be borne in mind; for this much, at least, is certain: that, where the circumstances are such as would authorize the court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, surprise, or excusable neglect, a continuance should be granted.

In respondent's brief some defects in the affidavit for continuance are pointed out. It is said that no merits are shown, and that the facts expected to be proved by the witnesses are not stated. It should be considered, however, that the affidavit was made by counsel not familiar with the details of the case, in the absence of his client, and that the pleadings were verified. We think that about all that Mr. Willis could have said, without subjecting himself to the charge of recklessness, was stated in his affidavit; and, besides, no objection appears to have been made to the affidavit upon these grounds upon the hearing of the motion for continuance. As to stating what is expected to be proved by absent witnesses, the language of the Code is that "the court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain." Code Civil Proc. § 595. This requirement is not imperative, and certainly should not be made of counsel when he cannot have the aid of his client, if the absence of the client is excusable.

Other questions raised by appellant on his motion for a new trial need not be considered. We think the court erred in not granting the continuance, and that the judgment and order denying a new trial should be reversed, and a new trial granted.

We concur: Belcher, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

(96 Cal. 669)

BURNS v. CUSHING et al. (No. 14,137.)

(Supreme Court of California. Dec. 9, 1892.)

Pleading—Complaint—Indefiniteness.

1. In an action to recover for legal services, a complaint which alleges that in May or June, 1884, defendants retained plaintiff in certain actions, and that, in pursuance of said retainer, said H. (plaintiff) rendered valuable services to said defendants since May or June, 1884, up to the 29th of January, 1890, is within Code Civil Proc. § 454, which provides that a party need not set forth in a pleading the items of an account therein alleged, but must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, and is not demurrable as being ambiguous and uncertain. Tompkins v. Mahoney, 32 Cal. 231; Hart v. Speck, 62 Cal. 187,—followed.

2. Under Code Civil Proc., which provides that the court must disregard any error in the pleadings which does not affect the substantial rights of the parties, a complaint averring that said services were reasonably worth the sum of $750, and defendants have only paid the sum of $200 on account, leaving the sum of $550 unpaid thereof, is not demurrable as failing to aver nonpayment of the amount sued for.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by J. T. Burns against Ellen Cushing and others to recover a claim for legal services performed for defendants by C. F. Hanlon. The claim was assigned to plaintiff by Hanlon, and he brings suit to recover. From a judgment for plaintiff, defendants appeal. Affirmed.

Otto Tum Suden, for appellants. *John F. Hanlon*, for respondent.

McFarland, J. This is an action to recover a balance due for legal services alleged to have been rendered by Charles F.

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[1] Code Civil Proc. § 473, provides that "the court may * * * relieve a party * * * from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

Hanlon, and assigned to plaintiff. Judgment went for plaintiff, and defendants appeal therefrom upon the judgment roll. The only point made is that the court erred in overruling the demurrer to the complaint.

1. In the complaint it is averred that in May or June, 1884, defendants retained and employed said Hanlon to commence, prosecute, and defend certain actions and proceedings at law and in equity and probate, and that, "in pursuance of said retainer, said Hanlon rendered valuable services to said defendants, and each of them, in and about the premises, since May or June, 1884, up to the 29th day of January, 1890." Appellants assailed this averment by special demurrer as ambiguous and uncertain; and in their briefs they argue that it is uncertain, because no particular action or proceeding is stated in which any of the alleged services were rendered, no time given at which any part of the services were rendered, no facts stated which would enable defendants to prepared a defense, etc. We think, however, that the averment comes within the provision of section 454, Code Civil Proc.[1] and that appellants should have demanded a bill of particulars, under that section of the Code. Tomkins v. Mahoney, 32 Cal. 231; Hart v. Speck, 62 Cal. 187.

2. Appellants contend that the demurrer should have been sustained because the complaint fails to aver nonpayment of the amount sued for. The averment on that subject is as follows: "Plaintiff, upon his information and belief, alleges that said services were reasonably worth the sum of seven hundred and fifty dollars, and defendants have paid the sum of two hundred dollars on account, and in part payment thereof, leaving the sum of five hundred and fifty dollars unpaid thereof." This form of averring nonpayment would certainly not gratify the taste of an accomplished and experienced pleader. The present participle is not a part of speech particularly well adapted to carrying a predicate. But under our liberal system, which expressly provides that "the court must, in every stage of an action, disregard any error or defect in the pleading * * * which does not affect the substantial rights of the parties,"[2] we think that the averment in question must be allowed to pass muster. And it must be considered as of the date of the filing of the complaint, although it appears that the cause of action was assigned to plaintiff on the day before the action was commenced. Moreover, we think that, if the averment could be deemed defective for the reason above considered, the defect was supplied by the answer. The judgment is affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

(3 Cal. Unrep. 670)

TYLER et al. v. DAVIS. (No. 13,551.)

(Supreme Court of California. Dec. 1, 1892.)

SUFFICIENCY OF FINDINGS.

Where the court found that plaintiff had rendered services worth a stated amount, and that they had been paid a named sum, the finding sufficiently made it appear that only the amount named had been paid, and defendant could not object that it did not support a judgment for the difference.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by William B. Tyler and another against George O. Davis to recover for legal services performed by plaintiffs for defendant. From a judgment for plaintiffs, defendant appeals. Affirmed.

The answer denied every allegation of the complaint, and set forth two affirmative defenses: (1) That the services alleged to have been rendered were in fact rendered for, and on employment by, one M. H. McDonald, the real party in interest in the cause mentioned in the complaint; (2) that all legal services rendered for defendant by either of the plaintiffs were rendered by plaintiff George W. Tyler, individually, upon a certain contract therein set forth, and that said "plaintiff has been paid in full for all services performed in said cause for defendants." The findings are as follows: "(1) That George O. Davis employed the plaintiff to defend the suit of Smith v. Davis, as alleged in the complaint, which service they accepted and performed, and their services in that behalf were reasonably worth the sum of one thousand dollars; (2) that plaintiff did not make the agreement set forth in the answer of defendant, but plaintiff George W. Tyler was indebted to the firm of Cope & Davis, at the time of their employment, in the sum of $180, and Mrs. M. H. McDonald, as agent for defendant, paid to plaintiffs, since said employment, the sum of four hundred and five ($405) dollars, making in all $585, which is a proper offset against the claim of plaintiffs." Judgment was rendered in favor of plaintiffs, and against defendant, for $415, principal, and $58.50, costs of suit.

D. H. Whittemore, *Wm. H. Sears*, and *James G. Maguire*, for appellant. *John D. Sullivan*, for respondents.

PER CURIAM. The findings in this case are, in our opinion, sufficient to support the judgment. The evidence is embodied in a bill of exceptions, and no claim was made by defendant upon the trial that anything more was in fact paid plaintiffs than is found by the court. The finding in regard to the amount paid to plaintiffs is to be construed as a finding that only the sum mentioned therein had been paid. Judgment and order affirmed.

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[1] Code Civil Proc. § 454, provides that it is not necessary for a party to set forth in a pleading the items of an account alleged therein, but he must deliver to the adverse party, within five days after a demand therefor in writing, a copy of the account, or he will be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular.

[2] Code Civil Proc. § 475.

97 Cal. 203; 3 Cal. Unrep. 753

RILEY v. NANCE. (No. 19,093.)

(Supreme Court of California. Jan. 17, 1893.)

Attachment Lien on Land—Judgment—Merger—Release by Bond on Appeal — Sheriff's Deed—Defendant's Deed—Priority of Title.

1. Code Civil Proc. § 671, provides that from the time a judgment is filed it becomes a lien on all the real property of the judgment debtor not exempt from execution in the county, owned by him "at the time," and that the lien continues for two years, "unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking, as provided in this Code, in which case the lien ceases." *Held*, that where an attachment debtor conveyed land after it was attached, but before judgment, there was no judgment lien thereon into which the attachment lien could merge, and the latter was not released by the execution of a bond on appeal from the judgment.

2. In such case the sheriff's deed to a purchaser at a sale under execution issued on the judgment takes effect from the date of the attachment, and will prevail over the title derived from the grantee of such attachment debtor.

Department 1. Appeal from superior court, Los Angeles county; W. N. Clark, Judge.

Action by William Riley against Roy Nance to quiet the title to certain real estate. From a judgment for defendant, plaintiff appeals. Reversed.

I. Hall, for appellant. *E. C. Brown*, for respondent.

Garoutte, J. This is an action to quiet title. The case was tried on an agreed statement of facts, as follows: In an action entitled H. vs. W. and A., commenced May 4, 1888, the land in question, being that of W. and A., was attached and held until judgment in the case, November 12, 1888. May 19, 1888, W. and A. conveyed said land by deed to R. December 10, 1888, W. and A. appealed to this court, giving the undertaking for said appeal and stay of execution. In July, 1889, said judgment was affirmed. September 16, 1889, said land was sold, under execution issued upon such judgment in attachment, to plaintiff's grantors. July 19, 1888, R. put a mortgage on said land, and respondent claims title to the land as a purchaser at a foreclosure sale thereunder in November, 1889. The court below held that the attachment lien merged in the judgment lien, and by the giving of the undertaking on appeal to stay execution the attachment lien was released and lost, under section 671 of the Code of Civil Procedure; and that the sale of the land in question under execution upon the attachment judgment gave no title; and that the title of R. must prevail.

Section 671 of the Code of Civil Procedure, in referring to a judgment lien, says: "The lien continues for two years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking, as provided in this Code, in which case the lien of the judgment ceases." Owing to the views entertained upon another branch of the case, we do not find it necessary to review the decision in Bagley v. Ward, 37 Cal. 121, wherein the doctrine of the merger of an attachment lien into that of a judgment lien is fully discussed, and which decision is adverted to in Porter v. Pico, 55 Cal. 174. It is sufficient for the purposes of this case to say that no judgment lien existed upon this realty, and that consequently the attachment lien could not possibly have been merged therein. At the time the judgment was rendered in the action wherein the attachment had been issued and levied, the judgment debtor had no interest in the realty whatever. He had conveyed all his title to R. To be sure, it was conveyed subject to the attachment lien, but R. had a complete and perfect title except as to this lien. The Code of Civil Procedure (section 671) provides that from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases. It was said in People v. Irwin, 14 Cal. 434: "It is not denied that Rigby was a judgment creditor, but it is claimed that his judgment never became a lien upon the property, and that the proceedings under it were therefore ineffectual for any of the purposes of a redemption. The reasons assigned are that, when the judgment was recovered, the title to the property had passed from the judgment debtor and vested in the relator, and that in the hands of the latter the property was not subject to the lien of the judgment, nor to any proceedings affecting the title, the validity of which depended upon such lien. It is undoubtedly true that the statutory lien of a judgment upon the real estate of the judgment debtor can attach only upon property in which such debtor has a vested legal interest. This was admitted *arguendo* in the case of McMillan v. Richards, 9 Cal. 365, and we have no doubt of its correctness."

A sheriff's deed executed in pursuance of an execution sale under a judgment in an attachment suit takes effect from the date of the attachment, if the levy is such as to create a lien. Porter v. Pico, 55 Cal. 171. It follows that appellant's title is anterior to, and must prevail over, the title obtained under the foreclosure proceedings. Let the judgment and order be reversed, and the cause remanded, with directions to the trial court to enter a judgment for the plaintiff upon the findings.

We concur: Paterson, J.; Harrison, J.

ISRAEL v. COLLINS. (No. 19,089.)

(Supreme Court of California. Jan. 14, 1893.)

Quieting Title—Description—Sufficiency.

In an action to quiet title, plaintiff described the land in question as "the west 80 acres of Pueblo lot numbered 1,258, according to the Pasco map of the city of San Diego." As evidence of her title, plaintiff introduced a deed from the city, from which both parties claimed, wherein was conveyed to her a lot described as "being that lot of land containing 80 acres, and situate north of and immediately adjoining the 80-acre lot granted to P." Plaintiff attempted to prove the location of the lot granted to P., but the only evidence of such grant was an entry in the official books of the city, showing that her petition for a lot had been filed, and the maps put in evidence were such that only a hazardous guess could be arrived at as to the location of the lands she had petitioned for. Plaintiff also put in evidence, in proof of a subsequent grant which it was claimed was made to amend the description of the land in the former deed, a resolution of the city's trustees that 80 acres of land out of the western part of Pueblo lot No. 1,258 be deeded to plaintiff, the same having been sold her by a former board, and a deed given without a proper description of the land. The resolution was signed by one of the trustees and the secretary of the board, and the trustee testified that he signed and acknowledged a deed pursuant to the resolution, but did not deliver it, as others were to sign it, and he did not know what became of it. It appeared that the deed was never delivered directly to plaintiff, and that neither she nor her husband ever saw it or had actual possession of it. No offer was made to prove its contents except by the resolution of the trustees. Plaintiff was never in possession of the lot which she claimed, and never improved it. *Held*, that she was properly nonsuited.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Action to quiet title by Mary A. Israel against Charles Collins. From a judgment nonsuiting plaintiff she appeals. Affirmed.

Gibson & Titus, for appellant. *Conklin & Hughes*, for respondent.

VANCLIEF, C. Action to quiet title to a lot of land situate in the city of San Diego. After the close of the evidence in chief on the part of the plaintiff, the court, on motion of the defendant, rendered a judgment nonsuiting the plaintiff, and the appeal is from this judgment, upon the judgment roll, including a bill of exceptions.

The complaint is in the the usual form, and the answer denies plaintiff's alleged title. The complaint describes the land in question as follows: "The west eighty (80) acres of Pueblo lot numbered one thousand two hundred and fifty-eight (1,258) according to the Pasco map of the city of San Diego;" and it is admitted that the city of San Diego was the owner of this lot on the 12th day of February, 1889, and that both parties claimed title from that city. As evidence of her title the plaintiff introduced a deed to her from the city of a lot described as follows: "Situate in the said city, and more particularly described as follows: Being that lot of land containing (80) eighty acres, and situate north of and immediately adjoining the (80) eighty acre lot granted to May Pollock, in consideration of and for a lot of land sold by former trustees, which good and sufficient reasons were shown belonged to Mary A. Israel, according to the official map of the said city made by Charles H. Poole, A. D. 1856, and on file in the office of the secretary of said board" (of trustees of the city.) It will be observed that this description by no means identifies the lot described as that described in the complaint. It does not describe it as being numbered; nor does it refer to the Pasco map, for the reason, doubtless, that the Pasco map was not made until May, 1870, more than a year after the deed was executed.

For the purpose of applying the description to the lot in question the plaintiff introduced the Poole map referred to; but it appeared, and is admitted, that the Poole map does not include any part of the lot numbered 1,258 on Pasco's map. For the same purpose the plaintiff attempted to prove the location of the lot said to have been granted to May Pollock, but failed to prove any grant to Pollock, or that Pollock ever possessed or claimed any land south of, or adjoining, lot 1,258, as located on Pasco's map. The only evidence relating to a grant to Pollock are the following entries in official books of the city: "San Diego, Jan. 21, 1869. To the Honorable Board of Trustees: I beg leave to ask your honorable board for eighty acres N. W. 1,773, and your petitioner will comply with the conditions imposed in like cases. MAY POLLOCK. Indorsed: Petition of May Pollock." In another book was the following: "No. 212. Date, Jan. 21, 1869. Name of applicant, May Pollock. Description, 80 acres N. W. 1,773." There is no evidence that any action was ever taken upon this petition other than to file it and make the above entry. These acts evince no official recognition of the description in the petition as a correct or intelligible description of any land belonging to the city, and without extraneous aid the description is unintelligible. The only extraneous evidence which can be claimed to touch it is that there is a lot on each of the maps above named numbered 1,773, but very different in shape, and apparently different in area. The maps appear to be on different scales, though no scale or point of compass appears on the copy of either in the transcript. On the Pasco map, lot No. 1,258 adjoins one side of No. 1,773, (probably the northern side,) but the junction extends only about one half the length of lot 1,773, while the other half of the same side is bounded by lot numbered 1,257 on the Pasco map; but neither of the lots numbered, respectively, 1,257 and 1,258, is laid down on the Poole map. From all this I think nothing more definite than a very hazardous guess can be arrived at, even as to the intended location of the 80 acres petitioned for by Pollock.

Plaintiff next attempted to prove a subsequent grant which she says was made for the purpose of amending the description of the land intended to be conveyed by the aforesaid grant of February 12, 1869, and for this purpose read in evidence the following resolutions of the city's trustees, passed at a regular meeting December 8, 1870: "Resolved, that eighty acres of land out of Peublo lot (western part) No. 1,258 be deeded to Mrs. Mary A. Israel, the same land having been sold to her February 19, 1869, by a former board, and deed given without a proper description of the land. JAMES MCCOY. A. B. MCKEAN, Secretary." James McCoy testified that the above is his signature, and that he was one of the city trustees at the time the resolution was adopted; that as one of the trustees he signed and acknowledged a deed pursuant to that resolution, which passed out of his hands, and he did not know what became of it. He did not deliver the deed, as others were to sign it with him. Supposes the deed was drawn by the secretary in whose office he signed it, and that, if it was executed by the other trustees and delivered, it must have been delivered by the secretary. D. K. Israel, husband of the plaintiff, testified that Judge Hayes was attending to the matter for his wife; that witness had delivered the old deed to him with other papers pertaining to the matter; and that Hayes had died about 10 years before the trial. The testimony of this witness further tended to prove that, if the deed had been delivered at all, it might have been delivered to Hayes for his wife, and that diligent search had been made for it without success. It appeared that the alleged second deed was never delivered by any person directly to plaintiff, and that neither she nor her husband ever saw it or had actual possession of it; but no offer was made to prove its contents as to description of the land, or otherwise, except as above stated. D. K. Israel testified that by his order a survey had been made for his wife of the "west eighty acres of Peublo lot 1,258," but he did not remember when, nor is there any evidence as to the boundary lines by that survey. He further testified that he had paid taxes for his wife on "west half of lot 1,258" for twelve years between 1872 and 1887, and that all the receipts therefor were in his name, except two, which were in the name of his wife. It appears that these receipts were put in evidence, but the record contains no copies of them, and it does not appear to whom the lot was assessed. The plaintiff was never in possession of any lot which she claims to have purchased from the city, and never improved any such lot. The only evidence of payment of any consideration for the lot claimed is a ledger entry as follows: "1869. Dr. Mary A. Israel. Feb. 18. To 80 acres N. of Pollock's, $1.00." "Cr. Feb. 18. By cash in full, $1.00." I think the deed of February 12, 1869, is void for uncertainty in its description of the land, and that the evidence has no substanial tendency to prove that the alleged second deed was ever executed by the board of trustees of the city, and would not have justified a finding to that effect. One member of the board could not have executed such a deed. See acts creating and incorporating this board of trustees, approved January 30 and April 28, 1852, (St. 1852, pp. 223, 225.) It follows that the plaintiff was properly nonsuited, and that the judgment should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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97 Cal. 249

PEOPLE v. BENOIT. (No. 20,935.)

(Supreme Court of California. Jan. 23, 1893.)

INCEST—EVIDENCE.

In the trial of defendant for incest with his daughter, it is reversible error to permit the daughter to testify that, about two years prior to the commission of the alleged crime, she was living as a prostitute, with her mother, at a house of ill fame, and giving to her father the earnings of her shame; such testimony being irrelevant, and tending to prejudice defendant before the jury.

Department 1. Appeal from superior court, San Diego county; E. S. TORRANCE, Judge.

Charles Benoit was convicted of incest, and appeals. Reversed.

Eugene Daney, for appellant. *Atty. Gen. Hart*, for the People.

HARRISON, J. The appellant was tried and convicted upon a charge of having committed incest with his daughter, a girl of about 15 years of age, and sentenced to the state prison for a term of 10 years. At the trial the district attorney was permitted, against the objection and exception of the defendant, to show by the testimony of the daughter that, about two years prior to the commission of the alleged crime, she was living as a prostitute, with her mother, at a certain house in San Diego, and giving to her father the earnings of her shame. This testimony was entirely irrelevant and immaterial to the determination of the issue before the court, and its admission was manifest error. Its evident effect was to prejudice the defendant before the jury by attempting to show his turpitude of character. But, however base his nature may have been, he was not on trial for any offense except that named in the information; and it was as much error for the prosecution to introduce evidence tending to show his bad character as it would have been to give evidence of other and distinct crimes that he had committed.

The judgment and order are reversed.

We concur: PATERSON, J.; GAROUTTE, J.

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3 Cal. Unrep. 700

SANTA CLARA VALLEY MILL & LUMBER CO. v. WILLIAMS et al. (No. 14,438.)

(Supreme Court of California. Dec. 8, 1892.)

MECHANIC'S LIEN—TIME OF FILING NOTICE—MATERIAL MEN—PERSONAL LIABILITY OF OWNER.

1. Code Civil Proc. § 1187, provides that any trivial imperfection in the construction of any building shall not be deemed such a lack of completion as to prevent the filing of any lien. *Held*, that where a building was erected at a cost of $4,700, and was completed on March 7, 1889, with the exception of about $7 worth of alteration, which was done on April 6, 1889, the building was completed on March 7th, within the meaning of the statute, and a lien for materials furnished, filed more than 30 days after March 7th, was not in time.

2. Code Civil Proc. § 1183, provides that the contract for building a house shall be in writing, and, before the work is begun, shall be filed with the recorder, otherwise to be void, and no recovery had thereon; and that labor done and material furnished by others than the contractor shall be deemed furnished at the instance of the owner, and be deemed a lien. *Held*, that when the original contractor had not filed his contract, and the material man had not filed any lien under the statute the latter is not entitled to a personal judgment against the owners of the building for material furnished the contractor. Lumber Co. v.

Schmitt, 16 Pac. Rep. 516, 74 Cal. 625, followed.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

(Not to be published in California Reports.)

Action by the Santa Clara Valley Mill & Lumber Company against Joseph E. Williams and Mary A. Williams, owners of a building for which plaintiff furnished materials, and O. F. Fuller and E. L. Lashbrook, the contractors, to recover the value of the materials furnished. There was a judgment in favor of the owners, and a personal judgment against the contractors in favor of plaintiff. From the judgment and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

John R. Jarboe and *W. S. Goodfellow*, for appellant. *J. R. Patton*, for respondents.

VANCLIEF, C. The defendants Joseph and Mary Williams, who are husband and wife, employed the defendants Fuller and Lashbrook to build a dwelling house, for a price exceeding $1,000, under a written agreement executed before the work was commenced, but the contract was never filed for record in the recorder's office of the county in which the house was to be built. The plaintiff furnished the lumber to be used and which was used in the construction of the house to Fuller and Lashbrook under a contract with them alone. After the house was completed, viz. on April 16, 1889, the plaintiff filed in the office of the county recorder its claim and notice of lien upon the house, to secure an unpaid balance of $2,201.64, due for the lumber furnished to Fuller and Lashbrook. The object of this action is to recover a personal judgment against all the defendants for the amount due plaintiff for lumber, and also to enforce the alleged lien. The court found as a fact that plaintiff's claim and notice of lien had not been filed for record within 30 days after the house was completed, and thereupon denied plaintiff any relief against the defendants Joseph and Mary Williams, and gave judgment in their favor for their costs, but rendered a personal money judgment against the defendants Fuller and Lashbrook for the amount claimed by plaintiff. Plaintiff appeals from the judgment in favor of Joseph and Mary Williams, and from an order denying its motion for a new trial as to them.

1. Appellant contends that the finding that plaintiff's notice of lien was not filed within 30 days after the completion of the house is not justified by the evidence. The evidence is sufficient to show that Fuller and Lashbrook completed their work upon the house on or before March 7, 1889, and that the house was accepted and used by Williams and wife before March 15, 1889; of all which plaintiff had notice. The house, as finished by Fuller and Lashbrook, had upon it an ornament called a "finial," and in it a water-closet. Some time after Fuller and Lashbrook had completed their work, including the finial and water-closet, Williams and wife expressed their dissatisfaction with the finial, because it was not large enough to correspond with the tower, and also complained that the seat in the water-closet was defective; and Mrs. Williams said she would rather pay for a larger finial than not to have it. Thereupon the plaintiff furnished a larger finial, and a satisfactory seat for the closet, which were delivered on March 21, 1889, and were put in place on the house, at the expense of the owners, on April 6, 1889. If the house was not completed until these alterations were made, the notice of lien was filed for record in due time; otherwise not. As to the imperfection of the finial and seat of the water-closet, and the alterations thereof, the court found that they were trivial in comparison with the entire construction of the house. This finding, also, is excepted to, as not being justified by the evidence. It appeared that plaintiff had estimated the price of the finial at $5, and the seat for the closet at $2, while the cost of the house, including the materials therefor, was $4,700. Upon this basis, I think, the finding in question was justified by the evidence. Every essential part of the building had been constructed prior to March 7, 1889. Only two small items of the work was claimed to be imperfect, and to perfect these required an expense of only $7. Section 1187 of the Code of Civil Procedure provides that "any trivial imperfection in * * * the construction of any building * * * shall not be deemed such a lack of completion as to prevent the filing of any lien." In Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. Rep. 686, it was held that a defect in work which could be perfected at an expense of $5 was trivial compared with the contract price of $145. The case of McIntyre v. Trautner, 63 Cal. 429, applies to neither the law nor the facts of this case. In that case the owner refused to accept the work from the contractor until perfectly completed, and the contractor completed the work. In this case the contractors did nothing after they delivered their work; and there is no evidence that they did not complete the house according to the directions and designs of the owners, (there being no valid express contract.)

2. It is further contended that plaintiff was entitled to a personal judgment against Joseph and Mary Williams, the owners of the building, for the value of the lumber furnished to Fuller and Lashbrook. In the case of Lumber Co. v. Schmitt, 74 Cal. 625, 16 Pac. Rep. 516, this point was directly decided against appellant's contention. This is admitted; but counsel for appellant contends that the decision in that case should be overruled. But, as the statute[1] seems fairly susceptible of the construction put upon it by that decision, and since it does not appear that the ends of justice would generally be promoted by the construction proposed by counsel

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[1] Code Civil Proc. § 1183, provides that contracts for building a house shall be in writing, and before the work is begun shall be filed with the recorder, otherwise to be void, and no recovery had thereon; and that labor done and materials furnished by others than the contractor shall be deemed furnished at the instance of the owner, and be a lien.

for appellant, I think the decision should stand. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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97 Cal. 189

STROZYNSKI v. STROZYNSKI. (No. 14,278.)

(Supreme Court of California. Jan. 14, 1893.)

DIVORCE—DIVISION OF COMMUNITY PROPERTY—REVISION ON APPEAL.

1. Civil Code, § 148, which provides that the division of community property by the trial court in granting a divorce to the spouses is subject to revision on appeal in all particulars, including those in the discretion of the trial court, empowers the appellate court to review the action of the trial court for any degree of error, though not amounting to an abuse of discretion.

2. On granting a wife a divorce for extreme cruelty, where it appears that the husband is a shoemaker, earning from $40 to $60 per month, the entire community property, consisting of a house and lot worth $2,000 and the household furniture, should be awarded to the wife, as this will still leave her to earn her own support, and that of her minor daughter, awarded to her custody.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Action by Kataryna Strozynski against Bolislaus Strozynski for a divorce on the ground of extreme cruelty. The divorce was granted, and, from a decree awarding her one half of the community property, plaintiff appeals. Reversed.

A. Morgenthal, for appellant. *Wm. C. Flint* and *W. N. Barrows*, for respondent.

VANCLIEF, C. Action for a divorce on the ground of extreme cruelty. A divorce was granted on that ground, and one half of the community property (undivided) was awarded to the plaintiff, and the other half to the defendant. The plaintiff brings this appeal from that part of the decree awarding one half of the property to the defendant.

The appeal comes here upon the judgment roll, from which it appears that the parties were married in Germany, February, 1873, and have one child, a daughter, aged 15 years at the time the action was commenced, (September, 1889,) the custody and care of whom was given to the plaintiff; that the community property consisted of a lot 57x105 feet at corner of Twenty-First and Sanchez streets, San Francisco, and a dwelling house thereon, the value of the lot and house being about $2,000, and the household and kitchen furniture in the dwelling house, the value of which does not appear; that the defendant is a shoemaker, whose average earnings are alleged in the complaint to be $60 per month, but denied in the answer to exceed $40 per month, and no finding upon this issue. The finding as to the alleged extreme cruelty is in the following language: "The defendant has treated her with extreme cruelty, has been guilty of extreme cruelty to her, has beaten her and called her vile names, within the year past." The defendant was adjudged to pay plaintiff's costs, taxed at $66.90, and $50 for her attorney's fees; both to be paid "to Benjamin Healy, plaintiff's counsel herein, at his office," for whom the present attorney for appellant was afterwards substituted.

It must be presumed that the foregoing statement comprises all the facts upon which the judgment of the trial court was based; and upon these facts the question to be decided is not merely whether that court abused its discretionary power in dividing the community property, but also whether it erred in the exercise of such power. Ordinarily the exercise of the discretionary power of the trial court will not be revised by the appellate court, except on the ground that such power has been abused; but, on appeals from judgments dividing community property in cases of divorce on the ground of adultery or extreme cruelty, the Civil Code has provided a different rule. Section 146 of that Code provides: "(1) If the decree be rendered on the ground of adultery or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case and the condition of the parties, may deem just. (2) If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties." Section 148 provides that "the disposition of the community property, * * * as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court." By this section the legislature must have intended to subject the exercise of the discretion of the trial court, in dividing the community property, to revision on appeal for any apparent degree of error, though not amounting to an abuse of discretion; otherwise, the section effected no change in, nor added anything to, the theretofore well-settled rule that the appellate court will not undertake to revise the exercise of discretionary power, except it appear that such power has been abused; and this construction of the section has been practically, if not expressly, adopted by this court.

The case of Eslinger v. Eslinger, 47 Cal. 62, was very similar to this case. In that case a divorce was granted the wife on the ground of extreme cruelty by beating her. The trial court divided the community property equally between them. Upon appeal by the wife this court awarded her three fourths of the property, and directed the trial court to modify the judgment to that effect. The appeal seems to have been taken on the judgment roll, as it appears that the evidence was not before the appellate court. The court cited section 148 of the Civil Code, and apparently rested its authority to revise the judgment upon it. In Brown v. Brown, 60 Cal. 579, a divorce was granted the wife on the ground of extreme cruelty. The trial court awarded her one half of the community property. On appeal this court modified the judgment in this respect by awarding her three fourths. Here, again, this court expressly based its power to revise the judgment upon section 148 of the Civil Code. An act of 1857, relating to husband and wife, provided that, when a "decree of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof shall only be entitled to such portion of the common property as the court granting the decree may, in its discretion, from the facts of the case, deem just and allow; and such allowance shall be subject to revision on appeal in all respects, including the exercise of discretion by the court below." St. 1857, p. 199. Under this statute the case of Eidenmuller v. Eidenmuller, 37 Cal. 364, was decided. The plaintiff (wife) was granted a divorce on the ground of extreme cruelty, though it was said the conduct of the plaintiff was not free from fault. The custody of the three younger children was given to the wife, and the two elder to the husband. The defendant, being a physician, had an income of about $1,800 per annum. The common property consisted of a house, lot, and household furniture worth about $4,500, and a horse and buggy worth $450. The lower court awarded to the plaintiff all the property except the horse and buggy, which was given to defendant, and ordered the defendant to pay her counsel fees and $75 per month for support. On appeal by defendant the appellate court said: "We cannot say that there was any abuse, or even improper exercise, of discretion in the disposition of the common property;" thus distinguishing an abuse from an improper exercise of discretion. But as to the alimony the court said: "We are of the opinion that the monthly allowance of $75 was too great a portion of his earnings;" and reduced it to $50 per month, apparently on the ground that the allowance, on the facts appearing, was an improper exercise of discretion,—a mere error of judgment as to a conclusion of fact,—and not an abuse of discretion. The result was that the plaintiff was awarded ten elevenths of the common property and one third of defendant's income, on a state of facts very similar to the facts in the case at bar, in which, I think, the trial court should have awarded to the plaintiff all the community property, namely, the lot and dwelling house and the household furniture. The house and lot constitute but a humble home for the plaintiff and her minor daughter, and it cannot be presumed that the household furniture was more than was necessary for their use. Allowing them all these, they are still left, so far as appears, to earn their support; and, as before stated, the case must be decided on the facts appearing from the judgment roll, and it cannot be presumed that either party had separate property. Indeed, it must be presumed that the court found all the material facts not admitted by the pleadings. The case of Bovo v. Bovo, 63 Cal. 77, is not in point for the respondent. The reporter's headnote is misleading.

I think the cause should be reversed, with directions to the lower court to modify that part of the judgment relating to the division of the community property, by awarding to the plaintiff all the community property, real and personal, described in plaintiff's complaint.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with instructions to the court below to modify that part of the judgment relating to the division of the community property by awarding to the plaintiff all the community property, real and personal, described in the plaintiff's complaint; and as so modified the judgment will stand affirmed.

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97 Cal. 208

HATTON v. HOLMES et al. (No. 19,005.)

(Supreme Court of California. Jan. 18, 1893.)

NOTARY PUBLIC—LIABILITY FOR FALSE ACKNOWLEDGMENT—DAMAGES.

Plaintiff, on representations of J. that he was the agent of K., who owned certain land, took a mortgage on the land, purporting to be signed and acknowledged by K., and delivered to J. a check for $1,000, payable to K. J. presented the check to a bank, and received payment thereon, the check being indorsed by K. The acknowledgment of the deed was false, and the indorsement of K.'s name on the check was a forgery. *Held*, in an action by plaintiff to recover the value of the check against the notary who took the false acknowledgment, that plaintiff had no right of action, in that the bank, having paid the check under a forged indorsement, acquired no rights therein against plaintiff, and could not charge the amount paid against plaintiff's account.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Edward Hatton against A. C. Holmes and others, to recover for loss alleged to have been sustained by plaintiff, by reason of defendant Holmes having taken a false acknowledgment to a mortgage of certain land, on which plaintiff had loaned money. Judgment for defendants. Plaintiff appeals. Affirmed.

Burnett & Gibbon, for appellant. *Wilson & Lamme*, for respondents.

BELCHER, C. In September, 1887, J. W. Keifer, of Kansas City, Mo., purchased eight acres of land situate in the county of Los Angeles, in this state, and had the deed made to Maria J. Keifer, his wife. In December, 1889, one O. B. Jenkins applied to the plaintiff for a loan of money on this land. He represented that Maria J. Keifer, of Kansas City, was the owner of the land, and that he was her agent, and wanted to borrow the money for her. He exhibited to plaintiff a certificate showing title in Mrs. Keifer, and together they examined the property, and plaintiff agreed to loan on it $1,000, if the mortgage was properly drawn up and duly certified. On the 2d day of January, 1890, Jenkins delivered to plaintiff a note for $1,000, payable to his order two years after date, with interest at the rate of 15 per cent. per annum, payable semiannually, and, if not paid, to be compounded, and a mortgage on the land to secure payment of the note; and the plaintiff gave Jenkins his check on a bank in Los Angeles for $1,000, payable to Maria J. Keifer. The mortgage described the mortgagors as "Maria J. Keifer, of Kansas City, Jackson county, state of Kansas, and J. W. Keifer," and both the note and mortgage appeared to have been signed by the two mortgagors. Attached to the mortgage was a certificate of acknowledgment in proper form, made by the defendant A. C. Holmes, who was a notary public in and for the county of Los Angeles, certifying that on the 31st day of December, 1889, "before me * * * personally appeared Maria J. Keifer, wife of J. Keifer, known to me to be the person described in, whose name is subscribed to, and who executed the within and annexed instrument," etc. Attached to the mortgage was also a certificate of acknowledgment, made by another notary public, certifying that on the 2d day of January, 1890, "before me * * * personally appeared J. W. Keifer, (husband of Maria J. Keifer,) known to me to be the person described in and whose name is subscribed to the annexed instrument, and he acknowledged to me that he executed the same." Jenkins presented the check received from the plaintiff to the bank for payment. At the time of the presentation the name "Maria J. Keifer" was indorsed upon the back of the check, and he then also indorsed his own name. The bank paid him the amount called for, and shortly thereafter he disappeared, leaving no property, and his whereabouts was thereafter wholly unknown. The note and mortgage were in fact forgeries. Jenkins was not the agent of Mrs. Keifer for any purpose, and she never authorized him or any one else to negotiate a loan upon the said property. On the 31st day of December, 1889, both Mr. and Mrs. Keifer were in Kansas City, and neither of them ever executed the pretended note or mortgage, or heard of them until some months afterwards, when Mr. Keifer received a letter from Los Angeles, stating that a fraud had been attempted. They were not acquainted with the notaries who certified to the acknowledgments, nad knew no other persons bearing their names. Defendant Holmes was a notary public in December, 1889, and took the acknowledgment purporting to be that of Mrs. Keifer. He did not know anybody by the name of Maria J. Keifer, but he kept a record of all acknowledgments taken by him, and from that and the certificate he knew that some woman must have appeared and been introduced to him as Maria J. Keifer, though he made no entry, and had no recollection as to who the person was who introduced her. Plaintiff commenced this action against the defendant Holmes and the sureties on his official bond to recover damages in the sum of $1,000 and interest thereon from January 2, 1890, and he alleged, among other things, that Holmes, as notary public, "negligently and falsely certified, in the acknowledgment to said forged mortgage, that the person so falsely personating Maria J. Keifer was to him well known to be the said Maria J. Keifer described in said instrument," and that he, "by reason of said acknowledgment and the certifications therein contained, and relying upon the truth of the same, believed the said mortgage to be a genuine and valid instrument and incumbrance upon the real estate therein described, and accepted the same as security for the payment," etc. The defendants, by their answer, denied most of the averments of the complaint. At the trial the plaintiff proved the facts to be substantially as before stated, and rested his case. The defendants then moved for a nonsuit upon the following grounds: "(1) That there was no cause of action made out against the defendants, or either of them. (2) The evidence fails to show that the defendant A. C. Holmes was negligent in taking and making the certificate to the mortgage. (3) That there is no evidence showing or tending to show that the mortgage was not acknowledged before him (Holmes) by one Maria J. Keifer. (4) That the evidence clearly shows that the damage sustained by the plaintiff (if any at all) was not in the act of the notary certifying to the mortgage, or in the fact that the mortgage was forged, if it may be assumed that it was forged, but from the fact that the bank on which he gave the check paid that check under a forged indorsement; and his remedy (if any) is against the bank, and not against the notary." The court granted the motion, and the plaintiff thereupon appealed from the judgment entered against him.

It is clear from the statement of the case which has been made that a scheme was devised to get the plaintiff's money by fraudulent means, and that Jenkins was the active agent in effecting the ends sought to be accomplished. Other parties were engaged with him, but it does not appear who they were. It is also clear that Holmes, as a notary, was guilty of negligence in taking and certifying the acknowledgment of a person whom he did not know, and without any proof by the oath or affirmation of a credible witness that she was the person she pretended to be. The Code provides: "The acknowledgment of an instrument must not be taken unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument." Civil Code, § 1185. A notary has no right, in disregard of this plain provision of the statute, to certify that he knows a person whom he does not know, on the mere introduction of some third party; and if he does so, and loss results therefrom, he renders himself and his sureties liable to make good the loss. This liability does not, however, extend to a case where the negligence of the losing party is the proximate cause of the loss. Bank v. Murfey, 68 Cal. 455, 9 Pac. Rep. 843; Overacre v. Blake, 82 Cal. 77, 22 Pac. Rep. 979. The questions, then, are: *First*, did the plaintiff in this case suffer the loss alleged? And, *second*, if he did, was it proximately caused by his own negligence?

1. The only loss claimed to have been sustained by the plaintiff arose from the fact that he delivered his check to Jenkins, and the latter collected and appropriated the money. The check, as before stated, was payable to Mrs. Keifer, and when presented for payment had her name indorsed upon the back of it. The indorsement was a forgery, but the bank, without hesitation or inquiry, so far as appears, paid over the money. The payment was not authorized, and the bank had no right to charge the amount paid against the plaintiff's account. "A forged indorsement passes no title to commercial paper, negotiable only by indorsement; and payment by the drawee, although in good faith, of a draft so indorsed, is no payment at all as to the true owner. Payments made upon forged instruments are, therefore, at the peril of the bank, unless it can claim protection upon some principle of estoppel, or by reason of some negligence chargeable to the depositor. It is the duty of a bank to pay the checks of its customer, drawn payable to order, to the person who becomes holder by a genuine indorsement; and it cannot charge him with payments made otherwise. * * * And where, by the fraud of a third person, a depositor is induced to draw his check payable to a nonexisting person or order, the drawer being in ignorance of the fact, and intending no fraud, the bank on which the check is so drawn has no authority to pay it, and charge the amount to the account of its customer, on the indorsement of the party presenting it, although it appears to have been previously indorsed by the party named as payee. Such indorsement is, in effect, a forgery, and the payment thereon by the bank confers no right on it as against the drawer of the check." Boone, Banking, § 192; and Janin v. Bank, 92 Cal. 14, 27 Pac. Rep. 1100. If the above is a correct statement of the law, (and we think it is,) then it follows that the plaintiff had sustained no loss, and was, therefore, not entitled to recover.

2. In view of what has been said, it is unnecessary to consider the second question above propounded. In our opinion, the court was justified in granting the nonsuit upon the fourth ground stated, and the judgment should therefore be affirmed.

We concur: **Temple**, C.; **VancliEF**, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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97 Cal. 251

PATTY v. COLGAN, State Comptroller. (No. 19,043.)

(Supreme Court of California. Jan. 23, 1893.)

Constitutional Law—Legislative Powers—Gifts of Public Money.

Const. art. 4, § 31, provides that the legislature shall have no power to make any gift of any public money. *Held*, that a legislative appropriation for the benefit of sufferers from the Tia Juana floods was void.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Petition by one Patty for a writ of mandate to E. P. Colgan, as state comptroller. From a judgment granting the writ, the comptroller appeals. Reversed.

Barham & Bolton, for appellant. *Johnston & Jones*, for respondent.

Paterson, J. This is an appeal by Hon. E. P. Colgan, state comptroller, from a judgment of the superior court of San Diego county, directing the issuance of a peremptory writ of mandate requiring him to draw a warrant in favor of the board of supervisors of San Diego county in the sum of $5,000, for the benefit of the sufferers from the Tia Juana floods of February 22, 1891. The application of the plaintiff and the judgment of the court were based upon the provisions of an act entitled "An act to appropriate the sum of five thousand dollars for the benefit of the sufferers from the Tia Juana floods of the twenty-second of February, 1891, and to provide for the payment to the board of supervisors of San Diego county and its distribution to the sufferers." Section 1 of this act reads as follows: "Section 1. There is appropriated the sum of five thousand dollars out of any moneys in the general fund not otherwise appropriated, to be paid to the board of supervisors of San Diego county, to be by said board held in trust and paid out for the benefit of the sufferers from the Tia Juana floods, occurring on the twenty-second day of February, eighteen hundred and ninety-one, in San Diego county." The act is clearly in violation of the provisions of section 31, art. 4, of the constitution, which provides that the legislature shall have no power "to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual." The object of this provision is well stated in Stevenson v. Colgan, 91 Cal. 651, 27 Pac. Rep. 1089. An act directing the comptroller to draw his warrant in favor of an individual cannot be impeached by evidence *aliunde*. Rankin v. Colgan, 92 Cal. 606, 28 Pac. Rep. 673. But here the facts which show the invalidity of the appropriation appear upon the face of the act, and the application ought to have been denied. Bourn v. Hart, 93 Cal. 321, 28 Pac. Rep. 951. The judgment is reversed, with directions to the court below to dismiss the proceeding, and enter judgment in favor of defendant for costs.

We concur: **Garoutte**, J.; **Harrison**, J.

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2 Cal. Unrep. 759

FIRST NAT. BANK OF SANTA MONICA v. KOWALSKY et al. (No. 19,049.)

(Supreme Court of California. Jan. 21, 1893.)

Presumptions on Appeal—Amendment of Judgment.

1. Where an appeal is taken from a judgment which recites that the motion for judgment was made on affidavit, and the record does not contain the affidavit, the supreme court will presume that it stated facts necessary to justify the judgment.

2. Where an appeal bond is signed by one

Ball as surety, but by a clerical error the judgment is against Bell, and the record shows the error and contains the data necessary to correct it, the error should be corrected by the trial court on motion of any party to the judgment.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

(Not to be published in California Reports.)

Action by the First National Bank of Santa Monica against H. I. Kowalsky. There was a judgment for plaintiff, and defendant appealed. An undertaking was filed signed by E. H. Kowalsky and A. Everett Ball as sureties, and from a judgment against them, they appeal. Corrected and affirmed.

T. J. Crowley, for appellants. *R. R. Tanner*, for respondent.

VANCLIEF, C. On January 26, 1891, the plaintiff obtained a judgment in the superior court of Los Angeles county against the defendant H. I. Kowalsky for the sum of $1,284.70, from which he appealed to the supreme court, and to perfect the appeal, and to stay execution of the judgment, filed with the clerk of the superior court an undertaking in the sum of $3,300, signed by appellants E. H. Kowalsky and A. Everett Ball as sureties. The undertaking expressed the conditions prescribed by sections 941 and 942 of the Code of Civil Procedure; among them the condition that, if the sureties did not pay according to the undertaking within 30 days after the filing of the *remittitur* from the supreme court in the superior court, "judgment might be entered on motion of plaintiff and respondent in plaintiff and respondent's favor against the said E. H. Kowalsky and A. Everatt Bell, the sureties aforesaid, for such amount, together with the interest that may be due thereon, and the damages and costs that might be awarded against the defendant and appellant upon the said appeal." On October 12, 1891, the supreme court dismissed the appeal, (27 Pac. Rep. 783,) and the *remittitur* was filed in the superior court on November 13, 1891. On January 13, 1892, plaintiff's attorney moved the superior court for judgment against the sureties on said undertaking for the amount of the judgment against H. I. Kowalsky, and judgment was accordingly rendered against E. H. Kowalsky and A. Everett Bell. The judgment thus rendered recited that "this matter came up regularly to be heard on the motion of attorney for plaintiff, the affidavit of E. J. Vawter, the judgment roll in this case, the *remittitur* of the supreme court filed herein, the notice and undertaking on appeal on file herein, together with all the records and files in this case; and, it satisfactorily appearing to me," (here follows a recital of all the other facts above stated.) No copy of the affidavit of Vawter appears in the transcript, and the omission of it is not accounted for. The sureties, E. H. Kowalsky and A. E. Ball, bring this appeal from the judgment against them upon the judgment roll in the original cause, and the judgment against them, with its recitals, as above stated.

1. Appellants contend that, "before a judgment can be rendered against the sureties on an appeal bond, it is necessary that an affidavit or petition (which fills the place of a complaint in actions generally) should be presented to the court and filed;" and that "there is nothing in the record here to show that the conditions of the obligations had not been fulfilled." Conceding, without deciding, that an affidavit or petition was necessary, the judgment recites that the motion for judgment was made upon the affidavit of Vawter, (who may have been an officer of the corporation plaintiff.) In the absence of that affidavit it must be presumed that it stated all the facts not shown by the other papers and records, upon which the motion appears to have been made, necessary to justify the judgment. Nothing is better settled than that the burden of showing error is upon appellant. The transcript does not purport to contain all the documents or papers upon which the motion was heard. The clerk does not so certify, but only that the documents and papers composing it are full and true copies of originals on file.

2. Appellants make the further point that "the judgment here is not against the sureties, but only against the surety E. H. Kowalsky;" but that "the record shows that the undertaking was given by E. H. Kowalsky and A. Everett Ball," while "the judgment is against Kowalsky and Bell." It is true that the record shows that the undertaking was given by Kowalsky and Ball, and that, by a clerical error in spelling, the judgment is against Kowalsky and Bell; but since the record shows the error, and contains all the means and *data* necessary to correct it, the error might and should have been corrected, by the court below, on motion of any party to the judgment. Newton v. Hull, 90 Cal. 495, 27 Pac. Rep. 429. I think the cause should be remanded, with direction to the court below to correct the error in the judgment by substituting therein the name of A. Everett Ball for the name of A. Everett Bell, and also for the name A. Everatt Bell, and that as corrected the judgment be affirmed; and also that appellants pay the costs of appeal.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with directions to the court below to correct the error in the judgment by substituting therein the name A. Everett Ball for the name A. Everett Bell and also for the name A. Everatt Bell, and that as corrected the judgment is affirmed; and also that appellants pay the costs of appeal.

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3 Cal. Unrep. 761

TUFFREE v. BROCK et al. (No. 14,882.)

(Supreme Court of California. Jan. 21, 1893.)

ACTION TO ESTABLISH A TRUST—FINDING OF FACT—CONFLICT OF EVIDENCE—MATERIALITY.

1. Where, in an action to establish a trust in lands, there is a substantial conflict in the evidence as to whether or not a certain person,

one of defendants, in making a purchase of the lands, was the agent of plaintiff, a finding that he was not such agent will not be disturbed.

2. In such action a witness testified that after the purchase by such defendant the latter said he had paid a certain sum to bind the sale, and asked witness if he and a friend did not wish to take a part in it; that the next day they met at plaintiff's room, and heard that both made a claim to the land, and gave the idea up; that such defendant claimed the property for himself; and that afterwards plaintiff claimed the property. *Held*, that it was not error to exclude evidence by such witness that he and his friend went to plaintiff's room for the purpose of acquiring an interest in the land from plaintiff on the assumption that he had an interest therein.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by J. K. Tuffree against Alvan D. Brock and others to establish a trust in certain lands to which defendants hold title. From a judgment for defendants, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Smith, Winder & Smith, J. W. Swanwick, and *A. W. Hutton,* for appellant. *John D. Bicknell, Brosseau, Hatch & Thomas, H. H. Appel, E. L. Campbell,* and *King & Saufley,* for respondents.

BELCHER, C. The plaintiff brought this action to obtain a decree declaring that the defendant corporations hold the title to certain lands situate in the county of Los Angeles, and frequently spoken of in the record as "Timms' Point," in trust for him. It is alleged in the complaint that on and before June 9, 1887, one A. W. Timms was the owner of the lands in controversy in fee, and that shortly before that day plaintiff was desirous of purchasing the same, and employed as his agent for that purpose the defendant Brock, and advanced the money necessary for his expenses, or otherwise provided therefor, and sent him to San Pedro, the residence of Timms, for the purpose of effecting the purchase; that Brock, as such agent, accordingly entered into negotiations with Timms, and on June 9, 1887, consummated an agreement with him for the purchase of the property for the sum of $25,000,—$100 payable in cash upon the execution of the contract, $9,900 payable on July 9, 1887, at which time the deed was to be executed, and the balance to be secured by two promissory notes for $7,500 each, and a mortgage on the property, both notes bearing interest at the rate of 10 per cent. per annum, compounding semiannually, if not paid, and one payable in one year and the other in two years after the date last mentioned; that Brock, for and on account of plaintiff, and with his moneys, paid to Timms the sum of $100 upon the contract, and though acting as the agent of plaintiff, and making the purchase for and upon his account he took the contract in his own name; that afterwards the defendants Berner, Pearson, Stratton, Weller, and Brock conceived the design of fraudulently obtaining the property under the contract, and repudiating the interest of plaintiff, and in pursuance thereof Brock executed assignments of interests in the contract to Stratton, Weller, and others, but all of their interests were on or before July 9, 1887, vested in Berner, who on that day induced Timms to execute a deed of the lands to him, and to accept his notes and mortgage in pursuance of the contract; that Berner on the same day, for the purported consideration of one dollar, executed a deed of the property to Pearson; that Pearson afterwards executed a deed for an undivided one fifth of it to defendant Lafferty, and that Lafferty subsequently conveyed the said one-fifth interest to the defendant Davis; that on October 20, 1887, Pearson, Davis, and Lafferty executed a deed of all the land to the defendant the San Pedro Harbor Dock & Land Association, and that this association, on April 23, 1888, executed to the defendant the Southern Pacific Railroad Extension Company a deed of two described portions of the land. It is further alleged that at and before the dates of all of the said conveyances the grantees therein had full and actual knowledge and notice of the facts before stated, and of the rights and interests of the plaintiff under the said contract; and also that plaintiff is ready, able, and willing, and offers to pay to the defendants, or such of them as may be entitled thereto, the money paid by them or by Berner as the consideration of a deed to him, and also to pay the amount of money secured by the said notes and mortgage when the same become due. The defendants, by their answers, denied substantially all the averments of the complaint. After trial the court found upon all the issues in favor of the defendants, and rendered judgment accordingly. The plaintiff then moved for a new trial upon a statement of the case, and his motion being denied, appealed from the judgment and order.

The principal contention in support of the appeal is that the finding that Brock, in making the purchase from Timms, was not acting as the agent of plaintiff, was not justified by the evidence. It is admitted, however, that there was evidence directly tending to support this finding and all the other findings, but objected that it was not credible, and therefore ought not to have been believed and acted upon, in view of the stronger and more credible contradictory evidence introduced by the plaintiff. It is a sufficient answer to this contention to say that there appears to have been a substantial conflict in the evidence, and therefore, under the well-settled rule in such cases, the judgment cannot be disturbed on this ground. It is further contended that the court erred in one of its rulings upon the admission of evidence. One George Kerckhoff was called as a witness in rebuttal by plaintiff. He testified that, some days after the bargain with Timms, "Mr. Brock told me that he made a payment of one hundred dollars to bind the sale of the Timms' property, and he asked me and another gentleman, a friend of mine, if we wanted to take part in it. The next morning we had a meeting at Mr. Tuffree's room in the Nadeau House, and then we heard that Mr. Brock made a claim for the property, and Mr. Tuffree made a claim for the property, and I didn't like the aspect of affairs, and we gave it up. We retired. Mr. Brock made a claim for the property for himself alone. * * * Question. I understand you to say that both Brock and Tuffree claimed the property; was that what you said? Answer. No. Peck claimed it for himself alone. Q. Then you say that Tuffree claimed it? A. No. Tuffree claimed the property, but he had not done so before. He claimed the property afterwards,—after we saw him. Q. What did you go to see Mr. Tuffree for?" This last question was objected to by defendants, and counsel for plaintiff then stated: "We anticipate showing by the answers to the question that the parties went there for the purpose of acquiring an interest from Mr. Tuffree, and in pursuance of the assumption upon their part that Mr. Tuffree did have an interest in the matter." The court sustained the objection, and the plaintiff excepted. We are unable to see any error in this ruling. If the witness had testified as counsel anticipated he would, the plaintiff's case would in no way have been strengthened or the defendants' weakened. The anticipated testimony was therefore wholly irrelevant and immaterial. No other points being made for a reversal, we advise that the judgment and order be affirmed.

We concur: Haynes, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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